Bingham v Oliver [1870] LRSC 1; 1 LLR 47 (1870) (1 January 1870)

RICHARD BINGHAM, Plaintiff in Error, vs. **JOSE B. OLIVER**, Defendant in Error

[January Term, A. D. 1870.]

Appeal from the Court of Quarter Sessions and Common pleas, Sinoe County

General issue—Special plea—Lease to aliens—Ejectment.

1. Where a special plea is pleaded the defendant is not allowed to argue points of law raised in the general issue, but must confine himself to the defense set up in the special plea.

2. A contract made with an alien for the lease of land granted a settler under the Immigrant Allotment Act before title to same has been perfected, is void.

3. Plaintiffs in ejectment must recover upon the strength of their own title and not upon the weakness of the defendant's title.

4. A lease to an alien for ninety-nine years is an evasion of the prohibition of the Constitution and therefore unconstitutional. A lease of land to an alien for a term more than twenty years is against the Constitution and public policy, and is therefore void.

It is the opinion of this court that the court below erred in allowing the plaintiff in error to plead the law points that were raised in the general issue and not to rely on his special plea. When the general issue is waived, all the law advantages involved in it are also waived but the one relied on; and the party is therefore compelled to rely on his special plea to sustain his position. A contract made with an alien for the lease of lands apportioned to a settler is in violation of a prohibitory clause of the statute of this Republic which in positive language declares that no bargain, transfer, sale, deed or lease of lands by or with the grantee of lands for the same, before a legal and complete title in fee simple has been obtained, shall be valid or lawful.

The transaction which took place between plaintiff in error, and on which this law is brought to bear, is peculiar,no doubt if all reports of cases in the world were searched, you would not find a similar one. In this case the plaintiff in error has drawn a town lot in the city of Greenville, Sinoe County, and before he made the necessary improvements required by law to entitle him to a deed in fee simple, he contracted with the defendant in error to lease to him, the defendant in error, in consideration of forty-five dollars paid to the said plaintiff in error for the lease of the said lot of land No. 1202, for the term of ninety-nine years; and in order that the said plaintiff in error should be made competent to transfer the said lot of land to him, the said defendant in error, he, the said defendant in error, promised and did make the improvements required by the statute respecting the improvements of the land, by which the said plaintiff in error obtained a deed in fee simple from the government. This being done, the plaintiff in error (as alleged) having refused to comply with his part of the contract, the defendant in error brought this action of ejectment in the court below, to which the plaintiff in error pleaded in defense the statute prohibiting all bargains, transfers, deeds or leases, before a legal and complete deed in fee simple had been obtained. The defendant having obtained a judgment in the court below, the case on a writ of error is before this court to be decided.

The statute is plain, and needs but little said by this court by way of interpretation thereof. However, as duty makes it incumbent upon me, I proceed to do so. The bargain made between plaintiff in error and defendant in error is void, and the plaintiff in error is not bound by it. The bargain, however, being unlawful as it relates to both parties, the deed which is the offspring, or in other words the resultant of the said bargain, vitiates itself. Therefore, the plaintiff in error does not acquire a legal and complete "title" to the said lot No. 1202, by said deed thus obtained. The plaintiff in error being imperfectly in possession of the said lot, however, the improvement made thereon passes imperfectly with the said lot of land, because in an action of ejectment the plaintiff must recover upon the strength of his own title and not upon the weakness of the defendant's title.

The next point to which the plaintiff in error resorted for his defense, is that an alien cannot hold real estate either by lease or otherwise under the Constitution of the Republic of Liberia. To hold real estate under the authority of the Constitution of Liberia means to be absolutely possessed of lands in Liberia ; hence, to have the exclusive right to it, and to disposing of the same. A lease held under the Constitution with respect to aliens in treaty stipulations with Liberia extends to mere chattel right; that is, the lessee can only hold the right of the use of the land and tenement. But he cannot bring an action of ejectment for lands, although he may be ejected any time after a year's notice had been given him to move off any land rented or leased by him. Notwithstanding an alien cannot bring an action of ejectment for lands, yet he may recover damages for any injury sustained by reason of the violation of any contract for the use of the land.

A lease of land to an alien for ninety-nine years is an evasion of the prohibition of the Constitution, and it is therefore unconstitutional. To constitute a good lease the term should not exceed twenty years, and the rent should accrue to the lessor annually. The lease of land to an alien for more than twenty years is against the Constitution and public policy, and therefore is void. For the Constitution prohibits an alien from even an imaginary claim to land, and therefore the law will not give aid to it, however much it may be disguised. If a wife join with her husband in a deed, her separate estate, as well as her husband's, will become liable for the warranty, because deeds and other writings are evidence against all parties to them. Therefore a wife may not join in a deed with her husband, since the letter and spirit of the Constitution is to keep their property separate and distinct, so far as the rights of the wife are concerned. Therefore to recover lands wrongfully detained, unless the liability of the wife to the plaintiff is clearly defined, either by law or set out in the deed, it is not necessary that the action be brought against the husband and wife jointly.

Therefore, the court adjudges that the judgment of the lower court be reversed, and that the original deed for the land, lot No. 1202, as described in the complaint of said defendant in error, is hereby vitiated and made void and of no effect; and as the plaintiff in error is in the imperfect possession of the said lot No. 12oz in the city of Greenville, all and singular the buildings and improvements on said lot passes and follows the imperfect possession of the said plaintiff in error ; and that the defendant in error pay all costs incurred since the appeal had been taken.

Clark v Barbour [1909] LRSC 1; 2 LLR 15 (1909) (10 February 1909)

JOHN CLARK, Appellant, v. **A. J. BARBOUR**, Defendant.

1. Courts will only decide upon issues joined between the parties specially set forth in their pleadings.

2. Matter of defense not set up in defendant's plea shall not be allowed.

3. Notice should be given by one party to the other of all matters of fact or law relied upon in prosecuting an action.

4. In an action of trespass it is not error in a court to refuse to determine question of ownership by evidence of a deed which merely proves the title of a privy of one of the parties.

5.Partitioners appointed by the court to apportion certain premises between joint owners, not making return of their doings to court do not defeat individual rights of parties to partition voluntarily by mutual releases and conveyances.

Damages for Trespass. On appeal from the Court of Quarter Sessions and Common Pleas for Sinoe County.

This case comes up on a bill of exceptions to the rulings and final decision of the Court of Quarter Sessions and Common Pleas, Sinoe County.

The appellee or plaintiff below brings action (see complaint) for an alleged trespass upon and damages to her property by the defendant, now the appellant. At the trial below the plaintiff recovered from the defendant the sum of $10 and all costs. To which judgment the defendant excepted and perfected an appeal to this court of final decision.

During the trial of this case before us, we noticed that there were urged many points not founded in the appellant's plea, and to allow them would mislead the court into deciding upon issues not joined between the parties. The statute requires that a complaint contain a distinct and intelligible statement in writing of a sufficient cause of action within the scope of the form of the action chosen. The statutes also require that an answer, or in other words the plea, of a defendant be a full and sufficient answer or plea to the complaint or to such part of it as it professes to answer. That a *defense* not set up in the defendant's plea, should not be allowed, because the fundamental principle upon which pleadings are conducted is that of giving notice to parties of all matters of fact or law relied upon in the defense: hence the defendant should plead in such a manner as would present a triable issue, since the dispute between the parties should be set forth in the pleadings.

Carefully examining the pleadings in this case, the defendant below defends the alleged trespass by alleging that he is the owner of lot No. 39 upon which the trespass is said to have been committed, and offered as evidence the deed of his father. The appellant excepted to the court's not giving final judgment in his favor upon the evidence of his ownership to lot No. 39 referred

to in the complaint as well as in the deed. This deed has had the careful consideration of this court and we find it only the evidence by which the surviving heirs of the late John Clark, of Sinoe holds lot No. 39. The court did not err when it refused to settle the ownership of the appellant on that evidence.

Before this court, it was strongly urged that there being no evidence of a partition of this lot between the heirs of John Clark, no one of the heirs could recover against another for trespass. Examining the evidence in this case we find that the surviving heirs of the late John Clark, four in number, applied to the Court of Quarter Sessions and Common Pleas, Sinoe County, in the exercise of its equity jurisdiction to appoint partitioners to divide said lot No. 39 between them: this was granted and partitioners appointed. The records show that the partitioners reported to said court that the property was partitioned as per request of the parties. The evidence further shows that the appellee erected a fence separating that which was known as her part of the lot from that of the appellant. Referring to the evidence, witness Lymas states that he saw on the day named in the complaint the appellant Clark, standing on *his part* of the lot sawing on the line fence between himself and appellee. Witness Grisby states as follows : "there is a fence separating the dwellers on this lot." Witness Rose Barbour states as follows : "The fence on lot No. 39 was built by appellee, A. J. Barbour."

This brings us to consider whether or not the sawing of the fence was justifiable, because the record fails to show that the partition of the property was not confirmed by the court.

It is the opinion of this court that the returns of the partitioner not being made to the court below do not defeat the individual rights of parties. (See Bouv. L. D., vol. 1, p. 365.) "Voluntary partition—that made by owners by mutual consent—is effected by mutual conveyance or release to each person which he is to hold." (See U. S. Digest, New Series, vol. 1, p. 42—Partition by act of parties) : "Where a partition of land is made between tenants in common and each accepts his part, goes into possession and makes improvements, it is a good partition even though it may never have been the judgment of a court." Carefully examining the trial of this case below, this court fails to see that substantial justice has not been done.

Wherefore, the judgment of the court below is confirmed, appellant paying all legal costs and charges. The clerk of this court is hereby ordered to issue a mandate to the court below as to the effect of this judgment.

Given under our hands this 10th day of February, A.D. 1909.
By the Court.

White et al v Steel et al [1909] LRSC 4; 2 LLR 22 (1909) (10 February 1909)

M. E. WHITE, **AARON PAGE**, **MOSES N. WILLIAMS**, Appellants, v. **WARREN STEEL** and **LUCINDA STEEL**, his wife, formerly Lucinda Sevier, **George Lewis** and **Pauline Lewis**, his wife, formerly Pauline Sevier, **Foster Smith** and **Mary Smith**, his wife, formerly Mary Sevier, **Francis Gould** and **Grace Smith**, formerly Francis and Grace Sevier, Appellees.

1. Oral evidence can in no case be received as equivalent to, or as substitute for written instrument.

2. Whatever character of defendant's title plaintiff in ejectment must show some title.

Ejectment. On appeal from the Court of Quarter Sessions for Montserrado County.

This action was traversed before the Court of Quarter Sessions and Common Pleas for Montserrado County at its March term, A.D. 1908, and is brought before this court on a bill of exceptions for review.

The action was brought by appellees to recover possession of lot No. 33, situated in the Town of Marshall, Montserrado County, the appellees claim title to the premises referred to on account of heirship, and introduced as written evidence a deed from the administrator of E. W. Wright's Estate to Hannah J. **White**, dated October 29th, 1875.

This court discovers from the records that on the 28thday of November, A.D. 1892, Hannah J. **White**, for the consideration of a sum of money conveyed the property of Julius C. **White** on the 10th day of December, A.D. 1892, as will appear by the copy of conveyance in the records.

The appellees in the examination of oral testimony at the trial, endeavored .to establish the existence of a will. It is the opinion of this court that oral evidence can in no case be received as equivalent to, or as a substitute for, a written instrument, for by so doing oral testimony would be admitted to usurp the place of evidence decidedly superior in degree.

This court is at a loss to know why it is that this action to recover the possession of realty was not backed up by strong proof as the title right. In ejectment parties claiming title to property whether by descent, purchase or otherwise, must show title, and that same has lawfully come to them, no matter how weak the defendant's title may appear. This has been remarked by this court in previous cases of ejectment. It is clear that appellees produced nothing in the court below to show title to the premises in question, but set up a plea in reference to the inability of Thomas J. **White** to contract, being a minor, (as they alleged) but according to the records that fact was not sustained. One witness saying he was under age and another that he was 22 years old. Upon the whole this court fails to see upon what grounds the court and jury below predicated their conclusion.

The court therefore reverses the judgment of the lower court and rules appellees to cost. The clerk of this court is commended to issue a mandate to the court below to the effect of this reversal judgment.

Given under our hands this 10thday of February, A.D. 1909.
By the Court.

Johns v Witherspoon et al [1946] LRSC 3; 9 LLR 152 (1946) (10 May 1946)

WILLIAM A. JOHNS, Heir of the Late Honorable J. J. W. JOHNS, Appellant, v. WILLIAM N. WITHERSPOON, Appellee, GEORGE JOHNS, Relator.
APPLICATION FOR LEAVE TO INTERVENE.

Argued April 18, 1946. Decided May 10, 1946. 1. Under certain circumstances a third party may
be permitted to intervene in a case pending in a court prior to the rendition of the judgment where his rights and interests are
or will be materially affected. 2. The rights of no one shall be concluded by a judgment rendered in a suit to which he is not a
party.

On application by relator for leave to intervene in an ejectment action, application denied.

William A. Johns for himself.
William N. Witherspoon for himself. B. G. Freeman for relator.
MR. JUSTICE BARCLAY delivered the opinion of the Court. George Blackstock A. Johns filed an application for leave to intervene in an ejectment suit. Said application was based on the following allegations contained therein : The late J. J. W. Johns of Greenville, Sinoe County, died some years ago leaving a last will and testament in which he devised to his son, the relator, lots Number 395 and 396 situated in the city of Greenville, Sinoe County. On November 25, 1932 relator mortgaged said premises to the Oost Afrikaansche Compagnie of Monrovia, Liberia through one Ahamadu Varfee Sirleaf for the sum of £1754.10. Relator shortly thereafter left Liberia and did not pay the loan and thereby redeem the mortgaged premises which should have been done in 1938, the due date for payment of the mortgage debt.

Subsequently, relator still being absent, the said Oost Afrikaansche Compagnie through the said Ahamadu Sirleaf sold said mortgaged premises without foreclosure of same to William N. Witherspoon, whereupon one William A. Johns, a half brother of George A. Johns, petitioner, believing the property to be a homestead and therefore claiming an interest therein, commenced an action of ejectment against Witherspoon. This case is now before us on the appeal of William A. Johns. It was after arguments had been submitted in that case that relator filed a petition entitled, "Petition for leave of Court to show Rightful Title to Property in Dispute," submitting to the Court therein that the property, the subject of the action of ejectment, belonged to neither of the contending parties, but to him. Attached to said application and made a part thereof were several exhibits, namely, a copy of the last will and testament of relator's father, the late J. J. W. Johns, a copy of the agreement of mortgage, and a copy of the deed. Copies of the petition with exhibits were served on the contending parties who both filed resistances thereto. Relator in his argument contended inter alia that the right to intervene in the case is a legal right granted him under the law to protect his interest in the subject matter of the case, especially so since at the commencement of the case in the court below he was not within the jurisdiction of the Republic and it was impossible for him to have known of the institution of said case. Having returned to the Republic and learned of the case still pending before this Court, relator felt that it was his duty in the protection of his rights to bring to the notice of the Court the information about his title and claim to the ownership of the property in dispute, rather than to sit dormant and be charged thereafter with laches. Hence he prayed for judgment in his favor. Although in law under certain circumstances a third party may be permitted to intervene in a case pending

in a court prior to a rendition of the judgment where his rights and interests will be materially affected and although this Court set the precedent for such permission in Childs v. States, [1934] LRSC 18; 4 L.L.R. 138, 1 New Ann. Ser. 139 (1934), nevertheless in this case we do not see that the legal title to said property and the right of petitioner to bring an action to recover possession of his alleged property which is presently the subject of litigation between William A. Johns and William N. Witherspoon, will be in any way affected by any judgment we may render in favor of either of the present contending parties since petitioner was not made a party to the action, was not summoned and placed within the jurisdiction of the court below, did not have his day in court, and is not represented in said case. In the case Tubman v. Murdoch, [1934] LRSC 26; 4 L.L.R. 179 (1934) which involved an application to vacate a writ of execution, Chief Justice Grimes, speaking for the Court, declared: "This principle, so settled by our own Supreme Court twenty-six years ago, is so much in harmony with the rule in vogue in all other jurisdictions the decision of which are available to us, that we could well refrain from citing other authority. But the language of the following makes the position, clear as it is, so much more plain that we have decided to add it. It is this: " 'It is a rule of universal application that the rights of no one shall be concluded by a judgment rendered in a suit to which he is not a party, and that a party cannot be bound by a judgment without being allowed a day in court. He must be cited or have made himself a party in order to authorize a personal judgment against him. A judgment rendered against a party who is brought in by motion as a defendant after the trial is concluded is erroneous as to such party.

" 'A court cannot render a valid judgment in favor of a party who is not before the court and is not represented in any manner in the action.' Ency. of P1. and Prac., 842-843." Id. at 184. We are consequently of the opinion that it would be improper for us to grant the prayer of the said petition, and are leaving relator to pursue the proper legal or equitable remedy in the court below, if he so desires, for the protection and recovery of his rights, interests, and property. The petition is denied with costs against relator ; and it is hereby so ordered. Application denied.

Tee v Chea [1955] LRSC 1; 12 LLR 205 1955 (5 August 1955)

CASES ADJUDGED
IN THE

SUPREME COURT OF THE REPUBLIC OF LIBERIA
AT

MARCH TERM, 1955. WESEH TEE, Appellant, v. PIOH CHEA, Appellee.
APPEAL FROM THE MONTHLY AND PROBATE COURT OF MONTSERRADO COUNTY.

Argued April 13, 1955. Decided August 5, 1955. 1. The property of an intestate estate may be transferred, conveyed or disbursed only under authorization of court. 2. The custody of an intestate estate is vested in the surviving spouse pending an order of the court as to the administration of the estate.

The appellant complained to the court below that the appellee had interfered with the administration of the intestate estate of appellant's deceased sister who had been the wife of appellee. The court below dismissed the complaint, which judgment was affirmed by this Court.
J. Dossen
Richards for appellant.
Nete Sie Brownell

for appellee.
MR. JUSTICE HARRIS delivered the opinion of the

Court. Pioh Chea, the above named appellee, and the late Weseh Monah, sister of the above named appellant, lived together as husband and wife for about thirty-odd years

after which she died intestate. Her sister, Weseh Tee, appellant, being at the time of her death in the County of Sinoe, did not return to Montserrado County until about three years thereafter. Upon her return to Monrovia, instead of reporting the death of her sister who, as aforesaid, died intestate, to the Monthly and Probate Court, and requesting that her sister's estate be administered in keeping with the law in such case made and provided, Weseh Tee applied to the husband for the property of her late sister, real and personal. The said husband, appellee in this case, presented to the appellant certain effects which he claimed to be the personal property of his late wife, and informed her that he had no deed for real property belonging to her sister. The appellant, claiming that her sister, Weseh Monah, had possessed more property at her death than had been produced by the appellee, complained to the court below that the appellee had interfered with her sister's intestate estate. The court below, instead of demanding proof of the allegations contained in the said complaint, appointed administrators who instituted an investigation during which they demanded of Pioh Chea what property, real and personal, of the late Weseh Monah he had in his possession. Obviously Pioh Chea, being the husband of the late Weseh Monah, was the custodian of any property left by her until ordered by legal authority to surrender the same. Consequently Pioh Chea could not be regarded as interfering with an intestate estate. This Court is of the

opinion that Weseh Tee, the appellant, and not Pioh Chea, the appellee, is liable for interfering with the intestate estate of the said late Weseh Monah ; for no person has the right to interfere with an intestate estate by demanding, receiving or taking away any of the effects of such estate except by order of court. This Court has therefore decided that the judgment of the lower court should be affirmed ; and it is so adjudged with costs against the appellant. This opinion is without

prejudice to the authority of the Monthly and Probate Court in the administration of said intestate estate. And it is hereby so ordered. Affirmed.

Williams v Horton [1960] LRSC 4; 13 LRSC 444 (1960) (14 January 1960)

SOLOMON WILLIAMS, Petitioner, v. D. R. **HORTON** and His Honor, J. EVERETT BULL, Stipendiary Magistrate, Monrovia, Respondents.
APPLICATION
FOR CERTIORARI TO THE STIPENDIARY MAGISTRATE'S COURT, MONROVIA.

Argued October 22, 1959. Decided January 14, 1960. 1. Certiorari will lie where the rights of a party are manifestly prejudiced by a ruling of an inferior court during the pendency of a case. 2. It is mandatory that a defendant be given notice of the nature of the action. 3. Since an appeal in a summary ejectment action does not serve as a supersedeas to the enforcement of the judgment, it is essential that the defendant in such an action be duly notified prior to the hearing thereupon.

Petitioner, a tenant at will of premises owned by one of the respondents, applied to this Court for a writ of certiorari, alleging that the respondent Magistrate had improperly and prejudicially ruled that no notice was required in a summary ejectment brought by the respondent landlord against the petitioner as tenant and defendant. Certiorari was granted. 0. Natty B. Davis for petitioner. E. N. Wollo for

respondents. MR. JUSTICE PIERRE delivered the opinion of the Court. These proceedings in certiorari have grown out of a summary ejectment case filed in the Magistrate's court by respondent **Horton** against the petitioner, who is alleged to be a tenant at will living on premises owned by the aforesaid respondent. The petitioner, as such tenant at will, is alleged to have paid annual rents over a period of time, until recently when he was asked to surrender the premises to his landlord.

There is no showing here that prior to the institution of the suit in summary ejectment any request for the tenant to quit the premises had been

made by the landlord and refused. The significance of this important requirement might never have been raised if the Magistrate's ruling on a motion to dismiss the complaint for want of notice had not raised the point. It would appear that the petitioner, in obedience to a writ of summons, found himself facing a complaint in summary ejectment before the respondent Magistrate. Feeling that he had not been brought into court in keeping with law or the rules governing our procedure and practice, he filed a motion to dismiss the complaint; and although the motion contains four counts, we deem only two of them legally sufficient and necessary to the determination of this case. These two counts read as follows : I. Because defendant says that the plaintiff has breached one of the fundamental principles of law, that of giving notice. Defendant contends that under the new 1956 Code, it is imperative that the plaintiff must serve on the defendant a copy of the writ of summons or a copy of the complaint if any there be. The object of this law, defendant contends, is to give him notice of what the plaintiff seeks to prove against him. This not having been done renders the entire action of the said plaintiff dismissible. II 2. And also because defendant says that plaintiff in his writ of summons refers to several notices served on him, without attaching one of the copies so as to enable the court to pass upon its merit, in order to ascertain whether the time given by the said plaintiff has expired, which would enable the plaintiff to receive judgment for the ousting of the defendant. This not having been done renders the said action a fit subject for dismissal, and this the defendant prays." The above-quoted counts, although separately stating different grounds for dismissal, are both anchored in the legal requirement of giving notice as a condition prece-

dent to a defendant's answering a complaint in any court. After hearing arguments for and against the motion, the respondent Magistrate prepared and read a ruling passing upon the issues of law raised therein. In this ruling he denied the motion ; and it was at this stage of the matter that the defendant, now petitioner, took flight to the Chambers of the Supreme Court, praying for the issuance of a writ of certiorari, so that the Justice presiding in Chambers might review and correct allegedly prejudicial errors committed in the court below. Before we look into the petition and examine the grounds thereof, it might be of importance to our conclusions to quote pertinent portion of the Magistrate's ruling denying the motion, and especially that portion of it which relates to the question of notice, and which reads as follows : "It is

not a legal obligation for plaintiff to be compelled to serve notice on the defendant in this case. Instead, our statute says that ejectment may be had, with or without notice, when the jurisdiction of such Magistrate shall be limited to the adjudication of right of possession, never of title." The Magistrate grounded this portion of his ruling on 1956 Code, tit. 6, § 1121 and 1123. We will discuss these statutory provisions in this opinion. The petition for certiorari has reiterated the grounds laid in the motion to dismiss in the Magistrate's Court, and has contended that the Magistrate's denial of the said motion was a prejudicial error which this Court should correct. Certiorari will lie in every instance where the rights of a party seem to be manifestly prejudiced by the rulings of an inferior court during the pendency of a case. We have examined the petition and the returns ; we have reviewed the motion to dismiss and the Magistrate's ruling thereon; we have studied the briefs of both parties, and we have listened to arguments from both sides before this bar. We have not been able to bring ourselves to agree with the grounds for denying the motion, as laid in the ruling

of the Magistrate. We are of the considered opinion that, in all cases brought before our courts, notice of some kind is legally necessary to the fair and impartial hearing of the defendant's plea. We think it was materially prejudicial to the defendant's interest in the instant action of summary ejectment to have brought him into court upon a writ which did not notify him of what was intended to be proved against him, to have denied him the opportunity of enjoying his right of notice, as the Magistrate's ruling did, and then to have attempted to hear him on a complaint which completely took him by surprise, insofar as his having had any knowledge of its contents, previous to his appearance in court. Our statute provides : "Service of a summons issued by a justice or magistrate shall be made by reading a copy thereof to the appropriate person as determined from the provisions of this section and by delivering to him a copy of such summons containing the substance of the complaint." 1956 Code, tit. 6, § 221 (e). It is our opinion that notifying the defendant is mandatory in all cases; but more so do we feel that this mandatory requirement should be observed in cases of summary ejectment, since appeal in such cases does not serve as a supersedeas to the enforcement of the judgment. A defendant in summary ejectment should be properly notified before he is made to appear at the hearing, since his failure to effectively defend against the complaint, could result in a judgment against him, and an announcement of appeal therefrom would not maintain the status quo. But, ordinarily, notice to parties of what is intended to be proved against them is the elementary duty of every complaining party; and we say and emphasize that this requirement should be most certainly complied with in suits of summary ejectment. Any ruling which would deny a defendant in such cases the right to be notified previous to his appearance in court is, in our opinion, an infringement of the most sacred rights of a party litigant.

According to the summary ejectment statute, a defendant may have redress by an action against the plaintiff after having been illegally evicted upon a judgment from which appeal was taken. It seems strange, indeed, that a plaintiff in such a circumstance, would be asked to satisfy any damages the defendant might have suffered as a result of the erroneous ruling of a magistrate when, indeed and in truth, his only act to warrant such treatment was an exercise of his legal right to bring an action for recovery or repossession of his own property. There is another peculiarity about this summary ejectment statute. Appeal in normal cases acts as a stay of execution of judgment until the appellate court reviews. In summary ejectment, however, the defendant's right to enjoy the benefit of appeal is subordinated to the whims and notions--no matter how illegal--of the Magistrate from whose judgment appeal is taken. The peculiarities of this statute would therefore seem to pose a few legal complications. However, since these peculiarities have not been raised in such a manner to give us the right to effectively pass upon them, we will. refrain from any further comment upon them in this opinion. Because of what we have said about the peculiarities of the summary ejectment statute, we feel that Magistrates and Justices of the Peace, in their handling of such cases, should strictly observe and enforce the laws and procedures governing such hearings before them, so as to leave the parties, and especially the defendants, no ground to question the fairness and legality of the courts' acts. For, no matter how well intentioned the Magistrate's rulings in such cases might be, if they are contrary to law, or if they violate trial procedure, appeal could not effect the same cure in summary ejectment as it would in cases where it serves as a mandatory stay of execution of judgment. These peculiarities would therefore require that Justices of the Peace and Magistrates lend themselves more studiously to applying the provisions of this statute with a view to the protection of the parties which is so necessary to

secure for all concerned the full extent of their legal rights. We have reviewed the two citations concerning ejectment referred to earlier in this opinion, and upon which the Magistrate based his ruling denying the defendant the right to be notified before the hearing; and we have not been able to agree with his conclusions that these statutory provisions apply to the circumstances in this case. The relevant portion of title 6, § 1121 of the 1956 Code, which is mentioned in the said ruling, is as follows : "A person rightfully entitled to the possession of real property may bring an action of ejectment with or without notice when : . . . (c) A tenant at will remains in possession after notice to vacate." Title 6, § 1123 of the 1956 Code, upon which the ruling was also based, reads as follows : "When a person who is entitled to the possession of real property is unable to obtain same by peaceful means, he may obtain possession thereof by a summary proceeding before a justice

of the peace or magistrate. The jurisdiction of such justice or magistrate shall be limited to the adjudication of the right of possession, never of title, and to the award of damages not exceeding three hundred dollars for the wrongful withholding of possession by the defendant. The justice or magistrate may also award costs in the proceeding and make the necessary order to put the rightful party in possession of the real property." Nowhere in any one of the above-quoted statutory passages is there anything which could have lead the Magistrate to infer that the Legislature intended to say that suits in summary ejectment could be brought without giving the tenant notice to vacate the premises before the institution of the action, or without giving him notice in the complaint of what he would be called upon to answer at the hearing. On the contrary, it is very clearly stated there that tenants at will who remain in possession of the landlord's property after notice to vacate might be sued in

ejectment, with or without notice. This should seem reasonable to any logical mind, and there should be no difficulty in understanding this to mean that a tenant who had refused to remove upon a previous notice to vacate should need no further notice before the landlord institutes summary ejectment against him. But the notice to vacate must, of necessity, have been given before the action is brought. Therefore we think it was error on part of the respondent Magistrate, to have ruled that previous notice to a tenant sued in summary ejectment is not a legal obligation on part of the plaintiff. In concluding this opinion, we do not feel that we should review any of the issues pending before the Magistrate in so far as the merits of the summary ejectment suit is concerned. We do not feel that the question of title, as raised by petitioner, both in his petition and in his brief, is either relevant to the proceedings, or cognizable before us at this time. Our only concern now is the question of whether or not the act of the Magistrate in denying the defendant's motion prejudiced his rights in the court below. It is therefore our opinion that, in view of the foregoing, the Magistrate should be, and he is hereby ordered to resume jurisdiction over the summary ejectment proceedings with a view to hearing and determining the same ; and since the respondent's counsel contended in his brief and argued before this bar that, nothwithstanding the ruling of the Magistrate, previous notice had indeed been given the tenant to vacate the premises, the plaintiff in summary ejectment should be called upon to prove, by witnesses or otherwise, his having given such legal notice, and the defendant's failure to have removed from the premises. The Magistrate will then proceed to determine the case in keeping with the evidence and the law controlling in such cases. And it is so ordered.
Certiorari granted.

Ajavon v Bull et al [1960] LRSC 57; 14LLR 178 (1960) (16 December 1960)

ADOLPH AJAVON, Appellant, v. J. EVERETT BULL, MAI L. BULL and PETER B. JALLAH, Stipendiary Magistrate, City of Monrovia, Appellees.
APPEAL FROM ORDER IN CHAMBERS ON APPLICATION FOR WRIT OF CERTIORARI TO THE MAGISTERIAL COURT, CITY OF MONROVIA.

Argued November
8, 1960. Decided December 16, 1960. 1. A voidable contract remains valid and binding until duly voided by a party entitled to do
so. 2. Certiorari will not lie after enforcement of a judgment. 3. Certiorari will not lie where the record below has not been produced.
4. A judgment of summary ejectment may not properly be granted or enforced against a defendant whose occupancy is supported by a
prima facie valid lease agreement unless the trial court has duly determined that the lease agreement is ineffective as a defense
in the summary ejectment proceeding. 5. On appeal from an order in Chambers denying certiorari after judgment in summary ejectment
proceedings, the Supreme Court, in affirming the order, may direct that the parties to the ejectment proceedings be placed in status
quo pending immediate adjudication by the circuit court of an appeal from the judgment.

Appellees, as lessors under a lease agreement,
obtained a judgment of summary ejectment against appellants as lessees in possession. Appellants perfected an appeal to the circuit
court from the judgment of the magisterial court in the summary ejectment proceeding. Before this appeal was heard by the circuit
court, appellees obtained a writ of possession from the magisterial court, upon which the appellants were ousted from the leased
premises. Appellants applied to the Justice presiding in Chambers for a peremptory writ of certiorari, which was denied. From the
order denying certiorari, appellants appealed to the Supreme Court, en banc. This Court affirmed the order in Chambers denying certiorari,
but modified the order by directing that the appellants be permitted to retain possession of the leased premises pending immediate
adjudication of the appeal in the Circuit Court.

LIBERIAN LAW REPORTS 0. Natty B. Davis Morgan for appellees.

179 Lawrence 4.

for appellant.

MR. Court.

JUSTICE MITCHELL

delivered the opinion of the

According to common law, a contract requires the agreement
of two or more minds and is binding on the parties thereto contracting. But if the contract presents a voidable aspect, it remains

valid and binding until it is voided by the party entitled to do so. In that event, the law requires such voidable aspect to be remedied within reasonable time by invoking the aid of equity; otherwise, its enforcement may not be impeded except for fraud. Article I, Section loth of our Constitution is also explicit on the point when it states that even the law-making body of the Republic is without authority to enact any law impairing a contractual obligation. The records from the court below filed in this case along with the returns of the appellees show that on July 6, 1956, J. Everett Bull and Mai L. Bull sued out an action of summary ejectment against one Adolph A. **Ajavon**. The suit was brought in the Magisterial Court for the City of Monrovia. The said plaintiffs alleged that the said defendant withheld from the plaintiffs their premises on Benson Street, Lot Number 132, without any color of right. Because of circumstances which we now regard as immaterial, this case remained on the docket of the court below until January, 1959. An assignment was then made for hearing of the case; and thereafter the court recorded its judgment on the back of the writ as follows : "At the call of the case the parties were present. Plaintiff gave notice that he amended his notice of representation, because of the unfortunate incident concerning his former lawyer, to include Counsellor Lawrence A. Morgan. Defendant was represented in

person. The mandate from the Supreme Court was read and noted. At this stage the writ and complaint were read. Defendant pleaded Not Liable. Plaintiff then asked for the qualification of his witnesses. Witnesses qualified and deposed. Witnesses for plaintiff testified, deposed and discharged with thanks of the court. Plaintiff rested evidence. At this stage defendant was called upon to testify if he so desired. Having failed to testify or produce any evidence to court, the court will now proceed to render its judgment. In view of the evidence adduced at the trial, and the defendant having waived his right to produce any witness, the plaintiff is hereby entitled to the possession of the premises in question. The defendant is to be ousted from said premises and the plaintiff put in possession of said premises; to pay costs of court. And it is so ordered. Plaintiff prays for a writ of possession ; same granted. January 19, 1959. "[Sgd.] P. BONNER JALLAH,
Stipendiary Magistrate, City Court.

"To which ruling defendant excepts and prays for appeal to the Circuit Court; same granted. "[Sgd.] P. BONNER JALLAH,
Stipendiary Magistrate, City Court."

As a natural sequence the Magistrate ordered the writ of possession issued and served on the same day. According to petitioner's petition, he and his tenants were ousted from the premises on the same night. Right here we would like to say that, from the judgment quoted above, it does seem that the trial below was comical; but because of the fact that the records also show that a regular appeal was prayed for by the defendant and granted, we will not

make ourselves hasty in commenting on anything in connection therewith. It was at this point of the proceedings that the defendant below, now appellant was moved to file a petition with the Justice presiding in Chambers praying for the issuance of the peremptory writ of

certiorari with the intention to offset the enforcement of the aforesaid judgment rendered by the magistrate; and hereunder we give the substance of the said petition : 1. The petitioner and J. Everett Bull entered into a regular lease agreement on October 1, 1955, for the second and third floors in the building of the said J. Everett Bull, erected on Lot Number 132, on Benson Street, in Monrovia, which lease agreement having been signed and sealed, was admitted to probate on the zoth day of said month and year. A copy thereof is herewith filed and forms a part of petitioner's petition. By virtue of said agreement petitioner from that time held the property under the aforesaid leasehold. 2. In spite of the fact that the term of the said lease agreement had not expired--same having been made for a period of ten calendar years, that is to say, from October I, 1955, to October 1, 1965, yet the plaintiff, intending to take undue advantage of him, instituted an action of summary ejectment against him in the magisterial court. His leading lawyer was not available at court when the case was called, regardless of the fact that Attorney Samuel E. H. Pelham appeared and asked the court to grant an adjournment. All of petitioner's documents were in the hands of his leading lawyer, Counsellor 0. Natty B. Davis, including the contract for the premises and other papers. The respondent magistrate flatly refused to grant his request and did arbitrarily proceed to the hearing of the case over and against the protest of Attorney Pelham. 3. Attorney Pelham later raised the question of jurisdiction over the subject matter, since a valid lease agreement between the plaintiff and the defendant could not be vitiated by summary proceedings; but all of this did not claim the magistrate's attention;

and he proceeded rashly, arbitrarily and illegally to hear and determine the said matter by rendering and enforcing his judgment against the petitioner. 4. In furtherance of the illegal acts of the respondent magistrate, he issued a writ of possession. Without serving same on defendant below, petitioner merely took the house, threw all of his tenants out, locked the premises and gave the keys to the plaintiff, now one of the respondents. 5. In further perpetration of their unlawful and illegal acts, respondents did send police officers on the premises during the nighttime who arrested several of petitioner's tenants and took them to the police station under the pretext of the charge of housebreaking. The appellees, when summoned as respondents on the alternative writ, filed their returns

in which they stated, inter alia, that the trial of the summary ejectment case in the court below was regular and legal ; that petitioner had taken exception to the judgment of the court and prayed for an appeal which had been granted him by the respondent magistrate; that the judgment had been already enforced; that the plaintiff had been placed in possession of the premises, and returns had already been made to the writ of possession before the petitioner filed his petition for certiorari ; and that therefore, according to law, certiorari would not lie because the petitioner enjoyed an adequate remedy at law in consequence of his appeal. Respondents contended that certiorari will lie only to review an illegal or prejudicial ruling of a judge of an inferior court in a matter pending before the said court, and not in a matter in which judgment has been rendered and enforced. They further contended that all other allegations laid in petitioner's petition were false, untrue and unsupported by the records in the case which they filed along with their returns; that the petitioner was entitled to file, along with his petition, copies of the

records of the court below which he sought to have reviewed ; that his failure to do so necessarily rendered his petition unmeritorious ; and that, therefore, the same should be dismissed. When the matter was heard by the Justice presiding in Chambers, issuance of the peremptory writ was denied. From this ruling, petitioner excepted and brought this appeal to be heard by the full bench. At the call of this case before us, counsel representing both sides ably argued their respective grounds. Appellant's counsel strenuously contended that he could not file the records from the court with his petition because the respondent magistrate had assured him that there was no record taken at the trial and that the records brought up by the respondents were made after the trial of the case. He also argued that the arbitrary attitude assumed towards his client during the trial below in denying his request for an adjournment, as well as the refusal of the magistrate to give consideration to the jurisdictional plea interposed by Attorney Samuel Pelham in behalf of his client, were all in absolute disregard to his client's rights under the law, and therefore were arbitrary acts of the court which were prejudicial to his interest. He said further that his client did not enjoy the right of an impartial trial; so there was no alternative left other than to have applied to the Chambers of this Court for the issuance of the writ. Appellees' counsel maintained that the records filed with the returns were the records that were actually taken at the trial of the case in the court below, and that at no time had the appellant's counsel been denied the right of obtaining the records as he had represented. Appellees' counsel said further that appellant's counsel--Counsellor Davis--was never announced as counsel for the defendant during the trial below, but that the defendant below, later petitioner, and now appellant, appeared and represented himself in person ; and the judgment entered against him

having been enforced, the writ of certiorari would not lie. At least these were
the same grounds argued before the Justice presiding in Chambers, from whose ruling this appeal has been brought before us. We have
sat patiently and digested the respective arguments. We have also carefully scrutinized the records in the case before us. Besides,
we have exercised extreme diligence in our effort to arrive at the opinion that we feel would legally justify every phase of the case. It is true that a writ of certiorari
will not lie when the matter sought to be reviewed has already reached a conclusion and judgment thereon been enforced. It is also
true that the law requires the party petitioning this Court for the writ to bring forward the records of the court below, which has
not been done in the case before us. These points were legally sufficient to warrant the dismissal of the petition and deny the writ.
Yet, for one or two strange and peculiar methods of procedure and practice that have presented themselves during the hearing of the
case, and which we would like to embrace before concluding this opinion, we feel ourselves compelled to address our attention thereto
before proceeding further. The petitioner appended to his application for certiorari a copy of a lease agreement signed by J. Everett
Bull as lessor and Adolph A. **Ajavon**, lessee, for the second and third floors of lessor's building situated on Benson Street, Monrovia,
and bearing the number 132, for a period of ten years, ending October 1,1965. This lease agreement, according to its endorsements,
shows that it was probated and registered in the Monthly and Probate Court on October 2o, 1955, recorded in Volume 68o, pages 266-268,
and witnessed by Mai L. Bull, one of the plaintiffs below in the summary ejectment suit. Upon scrutiny of this lease agreement we
have not been able to understand why the defendant would waive evidence at a trial for summary ejectment when his right of possession
was based upon an agreement of leasehold, as the judgment of the court would go to show. But, grant-

ing that he did waive his right to produce any evidence at the trial, our statute controlling summary ejectment provides "When a
person who is entitled to the possession of real property is unable to obtain same by peaceful means, he may obtain possession thereof
by a summary proceeding before a justice of the peace or magistrate. The jurisdiction of such justice or magistrate shall be limited
to the adjudication of the right of possession, never of title. . . ." 1956 Code, tit. 6, §1123. The right of possession being the
main issue involved, it does appear to us that the trial magistrate should have exercised some diligence to determine upon what right
the defendant below occupied the premises. We are in perfect agreement with the ruling made by the Justice presiding in Chambers
denying the issuance of the peremptory writ of certiorari so far as it refers to the grounds being inapplicable; but because this
is the Court of last resort, we are of the strong opinion that the trial magistrate was hasty in adjudicating the right to possession

of the premises, especially since, in summary ejectment suits, an appeal does not operate as a supersedeas to the enforcement of the judgment of the court. Appellees' counsel argued that the lease agreement in question has some fictitious aspects about it which detract from its legal validity. Granting that his argument were true, that phase of it would still have to be determined by some court and not by the voluntary act of either of the parties thereto without the intervention of equity. Therefore, not having previously sought the strong aid of equity, we are hesitant to say what legal effect could be given to this point of argument, although we fail to understand why a lease agreement that seems to possess all of its requirements in law should be disregarded merely by the assertion of one of the parties. "A void contract is no contract at all; it binds no one and is a mere nullity. . . . A voidable contract, on the other hand, is valid and binding until it is avoided by

 the party entitled to avoid it." 12 AM. JUR. 507-08 Contracts § 10. From the appellant's argument, it was upon this contract that he occupied the premises in question for almost a year before the institution of the summary ejectment suit; and therefore, if there are voidable aspects in the contract it was the duty of the plaintiff below to have instituted cancellation proceedings. The Constitution of Liberia makes it plain that not even the Legislature, which is the law-making body of the Republic, has the right to enact any law impairing the obligation of contracts ; and as the Court of last resort, whose responsibility it is to probe into the minutest points in litigation for the purpose of administering justice with that usual degree of equipoise, we would not feel ourselves justified to permit the petitioner to be dispossessed of the premises before his appeal to the Circuit Court had been prosecuted and heard. Because of the reasons above stated, it is our opinion that the judgment of the Magisterial Court rendered against the defendant below, now petitioner, on January 19, 1959, should remain in status quo ante, unenforced ; and the defendant below, now petitioner, is granted the right to prosecute his appeal nunc pro tunc without the least delay. The respondent magistrate is also ordered to approve the petitioner's appeal bond accordingly, so that the appeal may be heard without prejudice to either party concerned. And the Circuit Court of the Sixth Judicial Circuit is hereby ordered to give priority to the said appeal case at the December, 196o, term of the aforesaid court. The ruling of the Justice presiding in Chambers is hereby affirmed with the foregoing modifications, and with costs against the appellant in these proceedings. And it is hereby so ordered.
Affirmed as modified.

Tetteh v Stubblefield [1962] LRSC 1; 15 LLR 3 (1962) (1 June 1962)

IN THE

SUPREME COURT OF THE REPUBLIC OF LIBERIA
AT

MARCH TERM 1962.
,

JACOB C. TETTEH, Appellant, v. MARTHA STUBBLEFIELD,
Appellee.
APPEAL FROM THE MONTHLY AND PROBATE COURT OF MONTSERRADO COUNTY.

Argued April 14, 1962. Decided June 1, 1962. 1. A trial
court cannot properly pass upon issues not raised in the pleadings. 2. A
grantee of real property under an executrix's deed has a
duty to examine into the executrix's right to execute such a conveyance. 3.
In the administration of a decedent estate, a sale of
real property by the executrix is void if not duly authorized by the probate
court.

Appellee, as legatee under a will, filed objections
to the probation of a deed whereby the executrix sought to convey real
property of the testator to appellant. The probate court's
ruling that the deed was void as a matter of law was affirmed.
William N. Witherspoon for appellant. Morgan for appellee. Lawrence
A.

MR. JUSTICE WARDSWORTH delivered the opinion of

the Court. Appellee in the above-entitled cause of action, one of
3

Flood v Alpha [1963] LRSC 31; 15 LLR 331 (1963) (9 May 1963)

WILMOT J. FLOOD, Appellant, v. EDWARD ALPHA, Appellee.
APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO
COUNTY.

Argued March 12, 14, 1963. Decided May 9, 1963. 1. Issues not raised in the
court below, and not presented in proper and timely
manner on appeal, will not be considered by the Supreme Court. 2. In an
ejectment action, a defendant who failed to appear, failed
to file an answer, and failed to apply for a re-summons, but was represented
by counsel who acquiesced and participated in trial
of the action, will be deemed to have waived any right to plead an
affirmative defense, and cannot successfully appeal from the trial
court's exclusion of evidence relating to such a defense. 3. Failure to file
an answer in an ejectment action cannot be rectified
by amendment or repleading. 4. The right of a defendant in an ejectment
action to re-summons and process of notification under 1956

Code, tit. 6, § 1125, cannot be invoked after the conclusion of a jury trial of the action.

On appeal from a judgment upon a jury verdict in an ejectment action, judgment affirmed. O. Natty B. Davis for appellant. Henries Law Firm

for appellee.
MR. CHIEF JUSTICE WILSON

delivered the opinion of

the Court. This case, according to the record certified to this Court, had its origin in what appears to have been a mortgage of real property owned by appellant to John Padmore of Monrovia. Upon the maturity of the time for redemption of said property, appellant, to save the mortgage from foreclosure, applied for help to appellee, whom he described as a friend, and executed a transfer deed for said property to appellee, which deed was signed by appellant and his wife. The value mentioned in the deed,

and which appellee claimed to be the purchase price, was $750. It does not appear from the testimony recorded at the trial that the property was turned over to appellee immediately after the execution of the deed transferring same to him. After expiration of one year, appellee wrote and demanded that appellant vacate said property and alloW appellee to take possession of it. This the appellant refused to do. Thereupon an action of ejectment was filed by appellee to evict appellant from said property. Appellant contended that no actual payment of money was made to him by appellee, and that the whole transaction, based on what he claimed to have been friendly relationship, was a sham designed only to secure the property from foreclosure by John Padmore. If this theory were accepted, although the record does not substantiate it, the existence of a mortgage between appellant and appellee for said piece of property would be ruled out; and the question of whether any money was paid by appellee to appellant for the property at the time of the execution of the deed would be an issue of fact to be determined at the trial. The defense of appellant raised a legal issue which had to be pleaded in an answer to the complaint. However, throughout the trial of the case in the court below, all efforts to assert this right by appellant were rejected by the court upon objections raised by appellee, on the ground that appellant's whole defense rested on a bare denial, he having failed to file an answer in the case. We will later state in this opinion whether the position of the trial judge was correct. It is shown by the record that no answer was filed by appellant, and that at the call of the case, appellant not having appeared, the sheriff was ordered to send for appellant and have

him come to court and defend against plaintiff's complaint. Upon appearing in court and find-

ing himself
without counsel, appellant requested that the trial be adjourned and that he be given an opportunity to go in search of his lawyer,
Counsellor 0. Natty B. Davis. This request was granted, and the case was postponed until the following day. Upon resumption of the
trial, appellant appeared with Councellor 0. Natty B. Davis, whereupon appellant was compelled to proceed with the trial without having been re-summoned or afforded opportunity
to answer on record. The trial progressed until evidence had rested, when appellant's counsel moved the court for a vacation of the
entire proceeding, and for permission to replead because of a violation of the mandatory provision of the statute which provides,
inter alia, that where a defendant fails to appear after being summoned, the plaintiff may have a writ of re-summons, and that the
plaintiff must post a copy of the complaint together with a copy of the writ of resummons upon the property claimed, at least ten
days before the date on which the defendant is required in said re-summons to appear. For the sake of this opinion, we will quote
the exact words of this statute : "In addition to any of the other procedures authorized by statutes or under this Title, the following
procedure may be used when title is in issue in an action of ejectment. "If the defendant fails to appear after being summoned, the
plaintiff may have a writ of re-summons. The plaintiff shall thereupon post a copy of his complaint together with a copy of the writ
of re-summons upon the real property claimed by him at least ten days before the date the defendant is required to appear under the
writ of re-summons. If the defendant fails to appear within ten days of the appointed date, the plaintiff may apply for entry of
default and for the entry thereon of an imperfect judgment by default. As soon as possible thereafter the plaintiff shall be called
upon to establish his title to the premises

or land which is the subject of his claim; a jury shall
be empanelled if there is any question of fact to be tried. If the plaintiff succeeds in proving his title, a perfect judgment shall
be granted. The plaintiff shall then be allowed to apply for, and the court shall order the clerk of the court to issue, a writ of
possession, requiring the sheriff to eject from such premises or land all persons occupying them adversely to the plaintiff and to
put the plaintiff in complete possession thereof. "If the defendant appears in response to the writ of summons or re-summons, the
action shall be tried as provided by law in any civil action. If the plaintiff prevails, he shall be entitled to a writ of possession
upon entry of final judgment." 1956 Code, tit. 6, § 1125. This concession made to defendants in actions of ejectment is an extraordinary

procedure that obtains only in actions of ejectment, and does not apply generally in civil cases. It does not appear in the record of the trial that a re-summons was issued ; nor does the record disprove the claim of defendant, now appellant, that the mandatory provision of the statute in this respect was violated by the court. We will now consider the contention of appellant that the entire proceeding should be vacated, and that he should be given the right to replead because of the violation of statute by the trial court; and we will determine whether appellant secured for himself at the trial of said case the right to raise such an issue, and whether his motion was deserving of favorable consideration by the court. Besides what is shown in the record, appellant's counsel, when arguing before this Court, described the distressed circumstances in which appellant had retained him, and stated that he had found that no answer had been filed, nor had a writ of re-summons been issued. He stated,

also, that all efforts made by him to oppose appellee's contention that the deed showed an outright sale of the property to the appellee were met with objections, sustained by the court, on the ground that such questions raised affirmative matter which was not admissible under the appellant's defense, he being on a bare denial, not having filed an answer. It does not appear from the record that, upon his arrival in court, appellant's counsel, after observing that no answer had been filed, and that no writ of re-summons had been issued and served on appellant, ever demanded as of right that same should be done before proceeding with and participating in the trial of said case. Nor does it appear that, upon denial of such a demand by the court, appellant's counsel excepted and reserved same for review by this Court. Rather, appellant's counsel proceeded to participate in said trial until the submission of evidence, when he moved the court to vacate the entire proceeding and demanded the right to replead, which demand the court denied. It strikes us as strange and surprising that any lawyer appearing in court and finding that a fundamental right had been denied his client would waive the assertion of that right and participate in a trial which did not afford to his client a material benefit secured to him under the statute. A party failing to assert a right at the proper time must be considered as having waived that right, and is therefore estopped from raising it at a belated time. Judge Bouvier has written as follows with respect to the subject of waiver: "In practice, it is required of every one to take advantage of his rights at a proper time; and neglecting to do so will be considered as a waiver. If, for example, a defendant who has been misnamed in the writ and declaration pleads over, he cannot afterwards take advantage of the error by pleading in abatement;

 for his plea amounts to a waiver. Failure of counsel, either in brief or oral argument to allude to an assignment of error, is a waiver thereof. . . ." BOUVIER, LAW DICTIONARY, 3417 Waiver (Rawle's 3rd rev. 1914). Judge Bouvier has defined estoppel

as : "The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question." BOUVIER, LAW DICTIONARY, 1078 Estoppel (Rawle's 3rd rev. 1914). Reluctant as we are to sustain a decision that goes to deprive one of a property right, we cannot be remiss in our sacred duty to adjudicate in keeping with law. The point raised by defendant, even though there is no answer on record, and for that matter no pleading by him at all, does not warrant the sustaining of the request to replead, since the very word, replead, suggests the going over of a pleading or pleadings already filed. Our statutes governing the amendment of pleadings specify the grounds by which amendments may be allowed, without any provision for making or filing a pleading that was never filed, or repleading when the party never pleaded. 1956 Code, tit. 6, §§ 32o-322. The following statutory provision applies in a case where a party fails to respond to a pleading duly filed against him: "If a party fails to respond to an answer or subsequent pleading, he shall be deemed to deny the facts stated therein and to rest his case on such denial only." 1956 Code, fit. 6, § 312. If the benefit of raising issues of law is denied to a party who fails to respond either to an answer or a subsequent pleading where plaintiff and defendant have both filed pleadings, a fortiori, it should be denied when a defendant fails to file an answer in response to plaintiff's

complaint, as in this case. Yet, after participating in the trial up to the end of the testimony of witnesses, the present appellant seeks the benefit of responding to the complaint by an answer, claiming the right to replead when he neither pleaded nor insisted on the right to file an answer before participating in the trial in which he had no answer on record. The trial court was therefore correct in denying appellant the right to replead in this case. When it comes to vacation of the entire proceedings because appellant had been denied the benefit of a resummons and the necessary statutory notification by a placard of the writ of re-summons on the property in question, we would unhesitatingly sustain the position of appellant if he or his counsel had invoked that right upon their appearance in court, and same had been denied him by the trial judge ; but having failed to do so, and having proceeded with and participated in the trial up to and until after submission of the case to the jury, he must be considered as having waived that right, and was therefore estopped from raising it before this Court. Because of the foregoing, it is the decision of this Court that the ruling of the court below, being in harmony with the controlling statutes and with the practice of our courts, is hereby sustained; and the verdict of the jury and the judgment confirming same are hereby affirmed with costs against appellant; and it is so ordered.
Affirmed.

Fahnbulleh v Anthony [1964] LRSC 46; 16 LLR 118 (1964) (22 May 1964)

JAMES FAHNBULLEH, Appellant, v. ISSAC ANTHONY and His Honor, ALFRED D. VERDIER, Justice of the Peace, Appellees.
APPEAL FROM RULING
IN CHAMBERS ON APPLICATION FOR WRIT OF PROHIBITION.

Argued March 10, 1964. Decided May 22, 1964. 1. Justices of the peace have jurisdiction
to hear and to determine summary ejectment suits, whether such suits grow out of rights based on title or rights created by lease.
2. So long as a plantiff in summary ejectment has a legal right of possession, he is thereby clothed with authority to eject any undesirable tenant. 3. Even where title is involved in a summary ejectment action, the fact that plaintiff's right to sue grows out
of title to the property does not place the case beyond the trial jurisdiction of a justice of the peace or magistrate until the defendant has shown paper title to the same piece of property; only in that event would strength of title on both sides have to be
determined by a jury. 4. Paper title in only the plaintiff does not destroy the jurisdictional right of the justice of the peace
or magistrate to hear and determine summary ejectment cases. 5. Whenever a party has cause to complain against any irregular act
of a magistrate or justice of the peace, redress should be sought before a judge of the circuit court. The Supreme Court assumes
appellate jurisdiction only after the circuit court has heard such matters. 6. The Supreme Court has no immediate jurisdiction over
irregularities of magistrates and justices of the peace unless such irregularities have first been made the subject of investigative
review before the circuit court in summary proceedings.

On appeal, a ruling in Chambers denying prohibition to a justice of the peace court in summary ejectment proceedings was affirmed.
James Kandakai for appellant. Lawrence J. Morgan

for appellee.
MR. JUSTICE
PIERRE

delivered the opinion of the Court.

According to the record in this case, a lease agreement for years was concluded by and
between a "Mr. Fahn118

bulleh" as lessor, and the Lebanese merchant named Isaac Anthony as lessee for

certain premises in the city of Monrovia, which said premises are now the subject of summary ejectment. Petitioner, James Fahnbulleh, a tenant at will or at sufferance, who had been occupying the premises previous to the time when said lease agreement was entered into by his landlord and Isaac Anthony, was allowed to continue and remain in occupation until some time later when the lessee requested him to vacate the premises. Anthony sued out a writ of summary ejectment to evict him; and this writ was issued by Justice of the Peace Alfred D. Verdier. When the case was called in the justice of the peace court, petitioner, as defendant, raised the question of the court's jurisdiction, upon several grounds which we do not think are germane to this case of prohibition. His motion to the jurisdiction was resisted and the matter was suspended to give the court time to make a ruling thereon. At this stage the defendant applied for prohibition to restrain the justice of the peace from passing on the motion which questioned his jurisdiction. Our law gives justices of the peace jurisdiction to hear and to determine summary ejectment suits, whether such suits grow out of rights based on title or rights created by lease. So long as the plaintiff in summary ejectment had a legal right of possession, he was thereby clothed with authority to eject any undesirable tenant. Here is the statute supporting the right of the plaintiff to sue as well as the jurisdiction of the justice of the peace over the suit: "When a person who is entitled to the possession of real property is unable to obtain same by peaceful means, he may obtain possession thereof by a summary proceeding before a justice of the peace or magistrate." 1956 Code, tit. 6, § 1123. Even where title is involved, the fact that plaintiff's right to sue grows out of title to the property does not

place the case beyond the trial jurisdiction of a justice of the peace or magistrate. Only if the defendant had shown paper title to the same piece of property would strength of title on both sides have to be determined by a jury. Paper title in only the plaintiff does not destroy the jurisdictional right of a justice of the peace or magistrate to hear and to determine summary ejectment cases. And when, in the hearing of such cases, demurrers are pleaded either to the jurisdiction or on other grounds, these must be decided by the presiding justice or magistrate before the merits can be entered upon. Decisions on such demurrers, whether such decisions be legally correct or not, should never be made the subject of Supreme Court review before they have been passed upon by the circuit court, which is the court of appellate review in all matters determined by justices of the peace and magistrates. The statute of 1902 gave the circuit court both appellate and investigating jurisdiction over all appeals and charges of misconduct and irregularity involving magisstrates, justices of the peace and constables. Whenever a party has cause to complain against any irregular acts of a magistrate or justice of the peace, redress should be sought before a judge of the circuit court. The Supreme Court assumes appellate jurisdiction only after the circuit court has heard such matters. This not only conforms to the statute of 1902 referred to above,

but is also in harmony with the decision of the Supreme Court in King v. Ledlow, [1916] LRSC 15; 2 L.L.R. 283 (1916), in which the court held as follows at 2 L.L.R. 284: "The Act of 1902 providing for summary proceedings against justices of the peace, city magistrates and constables, is intended to
give the judges of the circuit courts jurisdiction to investigate the actions of said officers and to give immediate relief to all
concerned." This is still the practice in this jurisdiction and should

not be departed from under any
condition and in any circumstance unless there is a statute to authorize such departure. Failure to comply strictly with the abovequoted
statute of 1902 has not only deprived the circuit courts of some of their jurisdiction in the past but is also in direct violation
of our practice and procedure. Besides,, to ask the Supreme Court to investigate irregularities of magistrates and justices of the
peace would not only overburden the Supreme Court's Chambers docket, but also tend to lower the functions of the Supreme Court to
that of the circuit courts. The Supreme Court has no immediate jurisdiction over irregularities of magistrates and justices of the
peace until such irregularities are made the subject of investigatory review before the circuit court in summary proceedings. The
function of the writ of prohibition is to restrain proceedings beyond the jurisdiction of a tribunal and to restrain proceedings
where the procedure adopted is strange to that known to the practice in such cases legally provided. But prohibition cannot restrain
a justice of the peace or magistrate from hearing cases in summary ejectment or from reserving ruling on demurrers arising in such
cases. We therefore hold that the petition for prohibition in this case was without legal merit and that the Justice presiding in
Chambers was legally correct in denying it. Affirmed.

Badio et al v Cole-Lartson et al [1985] LRSC 23; 33 LLR 125 (1985) (20 June 1985)

HIS HONOUR HALL W. BADIO, Assigned Circuit Judge, presiding over the June Term, A. D. 1983, Civil Law Court, Sixth Judicial Circuit, Montserrado County, and **JULIA AMMONS-WEBSTER, et al.,** Appellants/Respondents, *v.* **LEONORA COLE-LARTSON** and **CECIL WALKER, lineal heirs of IRIS E. B. COLE,** Appellees/Petitioners.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE GRANTING OF A PETITION FOR A WRIT OF ERROR.

Heard: March 27, 1985. Decided: June 20, 1985.

1. The pleadings in a civil case consist of a complaint, an answer and a reply which may contain affirmative matters or counterclaims. No other pleadings are allowed.
2. Averments in a pleading to which a responsive pleading is required are deemed admitted when not denied in the responsive pleading.
3. Averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided.
4. Persons who ought to be parties to an action if complete relief is to be accorded between the persons who are parties to such action or who might be inequitably affected by a judgment in such action shall be made plaintiffs or defendants. Rev. Code I: 5.51(1).
5. When a person who should be joined as a plaintiff refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff.
6. When a person who should be joined has been made a party and is subject to the jurisdiction of the court, the court shall order him summoned to appear in the action. Rev. Code I: 5.51(2).
7. If jurisdiction over a person who should be joined to an action can be sustained only by his consent or voluntary appearance, the court may dismiss without prejudice or when justice requires, proceed in the action without making him a party. Rev. Code I: 5.52(1).
8. In deciding whether to proceed or dismiss the case without prejudice, the court must consider the factors stipulated by the Civil Procedure Law. Rev. Code 1:5.52(1).
9. The objection that the court cannot proceed in the absence of a person who should be joined is not waived at any time before judgment in the trial court. Rev. Code 1: 5.52(1).
10. If the appeal court finds joinder of an additional party to be indispensable to an enforceable judgment, it shall remand the case to the trial court for retrial after joinder of such party. Rev. Code 1 :5.52(2).
11. An action to recover real property or its possession shall be barred if the defendant or his privy has held the property adversely for a period of not less than twenty years. Rev. Code I: 2.12(2).
12. No judgment can conclude or bind a person not a party to a suit, nor can it affect the property of such person unless he has been brought under the jurisdiction of the court.

Th respondents instituted an action of ejectment in the Sixth Judicial Circuit Court, Montserrado County, against one Allida. The defendant in those proceedings filed a two-count answer in which he asserted that he was only a caretaker of the premises, that the said property belonged to the petitioners in prohibition, and that the respondents were barred by the statute of limitations from claiming title to the property. Notwith-standing, the petitioners in prohibition were never joined as party-defendants, either upon application of the plaintiffs or action by the trial court on its own motion. instead, the trial judge proceeded to rule on the issues of law and to sent the case to trial. A trial having been conducted, a verdict was returned in favor of the respondents.
The petitioner, the alleged owners referred to by the defendant in his answer, thereupon filed a petition before the Justice in Chambers to prohibit and restrain the trial judge from rendering and enforcing a final judgment in the ejectment action, as well as against the plaintiffs in the trial

court. After hearing of the arguments on the petition and returns, the Justice granted the writ of prohibition. From this ruling, an appeal was taken to the Bench *en banc.*

The Supreme Court affirmed the ruling of then Justice in Chambers, stating that the trial court, when ruling on the issues of law, had erred in not passing on the legal issue raised in the answer and not rebutted by the plaintiffs. The Court cited the statute and previous opinions of the Court, to the effect that allegations made in a pleading and not denied by the opposing party when such denial should have been made, shall be deemed as true. The Court also opined that the defendant, hav-ing stated in his answer that others and not he, were the owners of the disputed property, the plaintiffs should have made application to the court to have the real alleged owners of the property joined as party-defendants or withdraw the first complaint and file another in which the petitioners would then be named as defendants. The Court noted that in the absence of such joinder, as permitted by law, a judgment rendered in the ejectment action could not be binding on or effective against the petitioners.
The Court further observed that in light of the lack of denial by the plaintiffs to the defendant's plea of the statute of limitations, the trial court should have ruled disposing of that issue of law. The Court concluded therefore, that in the interest of justice, property being at issue, the writ of prohibition be *granted* and the trial judge be *restrained* from enforcing the judgment in the ejectment proceedings.

Stephen Dunbar, Sr. appeared for the respondents/ appellants. *M. Fahnbulleh Jones* appeared for the petitioners/ appellees.

MR. JUSTICE MORRIS delivered the Opinion of the Court.

The petitioners herein, who should have been made proper defendants in the ejectment suit out of which these proceedings have grown, have filed this petition to restrain the trial judge from rendering and enforcing the final judgment in an eject-ment action filed by Julia Ammons-Webster, Elizabeth Am-mons, Caroline Ammons-Smythe, Jemima Ammons-Parker, by and through her husband, Francis Parker, Igal Ammons and Lemuel Ammons against Allida. The records reveal that Allida, the only defendant in the ejectment suit instituted by the corespondents in the lower court, filed a two-count answer in which he raised two issues, same being the ownership of the property and the statute of limitations. We quote the two counts of the answer for the benefit of this opinion:

"1. Because defendant says that he is not the legal owner of the property in question but only a caretaker: The property belongs to the late Iris Cole which property now descends to her heir, LEONORA COLE-LARTSON, CECIL W. COLE and OLIVE COLE.

AND THIS DEFENDANT IS READY TO PROVE.

2. And also because defendant says that admitting the claim of plaintiffs to said property, the Iris Cole and her privies, J. M. Thomas, have enjoyed the said property for over a period of Twenty (20) years by open, notorious, continuous, exclusive and physical ownership and occupancy of said property and plaintiffs and/or their privies have not instituted any action during these many years. Defendant therefore raises high the plea of statute of limitations as a bar to the above action.

AND THIS DEFENDANT IS READY TO PROVE."
There was no reply filed by the plaintiffs to traverse the issues raised in the defendants answer. However, the court made the following ruling on the issues of law:

"COURTS RULING ON. LAW ISSUES

Countering plaintiffs' complaint, defendant filed a two-count answer which rested pleadings. Count 1 alleging that he is not the legal owner to the late Iris Cole which descended to her heirs, the owners Leonora Cole-Lartson, Cecil W. Cole and Olive Cole, and two, that he appears to plead limitation, setting forth that he admits the claim of plaintiffs to said property, still they are not entitled to the possession thereof since the said Iris Cole and her privies, naming another person not mentioned in count 1, J. N. Thomas, as having enjoyed the said property over a period of 20 years.

Said count 2 of the answer shifts the responsibility on the defendant to prove this plea of limitation which should be tried by a jury under the direction of the court.

In view of the foregoing, the court hereby rules to trial the complaint and counts 1 and 2 of the answer. The clerk is ordered to docket the case on the trial docket for trial at the ensuing December Term of this Court. And it is hereby so ordered.
To which the defendant excepts."

Our Civil Procedure Law, Rev. Code 1: 9.1 (1), provides that: " . . . there shall be a complaint and an answer; and there shall be a reply to an answer which contains affirmative matter or counterclaim. No other pleadings shall be allowed." The same statute also provides, at section 4.9 (3), under "*Effect of Failure to deny*," that:

"Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided."
It appears to us that the failure of the plaintiffs to file a reply was an admission of the issues raised in the answer. Therefore the plaintiffs should have made application to court to have the real owners of the property, the petitioners herein, as alleged in count one of the answer, joined as party-defend-ants or the plaintiffs could have withdrawn the first complaint and filed another with petitioners as the defendants. We quote the relevant statute on joinder of parties:

"§5.51. When Joinder required.

1. *Parties who should be joined.* Persons (a) who ought to be parties to an action if complete relief is to be accorded between the persons who are parties to such action, or (b) who might be inequitably affected by a judgment in such action shall be made plaintiffs or defendants therein.

2. *Compulsory joinder.* When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in a proper case, an involuntary plain-tiff. When a person who should be joined according to the provisions of paragraph 1 has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned to appear in the action.

§5.52. Effect of failure to join.

1. *When court may proceed in absence of person who should be joined.* If jurisdiction over a person who should be joined according to the provisions of section 5.51 (1) above can be obtained only by his consent or voluntary appearance, the court may dismiss without prejudice or, when justice requires, proceed in the action without making him a party. In determining whether to proceed or to dismiss without prejudice, the court shall consider: (a) whether the plaintiff has another effective remedy if the action is dismissed on account of the non-joinder; (b) the prejudice which may accrue to the defendant or to the person not joined as a result of the non-joinder; (c) whether and by whom prejudice might have been avoided or may in the future be avoided; (d) the feasibility of a protective provision by order of the court or in its final judgment; end (e) whether an effective judgment may be rendered in the absence of the person who should be joined.

2. *Non-joinder not waived.* The objection that a court cannot proceed in the absence of a person who should be joined is not waived at any time before judgment in the trial court. If the court on appeal finds that joinder of an additional party is indispensable to an enforceable judgment, it shall remand the case to the trial court for retrial after joinder of such party." Civil Procedure Law, Rev. Code 1 :5.51 and 5.52.
The law on the statute of limitations stipulates:

"An action to recover real property or its possession shall be barred if the defendant or his privy has held the property adversely for a period of not less than twenty years." Civil Procedure Law, Rev. Code 1:2.12(2).

It is our holding that an effective judgment could not have been rendered in the ejectment case without joining the petitioners as party defendants, since they are the supposed rightful owners of the property in question and Mr. Allida is simply a caretaker, as alleged in count one of the untraversed answer. In order to mete out transparent justice to the parties, property being in issue, it is but fair to grant the petition restraining the enforcement of the judgment in the ejectment case out of which these proceedings had grown.
It is a cardinal principle of law that no judgment can conclude a person not » party to the suit, nor can it affect the property of such person unless he has been brought under the jurisdiction of the court. In the case at bar, the petitioners were never made parties to the ejectment suit, even though Mr. Allida. informed the plaintiffs that he was a mere caretaker of the property, and that the petitioners were the rightful owners of said property by descent. The lower court, not having ac-quired jurisdiction over the petitioners in the ejectment case, its judgment cannot bind them.

Tubman v. Murdoch, 4 LLR 79 (1934); *Davis-Johnson v. Alpha et. al.*, 13 LLR 573 (1960); *Eitner v. Sawyer*, [1977] LRSC 47; 26 LLR 247 (1977); and *Boye v. Nelson*, [1978] LRSC 33; 27 LLR 174, 175 (1978).

The statute of limitations in this case was pleaded affirmatively as consistently required by this Court in its seve-ral opinions. *Bryant et. a1. v. Harmon and Oost Afrikaansche Compagnie*, [1956] LRSC 18; 12 LLR 330 (1956); *Jackson v. Mason*, [1975] LRSC 7; 24 LLR 97 (1975).

In the absence of a reply filed, we must assumed that the issues raised in the answer were admitted by the plaintiffs and the judge should have accordingly ruled while disposing of the law issues.

In view of the foregoing circumstances and the laws cited, it is our candid opinion that the ruling of the Justice in Chambers should be and the same is hereby affirmed with cost against the respondents. And it is hereby so ordered.

Ruling affirmed.

Fofana v Toe [1998] LRSC 19; 39 LLR 25 (1998) (5 August 1998)

MANUELLA PEDILLA VARGAS, Petitioner, *v.* HER HONOUR C. AIMESA REEVES, Resident Judge, Sixth Judicial Circuit Court, and EZZAT N. EID, Respondents.

Heard: November 16, 1998. Decided: January 21, 1998.

1. A petition for a writ of certiorari shall contain a statement of the decision that is alleged to be illegal or of the intermediate order or interlocutory judgment of which review is sought.
2. A petition for certiorari is permissible only where the trial court rules on a motion or other matter in a trial, exceptions are taken thereto, and the party proceeds forthwith to apply for the remedial writ. If the petitioner waits until an assignment is issued and served, and files a motion or participates otherwise in the case, the original action excepted no longer comes within the reach of a remedial process, and certiorari can no longer be pursued. The process of appeal must therefore then be pursued.
3. The writ of certiorari will not be granted where adequate relief can be obtained through a regular appeal.
4. Certiorari is a special proceeding to review and correct a lower court's interlocutory ruling or intermediate order.
5. It is contemptuous for counsel to mislead the court into doing an act which it would not normally do.

6. Laws found to be inconsistent with the Constitution are void and the Supreme Court has the authority to declare such laws unconstitutional.
7. Under the Constitution, all parties have the right to trial by jury. The Constitution is silent, however, on the time, forum, and manner in which the right to trial by jury can be invoked and enjoyed.
8. Constitutional law categorizes rights under two distinct headings: Those which are self-executing and those which are not sel-executing.
9. Self-executing constitutional provisions are those which are immediately effective without the necessity of ancillary legislation; provisions by which rights given may be enjoyed or duty imposed enforced.
10. Non-self-executing constitutional provisions are those which merely indicate principles without lying down rules giving them force of law.
11. Section 22.1(2) of the Civil Procedure Law requires that a demand for jury trial must be made not later than ten days after service of a pleading, while section 22.1(4) provides that the failure of a party to serve a demand in keeping with section 22.1(2) and to file it in keeping with section 22.8. A failure to comply with these sections constitutes a waiver by the party of the right to trial by jury.
12. In order for the Court to sustain a successful challenge to the constitutionality of a legislation, the Court must come out clear and unequivocal terms and specifically declare said statute unconstitutional.
13. The basis for demanding a jury trial in a declaratory judgment proceeding is that there must be an issue of fact which is in dispute between the parties.

Petitioner filed a petition in the lower court praying for a declaratory judgment against the co-respondent. Following the resting of pleadings, the judge ruled on the law issues, and determine that there were no fundamental disputes as to the facts inj the case. She therefore ruled the case to trial of the facts without a jury, and immediately thereafter assigned the case for hearing. Whereupon, the petitioner filed a motion demanding a trial by jury, asserting that there were issues in dispute. The motion was resisted and denied by the judge, with the petitioner excepting thereto and announcing that he will avail himself of the statute. Thereafter, petitioner filed a motion for the judge to recuse herself from hearing the case. While the motion was pending, petitioner petitioned the Justice in Chambers for a writ of certiorari, praying the Supreme Court to review the trial judge's denial of the request of petitioner for a trial by jury, contending that the statutory provision which prescribed the time within which a request for trial by jury should be made was unconstitutional.
As the matter involved a constitutional issues, the Justice in Chambers forwarded same to the Bench *en banc* for disposition. The Supreme Court *en banc* denied the petition holding, firstly, that the constitutional provision granting the right to trial by jury was not a self-executing provision and therefore required further action by the Legislature. The provision under challenge, it said, was to given meaning to the constitutional guarantee and ensure an orderly enjoyment of the guarantee. The petitioner, it said, had failed to make the request with the ten day period prescribed by the statute and had therefore waived the right to jury trial.

Secondly, the Court opined that although the petitioner had taken exceptions to the ruling denying the request to a trial by jury, he had failed to immediately proceed by remedial process for a review of the ruling, but had instead waited until an assignment for trial had been issued

and served on the parties, and had further filed a motion of recusal. By these acts, the Court said, the petitioner had rendered the remedial process impermissible since the matter before the trial court was no longer the ruling denying the request for a jury trial but a motion to recuse. Therefore, it said, the only remedy to pursue then was an appeal. Certiorari, the Court observed, could not be used as a substitute for appeal, especially where appeal was an adequate remedy. Certiorari was therefore *denied* and the trial ordered to proceed with the hearing of the petition for declaratory judgment.

Beyan D. Howard and *Tiawan S. Gongole* of Legal Consultants Inc. appeared for petitioner. *H. Varney G. Sherman* and *F. Musah Dean* of Sherman & Sherman Inc. appeared for respondents.

MR. JUSTICE WRIGHT delivered the opinion of the Court.

These certiorari proceedings are before this Bench *en banc* from the Chambers of our very distinguished colleague, Mr. Justice John Nathaniel Morris, before whom the petition was filed but which he forwarded to the Supreme Court for determination of the issues since they were of a constitutional nature.

The facts are that on February 28, 1998, petitioner filed a petition for declaratory judgment against Co-respondent Ezzat N. Eid in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County. Co-respondent filed his returns to the petition on March 5, 1998 and petitioner filed her reply on March 17, 1998. There pleadings rested. On April 1, 1998, the court below heard arguments on the law issues and on April 6, 1998, passed on the law issues and ruled the case to trial.

In its ruling on the law issues, the trial court stated that "there is no dispute as to certain fundamental facts" and that it was necessary to narrate said facts as the basis for the disposition of law issues. Immediately after the court ruled on the law issues on April 6, 1998, the court there and then, and with both counsels present, assigned the case for trial on April 14, 1998, at 1:00 p.m. On April 13, 1998, petitioner filed a motion for jury trial which was resisted on April 14th when trial should have been had.

In her motion, petitioner contended that the declaratory judgment: proceeding involved factual issues to be determined; secondly, that petitioner was entitled to jury trial as a matter of right; and finally that petitioner demanded a jury trial of all issues of fact in the case.

In his resistance to the motion, respondent contended, among other things, that petitioner had failed to state which facts were in dispute that would require jury trial; secondly, that there were no issues of fact in dispute; thirdly, that the right to a trial by jury, as guaranteed by the Constitution, was not self executing and is effectuated by statute and that petitioner had failed to comply with the requirement of the statute, and hence, she could not enjoy that constitutional right.

The court, on April 22nd 1998, ruled denying the motion on the grounds that generally

declaratory judgment proceedings are heard by the judge sitting alone, except where there are issues of fact in dispute, and that in the instant case there were no issues of fact in dispute. The judge also ruled that a party wishing to exercise his right to jury trial must apply for it within ten days after pleadings have rested; that he must specify the issues sought to be tried by jury; and that a failure to comply with the statute constituted a waiver of that right. Petitioner excepted to this ruling and notified the court that she would take advantage of the statute.

On April 27, 1998 the court issued a notice of assignment for trial of the facts on April 29th 1998. Upon receipt of the said assignment, petitioner, on that same day, April 27, 1998, petitioner filed a motion to recuse, demanding that the judge recuse herself from trying the case. Before the judge could assign, hear and rule on said motion to recuse, the petitioner also on the self-same day of April 27th filed a petition for a writ of certiorari, which certiorari petition is now the subject of this opinion. The Chambers Justice conducted a conference with the parties and subsequently issued the writ, but forwarded the matter to the Full Bench since it was argued that the petition had raised two novel constitutional issues, as follows:

(a) Whether a party is mandatorily entitled to a trial by jury in declaratory judgment proceedings; and

(b) If a party is entitled to a jury trial in a declaratory judgment proceeding, whether there is a time limit within which said party should exercise such right.
When this case was argued before us, several issues were advanced by both counsels which the Court will address later in this opinion. However, the first question to answer is whether or not certiorari will lie. This is basic.

"Certiorari is a special proceeding to review and correct decisions of officials, boards, or agencies acting in a judicial capacity, or to review an intermediate order or interlocutory judgment of a Court". Civil Procedure Law, Rev. Code 1: 16.21 (1); *Liberian Insurance Agency Inc. v. Monsour N. Ghosen & Bros,* [1976] LRSC 1; 24 LLR 411 (1976), text at 412.

“A petition for a writ of certiorari shall contain a statement of the decision that is alleged to be illegal or of the intermediate order or interlocutory judgment of which review is sought.” *Ibid*., § 16.23(1)(b), at 147.
Recourse to the trial court's records indicate that the court ruled denying petitioner's motion for a jury trial on April 22, 1998, to which ruling petitioner excepted and gave notice that she would take advantage of the statute. The exception was noted and the matter suspended. Then on April 27, 1998, the judge assigned the case for trial on April 29th. On that same day, April 29th, petitioner filed the motion for the judge to recuse herself, and at the same time filed this petition for a writ of certiorari in the Chambers of the Supreme Court. What was the purpose of the certiorari and what ruling of the trial court was sought to be reviewed?

From the sequence of events, we hold that when the trial court ruled con the motion for jury trial, it was proper for petitioner to except and it was at that point that a petition for certiorari may have been permissible in keeping with petitioner's notice to take advantage of the statute. But once the notice of assignment was issued and served and then the motion to recuse was filed, it meant that the court's ruling on the motion for jury trial became part of the record for appeal and

was no longer within the reach of a remedial process. Once petitioner filed her motion for the judge to recuse herself, it meant that petitioner was ready to go to the next stage of the case, which was to dispose of said motion and proceed from a ruling thereon, thereby making the court's ruling on the motion for jury trial part of the settled record of the case. In short, the filing of the subsequent motion to recuse was the cut-off point as to the ruling on the previous motion for jury trial. Only appeal would render said ruling reviewable and a writ of certiorari will not be granted where adequate relief can be obtained through a regular appeal. *Morris v. Flomo*, [1977] LRSC 52; 26 LLR 314 (1977).

Therefore, it is our holding that certiorari was inappro-priately filed with the Supreme Court because the matter before the trial court was no longer the motion for jury trial but rather the motion to recuse, and the court had neither assigned nor heard the motion to make a ruling thereon, which would then have been a fit subject for review.

Certiorari is a special proceeding to review and correct a lower court's interlocutory ruling or intermediate order. *Wright v. Reeves*, [1977] LRSC 19; 26 LLR 38 (1977). In the instant case, there was no ruling on the motion to recuse and hence nothing to review and correct. At least, in the *Morris v. Flomo* case, the certiorari was filed immediately after the ruling, so there was something to review and correct. Similarly, this was the situation in the *Wright v. Reeves* case. Accordingly, the petition for certiorari is denied, the alternative writ quashed and the peremptory writ refused for being unfounded, illegal, and without merit.

This Court is of the view that the filing of the petition for certiorari was done in bad faith and for the mem purpose of delaying and baffling the main suit, which, itself, was filed by petitioner. Why should petitioner employ such measures with the aid of the Court to frustrate and baffle justice in a case brought by petitioner? It is safe to assume that if petitioner had a justifiable cause, logic dictated that she would or should be anxious to get it heard and determined. The aid of this Court was invoked by means of misrepresentation because it is clear that bad our distinguished colleague, the Chambers Justice, who ordered the alternative writ issued, been aware of the fact that a motion to recuse had been filed subsequent to the previous ruling on the motion for jury trial, he would never have ordered the said writ issued. This is contemptuous where counsel would mislead the Court into doing an act it normally would not do.

In the case *Liberian Insurance Agency Inc. v. Monsour N. Ghosen & Bros*, cited *supra*, the jury returned a verdict on June 19, 1975 and petitioner noted his exceptions thereto on the record and gave notice he would file a motion for new trial. The very next day, June 20, 1975, he filed his petition for certiorari without including in his petition that a verdict had been returned, to which he had excepted and had given notice that he would file a motion for new a trial. So without this information, the Chambers Justice, Mr. Justice Horace, issued the alternative writ on the same date.

When the case was heard in Chambers by Mr. Justice Wardsworth, the petition was denied and the alternative writ quashed, the peremptory writ was denied, and petitioner then appealed to the Full Bench.

Because the instant case is wholly analogous to the *Ghosen* case, in so far as the conduct of the Petitioner withholding information from the Chambers Justice is concerned, and because we are in complete agreement with the action of the court, we shall quote verbatim what this Court had to say, speaking thru Mr. Justice Horace:

"It seems that this act was a calculated one on the part of the petitioner, for if the Justice who ordered the alternative writ issued had been aware of this fact, perhaps no alter-native writ would have been ordered issued.

Because of the unmeritorious petition filed by counsel, bent upon deceiving this Court when he argued that his petition was filed before a verdict was brought against him, when it was not, he is hereby amerced in a fine of $50.00 to be paid within forty-eight hours after rendition of this decision. Until the fine is paid he shall not be permitted to practice law in any of the courts of the Republic." *Ibid.*, text at 413.

Accordingly, this Court hereby holds petitioners counsel in contempt for bringing such unmeritorious petition, knowing fully well that they had excepted to the ruling on the motion for jury trial, that the case was subsequently assigned for trial, and that shortly before trial they had filed a motion to recuse, which motion was not yet assigned, heard, or ruled upon to form the basis for review. Moreover, counsel for petitioner did not bring these facts to the attention of the Chambers Justice but caused him to order the issuance and service of the alternative writ. Counsel, in persons of Counsellors Tiawan S. Gongloe and Beyan D. Howard, are hereby fined the sum of LD$1,000.00 (One Thousand Liberian dollars) each to be paid into the government revenue within seventy-two hours after rendition of this judgment. Upon their failure to so pay this fine, they shall be suspended from the practice of law, directly and indirectly, in any court in this Republic for a period of three months.

Further, the lawyers who signed the petitioner's counsellor certificate, in persons of Counsellors Charles Abdullai and Nyenati Tuan, are also fined the amount of LD$500.00 (Five Hundred Liberian dollars) each to be paid within seventy-two hours, and upon their failure to pay the fine, they too shall be suspended from the practice of law for one month . Their role in the deception by petitioner is that they claim to "have fully read and *analyzed* (Emphasis supplied) the petitioner's petition for certiorari and that in their opinion the contention of the petitioner is sound in law. So they too conspired to deceive the Chambers Justice.

Even though we have already ruled that certiorari does not lie, it is important to pass upon the very crucial issues raised by the parties and strenuously argued before us. For the benefit of this opinion the single most important issue is whether or not the statute prescribing the manner in which the constitutional right to trial by jury may be invoked and enjoyed is itself unconstitutional and hence unenforceable?

Petitioner was vehement in his contention that section 22.1(2)(3) and (4) of the Civil Procedure Law, Rev. Code 1, violates one's right to trial by jury as guaranteed by the Constitution. Petitioner argued that insofar as it relates to the tame within which a trial by jury may be demanded by a party, the said statute is unconstitutional since the Constitution itself does not contain any time limitation. Petitioner relied on Arti-cle 2 of the 1986 Constitution of Liberia, which provides: "This Constitution is the supreme and fundamental law of Liberia and its provisions shall have binding force and effect on all authorities and persons throughout the Republic. Any laws, treaties, statutes, decrees, customs and regulations found to be inconsistent with it shall, to the extent of the incon-sistency, be void and of no legal effect." Petitioner argued that the Supreme Court, pursuant to its power of judicial review, is empowered to declare any inconsistent law unconstitutional.

For us, that is a non issue. We recognize and give credence to the Constitution of Liberia and to the principle that any law found to be inconsistent with the Constitution is void, and that the

Supreme Court has the power to declare said law unconstitutional. The problem here is that the law must first be found to be inconsistent with the Constitution, and then it can or will be declared unconstitutional. This is the present exercise wherein we must now determine and declare whether section 22.1 of the Civil Procedure Law is unconstitutional.
The Constitution of Liberia provides that all "parties shall have the right to trial by jury." LIB. CONST., Art. 20(a)(1986). That is all the Constitution says. It is silent as to the time, forum, and manner in which this right to trial by jury can be invoked and enjoyed.
Respondent, on the other hand, argued that this right to trial by jury, like other provisions of the Constitution, is merely a declaration which is not self executing but requires enabling legislation to give it effect. We agree with this argument.

Constitutional law categorizes rights under two distinct headings: those which are self-executing and those which are not self- executing. 16 AM. JUR. 2d, *Constitutional Law,* §§ 139 and 140. Self-executing constitutional provision refers to provisions which are immediately effective without the necessity of ancillary legislation. A constitutional provision is self-executing if it supplies sufficient rule by which right given may be enjoyed or duty imposed enforced; constitutional provision is not-executing when it merely indicates principles without laying down rules giving them force of law. BLACK'S LAW DICTIONARY 1360 (6th ed. 1990).
We have already stated that the constitutional provision on the right to trial by jury is not self-executing and requires ancillary enabling legislation to give it effect. We therefore turn then to the statute enacted pursuant thereto to determine whether the said statute is in contravention of the constitutional provision or within its contemplation.
Petitioner does not have a problem with Chapter 22, trial by jury. In fact, petitioner invoked her right to jury trial citing and relying on section 22.1, subsections 1, 2, 3, 5, and 6 of the Civil Procedure Law, Rev. Code 1. Petitioner's position is inconsistent and contradictory, for on the one hand petitioner cited and relied on section 22.1(2) without attacking it, while on the other hand, she challenged that identical provision as being illegal and inconsistent with the Constitution. When ar-guing the motion for a jury trial, petitioner did not express any reservations regarding section 22.1(2) or any portion thereof. She only discovered that the provision was unconstitutional when her motion for jury trial was denied. We wonder if petitioner would have raised the same challenge if her motion had been granted. We think not. Petitioner’s counsel, when arguing before this Court, contended that his only problem with the statute was its prescription of a time frame within which a trial by jury can be demanded and enjoyed and that one's failure to comply with its requirement should be of no consequence. Petitioner unsuccessfully attempted to confuse the Court.

Irrespective of petitioner's view on the legality of this sta-tute, the Court holds that the statute is not unconstitutional but that it is in aid of the Constitution. This statute gives form, shape and effect to the broad constitutional provision which is merely a general guideline. The statute makes it capable of being exercised and enjoyed. Without such a statute, the constitutional provision will remain abstract and a mere decla-ration or principle. The Constitution cannot provide for every single scenario or possibility or transaction and that is why statutory enactments are provided for, so as to give life or meaning to constitutional principles, and such enabling legis-lation must be strictly observed.
Petitioner's challenge to the constitutionality of the statute is defeated and as a demonstration of

the fact that this provision of the statute conforms to or is in aid of the Constitution, even the opening sentence of the chapter which includes section 22.1 (1), and which reads, as follows:

"The right to trial by jury as declared by the Constitution or as given by statute *shall be preserved inviolate*" Civil Procedure Law, Rev. Code 1: 22.1.
This shows that our lawmakers were mindful of the constitutional right at the time the statute was being enacted and therefore their intent could not have been to undermine that constitutional provision. Petitioner says the contention of illegality of the statute relates to only the time limit and that the rest of it is valid. That argument is merely academic and hair-splitting and of no persuasion. Section 22.1 (2) requires that a demand for jury trial must be made not later than ten days after service of a pleading, while section 22.1 (4) provides that the failure of a party to serve a demand in keeping with section 22.1(2) and to file it in keeping with section 8.2, constitutes a waiver by him of trial by jury. Civil Procedure Law, Rev. Code 1: 22.1(2). This law is clear and mandatory. This is the situation in the instant case, that petitioner waived her right to jury trial by her failure to demand jury trial within ten days after pleadings rested.

Going further, the Court observes, as respondent have contended, that the right to trial by jury is not the only consti-tutional right which is not self-executing and requires ancillary legislative enactment and for which the Legislature has provi-ded such enabling legislation. Therefore, if this enabling statute on the right to jury trial were to be declared unconstitutional simply because the Constitution itself does not specifically contain similar wordings, then we would have to also strike down all other enabling statutes which give effect to non-self-executing constitutional rights.
Some of the other constitutional rights which are not self-executing for which enabling legislation have been passed include the right to appeal from an adverse judgment, the right of free movement to include travel in and out of Liberia, the right to bail, the right to vote, the right to freedom of assembly and of association, or for that matter, to own, use and enjoy property. For example, on property rights, is it unconstitu-tional where the statute requires that as evidence of title to real property one must have a deed and that the deed must be probated and registered within four months? As to personal property, is it unconstitutional for one to be required to register his vehicle and obtain a license plate and a driver's license before plying the streets and to drive on a particular side of the street and at a certain speed? As to free movement of citizens, is it unconstitutional for one to be required to obtain a passport or laissez-passer and thereafter an exit visa and be registered before leaving Liberia or for an alien to be required to comply with regulations of the Bureau of Immigration? As to the right to vote, is it unconstitutional for one to be required to register with the Elections Commission and to obtain a voter's registra-tion card and to vote in a particular precinct or district? As to the right to bail, is it unconstitutional for an accused to be required to tender a property valuation bond meeting certain requirements of the Ministry of Finance or of the statute as to sureties? As to the right to appeal, is it unconstitutional to require a party to first announce his appeal orally and then file a bill of exceptions in ten days and appeal bond in sixty days and notice of completion of appeal? Why doesn't the appellant just announce his appeal and appear in the Supreme Court Chambers to await the call of his case? Moreover, since the Constitution has not defined every single criminal offense, are the Penal Law and the Criminal Procedure Law unconsti-tutional? Since there is constitutional guarantee of freedom of speech, is the law on libel and slander unconstitutional?

We can go on and on with this list, and the answer to all of the above would still be in the negative, that these statutes are not in themselves unconstitutional simply because they pre-scribe means and rules by which rights guaranteed by the Constitution ought to be invoked, exercised and enjoyed. We hereby reiterate that the failure of any person to obey, comply with, and abide by provisions of ancillary or enabling statutes which seek to give meaning to rights guaranteed by the Con-stitution amounts to a waiver or forfeiture of said right, and that a challenge to such statute will not be entertained simply because a person feels or is affected by the application of such statute.

Petitioner relied heavily on and gave much prominence to the case *Saleeby Brothers Inc. v. Barclay's Export Finance Company, Ltd.*, [1971] LRSC 70; 20 LLR 520 (1971), text at 523-524, in which the Supreme Court held that "an application for trial by jury can be made at any time before testimony of witnesses begins at the trial." Petitioner contended that the statutory provision requiring a party to demand a jury trial within ten days after the service of a pleading is unconstitutional. We observe that in the *Saleeby* case, as to the issue of waiver of jury trial, the Supreme Court said:

"We find ourselves unable to agree with this contention because we do not feel that any statutory requirement as to time of making the application can deprive a party of the constitutional right to a jury trial if in the party's views, a jury trial is necessary to the protection of his rights." *Id*., at 523.

It must be noted that the Supreme Court expressed it views and opinion without specifically declaring the statute uncon-stitutional. The Court said "We do not *feel*" that a statutory requirement can deprive a party of the constitutional right to jury trial..." (Emphasis supplied). It is our view that when the Court sustains a successful challenge to the constitutionality of a legislation, the Court must come out in clear and unequivocal terms and specifically declare said statute unconstitutional. In the *Saleeby* case, the Court stopped short of making such a declaration, thus leaving the statute still valid and in force. Hence, the *Saleeby* case certainly cannot be used as a guidepost in cases of this nature, since it expresses the mere "*feelings*" of the Court without a clear and outright declaration that the statute is unconstitutional.

To the contrary, this Court now holds and declares that section 22.1(2), being an ancillary and enabling legislation to the constitutional guarantee of the right to trial by jury, is constitutional, lawful and valid, and is to be strictly observed and complied with. Not only that, but we hereby declare our disagreement with the holding of the Supreme Court in *Saleeby* case as regards the time within which a demand for jury trial may be made. Accordingly, that portion of that *Saleeby* opinion as regards time to demand jury trial is hereby recalled and declared of no legal effect and that the present statute, section 22.1(2)(4) is declared legal and ordered observed and enforced. The inclusion of a time limit for the enjoyment of the right to a jury trial does not operate as a limit on or denial of the right but only ensures that it is enjoyed with some order.

One other issue which came up was whether or not a jury trial was permissible in actions of declaratory judgment. The law is clear on this. The trial court in its ruling on petitioner's motion for jury trial held that ordinarily declaratory judgment proceedings are for the judge alone and that a jury is called in only when there is an issue of fact in dispute. Civil Procedure Law, Rev. Code 1: 43.9. Note that the section relied on by the Court in its ruling and by petitioner in support of its motion, provides that the right to a jury trial may be demanded under the circumstances and in the manner provided in chapter 22, i.e., the same section 22.1 which

petitioner now challenges.
Proceeding on the strength on section 43.9, *supra*, relied on by petitioner (See page four, 20th day's jury session, March Term, Tuesday, April 14, 1998, of the minutes of the Civil Law Court as the basis for demanding a jury trial in declaratory judgment proceedings, there must be an issue of fact which is in dispute between the parties. We need to determine in the instant case whether there were any factual issues in dispute between the parties and what were those issues.

As stated earlier in this opinion, the trial court in its ruling on the law issues ruled that "there is no dispute as to certain fundamental facts" and that it was therefore necessary to narrate those facts as the basis for the disposition of the law issues. To this ruling, petitioner's counsel excepted in part and gave notice that he will take advantage of the statute.
Even though petitioner excepted to this ruling, yet peti-tioner took no further action as to said ruling but proceeded with further action in this case. That ruling of the court on the law issues is not subject of review in these certiorari proceedings and will govern the further conduct of the trial.
Applying the ruling that there was no disputable issue of fact and the governing statute, section 43.9, to the instant case, it is clear that petitioner was not entitled to a jury trial in these declaratory judgment proceedings. Hence, this case will now go to trial without a jury for these two reasons, i.e. that there is no disputable issue of fact, and because a jury trial was not demanded within the time limit prescribed by section 22.1 (2).
WHEREFORE, and in view of the foregoing, it is the considered opinion of this Court that the ruling of the trial court on the petitioner's motion for jury trial, being part of the settled records of the case, is hereby affirmed in whole as it is supported by the law controlling. The petition for the writ of certiorari is denied because there was no legal basis for bringing same. The alternative writ is quashed and the pe-remptory writ refused. Counsels for petitioner are hereby fined the sum of L$1,000.00 each, to be paid within 72 hours or else be suspended from the practice of law for three month. Counsels who signed their certificate are also fined L$500.00 each or be suspended from the practice of law for one month.
The trial court is ordered to resume jurisdiction over the case and proceed with the trial of the declaratory judgment case without a jury. Costs are assessed against petitioner. The Clerk of this Court is hereby ordered to send a mandate to the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, ordering the judge presiding therein to resume juris-diction over the case and commence the trial of the declaratory judgment action without a jury. And it is hereby so ordered.

Ruling affirmed.

MADAM CHIEF JUSTICE SCOTT *dissents.*

I am constrained to disagree with my distinguished Asso-ciate Justices in the majority opinion in this matter. The facts of this controversy have been stated in the majority opinion and it would be redundant to restate same. The issues raised in the writ of certiorari are constitutional issues.

They concern the right to a jury trial is guaranteed in the Constitution. However, in my opinion, the deciding issue is whether or not a party litigant should be denied his or her constitutional right to a jury trial due to the negligence of his or her counsel; or, for that matter, whether or not a time limit, in terms of the number of days, should be legislated to allow for the right to exercise the constitutional right to a jury trial.

Since the incumbency or formal seating of this Supreme Court Bench in October 1997, the theme of almost all of the opinions handed down has been the pursuit of substantive justice and not the strict adherence to procedural law at the expense of simple justice. Our premise in these opinion has been that a party litigant should not lose his or her rights due to the negligence of a lawyer in failing to comply with the statu-tory or other procedural steps governing a case. Thus was the logic in our majority opinion in the following cases:

(1) Sannoh v. ADC Airlines et al., 38 LLR 603 (1998), decided October Term, A. D. 1997.
(2) Donzo v. Ahmed, 37 LLR 107 (1992), decided October Term, A. D. 1992.
(3) West Africa Rubber Trading Company v. Metzger and Temhmeh, [1998] LRSC 30; 39 LLR 151 (1998), decided March Term, A. D. 1998.
(4) National Iron Ore Company et al. v. Yancy, Cooper and Tweh.

In all of these opinions, we have imposed fines and suspen-sions on the negligent lawyers and have permitted the party litigant to enjoy their legal rights *non pro tunc*; and here is precedent in the opinions of this Court to support this trend. See *Saleely Bros., Inc. v. Barclay Export Finance Company, Ltd.*, [1971] LRSC 70; 20 LLR 520 (1971); *Sannoh v. ADC Airlines*, [1998] LRSC 11; 38 LLR 615 (1997); *In the Matter of Counsellor Constance*.
My interpretation of the statute under review also takes a contrary view to that held by the majority opinion. It is my considered opinion that the Legislature did not intend to deny a right to jury trial by the enactment of chapter 22, section 22.1(2), Civil Procedure Law, Rev. Code 1. To appreciate the intent of the Legislature we have to examine the entire section. The very first paragraph of chapter 22.1 reads:

"(1) *Right preserved.* The right to trial jury as declared by . . . the Constitution, or as given by statute shall be preserved inviolate.
This is a command from the Legislature affirming and upholding the constitutional right to a trial by jury. It leaves no room for discretion by a trial judge or court. Indeed, the section provides for relief in the event at party litigant does not demand a trial by jury. Paragraph five of section 22.1 reads:

"*Relief for failure to make demand.* Notwithstanding, the failure of a party to demand a jury in an action in which such a demand might has been made upright, the court in its discretion, upon motion, may order a trial by jury of any or all issues."
Moreover, the statute continues to provide opportunities to ensure that a party litigant is accorded the right of jury trial. Paragraph 6 of the said section 22.1 reads:

"*6. Issues triable by a jury revealed at trial.* When it a pegs in the course of a trial by the court that the relief required, even though not originally demanded by a party, entitles the adverse party to a trial by jury of certain issues of fact, the court shall give the adverse party an opportu-nity to demand a jury trial of such issues. Failure to make such a demand within the

limited by the court shall be deemed a waiver of the right to trial by jury. Upon such demand, the court shall order a jury trial of any issues of fact which afire required to be tried by jury."

In view of the foregoing quoted paragraphs, it is my consi-dered view that the failure to serve a copy of the demand for Jury trial on the adverse party ....not later than ten (10) days after the service of a pleading or an amendment of a pleading ....is not intended as a bar to the constitutional right to a trial by jury. It was not the intent of the framers of the statute to deny the right to trial by jury.

My esteemed Associate Justices have held that certiorari will not lie because petitioner, on April 27, 1998, had simulta-neously filed a petition for a writ of certiorari before the Chambers Justice and a motion to recuse against the trial court judge, Her Honour C. Aimesa Reeves. The view of the majority is that the filing of the motion to recuse, which remains unheard and undetermined, rendered the judge's ruling denying the motion for jury trial an issue reviewable upon appeal and not by a writ of certiorari. The majority holds that "certiorari as inappropriately filed in the Supreme Court because the matter before the trial court was no longer the motion for jury trial but rather the motion to recuse.

I disagree with the foregoing reasoning and conclusion of my distinguished Associate Justices. The trial judge had ruled denying the motion for a jury trial. Petitioner had taken excep-tions thereto and made record that advantage would be taken of the statute. Clearly, the judge had made a determination on the motion for jury trial. This was a complete act. The motion for jury trial was not pending any longer. It is this ruling that was correctly and appropriately reviewable by a petition for a writ of certiorari. All lawyers are aware that the remedial process of certiorari reviews rulings and not motions that are undeter-mined. Further, when an interlocutory ruling is made by an inferior court, that issue is determined, and that the ruling becomes fit subject for review by a higher forum with appellate jurisdiction.

Additionally, it is my considered opinion that the simulta-neous filing of a motion to recuse is not a waiver to seek a remedial review. The said motion to recuse may be filed at any stage of the trial.

Further, it is the practice in our jurisdiction that during a trial, when a party excepts to ail interlocutory ruling or order of the judge and announces that he will take advantage of the statute controlling, the trial does not halt, but continues. Are my colleagues saying that the continued participation of the aggrieved party in the ongoing trial after taking exception and announcing that advantage will be taken of the statute serves as a waiver to seek a writ of certiorari? I think not. My question is how does the aggrieved party prevent the judge from pro-ceeding with the case? Is the majority saying that the exceptions taken and the declaration to take advantage of the statute serves as a stay on further proceeding in the action? The majority is not clear in its opinion.

One wonders how is the trial affected if the judge's ruling is reversed? The effect of a reversal of the judge would return both parties to the lower court, aid the court would dispose of the motion to recuse, if need be, and then both parties would proceed to present their various sides of the matter before the jury. No harm would be done to defendant if plaintiff is granted his request of constitutional right to a jury trial. No one is harmed and no one loses if the petitioners is granted the constitutional right to jury trial. Hence, certiorari should lie.

This view is affirmed, confirmed and upheld by opinions we are delivering at

these closing ceremonies, that is, the October, A. D. 1998 Term of this Honourable Court. See: (1) *Lamin, et al, v. Swope and Save the Children*; (2) *The Liberia Trading and Development Bank (TRADEVCO) v. Mathies and Cavalla Rubber Corporation.*

Therefore, it is my considered view that the intent of the Legislature in enacting chapter 22, section 22.1, was to pre-serve inviolate the constitutional right to jury trial. The filing of the motion for a jury trial beyond the 10 day period is not sufficient ground to deny petitioners his or her constitutional right. The denial of the right to jury trial is contrary to the intent and spirit of section 22.1.

The assertion of the constitutional right to jury trial does not prejudice the rights of respondents, but the denial thereof is manifestly prejudicial to the right of petitioners. Therefore, it is my considered opinion that certiorari will lie. Hence my dissent.

Meridien Bank v Andrews et al [2000] LRSC 12; 40 LLR 111 (2000) (21 July 2000)

MERIDIEN BIAO BANK LIBERIA LIMITED (MBBIL), by and thru its President and Chief Executive Officer or other authorized representative, Petitioner, v. HIS HONOUR JOSEPH W. ANDREWS, Assigned Circuit Court Judge, Civil Law Court, Sixth Judicial Circuit, Montserrado County, the Sheriff, Bailiffs and all those acting under the Authority of the Presiding Judge, First Respondents, THE NATIONAL BANK OF LIBERIA, by and thru its Governor, CHARLES BRIGHT, Second Respondent, and THE EPISCOPAL CHURCH OF LIBERIA, by and thru its Diocesan Board of Trustees, by its Chairman, MR. C. GYUDE BRYANT, Third Respondent.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE DENYING THE PETITION FOR A WRIT OF PROHIBITION.

Heard: May 31, 2000. Decided: July 21, 2000.

1. A Justice in Chambers may, in the exercise of his discretion in a remedial process, issue the writ as prayed for by the petitioner, or issue the writ on such terms and conditions as he may determine, or refuse to issue the writ, or cite the parties to a conference.

2. The Associations Law expressly provides that in the determination of the legal status of corporations which are organized for banking purposes, the Banking Law shall prevail over any conflicting provisions of the Liberian Business Corporation Act.

3. After entering into possession of a financial institution, and subsequent to the court appointing an officer, the National Bank of Liberia shall be vested with the full and exclusive power of

management and control of the financial institution, including the power to initiate, defend and conduct, in the name of the seized bank, any actions or proceedings to which the financial institution may be a party, pending the final adjudication of proceedings to lift the seizure.

4. Pending the lifting by the circuit court of the seizure of a financial institution, the seizure order shall be conclusive, final and binding.

5. The National Bank of Liberia has the full and exclusive power under the Financial Institution Act to act on behalf of a seized financial institution, including receiving proceeds for and on behalf of the seized financial institution.

6. Service of process made on the National Bank of Liberia for and on behalf of a seized financial institution over which the National Bank has the power of control and management constitutes valid service on the seized financial institution.

7. Summary proceedings to recover possession of real property is the proper proceeding to bring to oust a person from property when the lease has terminated or where the lease agreement provides for such eviction upon the default by the lessee to fulfil certain conditions stipulated by the lease.

8. There are two kinds of notices: Actual and constructive. Notice in law is regarded as actual when the person sought to be affected by it knows of the actual existence of the fact. Constructive notice is one which is presumed because of the fact that a person has knowledge of certain facts which should impact on him, or lead to knowledge of the ultimate fact.

9. There is no title to real property involved under a lease agreement where the agreement has terminated by its own terms or by operation of law.

10. Where ordinarily the non-payment of rent is not a ground for summary eviction, yet where the parties to a lease agreement provide therein that the lessee shall have peaceable and quiet enjoyment of the premises free of eviction or interference by the lessor if the lessee pays the rent and punctually performs the terms and conditions thereunder, a failure to pay the rent or perform the terms of the agreement vests in the lessor the right to have the lessee evicted from the demised premises.

11. The lessee of demised premises is subject to eviction for failure to pay the rental where the lease agreement states that payment of the rental is a precondition to enjoying peaceable possession of the demised property.

12. The jurisdiction of the courts cannot be ousted by a private agreement of the parties to a contract.

13. The Financial Institution Act forbids a writ of execution being levied against the assets of a seized financial institution.

14. Ordinarily the landlord may not reenter demised premises for breach of the covenant unless the covenant is valid and enforceable, and there is a stipulation that the breach shall work a forfeiture or termination of the tenant's interest or confer on the landlord the right of reentry.

15. Prohibition is the proper remedial process to restrain an inferior court or administrative tribunal from taking action in a case over which it has no jurisdiction or where it acts beyond its jurisdiction or attempts to proceed by rules different from those which ought to be observed at all times.

16. Prohibition will not lie where the trial judge has acquired jurisdiction over the subject matter and parties, and properly entertained the action.

The petitioner sought prohibition from the Supreme Court to restrain the co-respondent trial judge from carrying out a writ of execution intended to evict the petitioner from a certain demised premises which petitioner had leased from Co-respondent Episcopal Church of Liberia. The co-respondent church had instituted summary proceedings to recover possession of real property against the petitioner and had obtained judgment in its favor, based upon which a writ of possession had been issued and served and the property turned over to it. Prior to the institution of the summary proceedings, the petitioner, a financial institution, had been seized by the National Bank of Liberia and its operation and assets subjected to the management and control of the National Bank. The service of the writ of summons was made on the National Bank, for and on behalf of the petitioner.

In the petition, the petitioner contended that the National Bank was without the authority to receive precepts in its behalf; that summary proceedings to recover real property was the wrong form of action since petitioner had a valid lease agreement with the co-respondent church and which agreement vested title to the premises in petitioner; and that the non-payment of rent was not ground for eviction of a tenant holding a valid lease agreement.

The Justice in Chambers ordered issuance of the alternative writ but subsequently denied the issuance of the peremptory writ after hearing the matter on the merits. On appeal to the full bench, the Supreme Court rejected the several contentions of the petitioner. With regard to the petitioner's contention that the Justice in chambers had erred initially in ordering that the action remain in status quo rather than status quo ante, the Court held that the contention was without merits, noting that the Justice in Chambers had the discretionary latitude to order the issuance of the writ as prayed for, to order the issuance of the writ on such terms and conditions as he deemed appropriate, to refuse to issue the writ, or to cite the parties to a conference.

The Court also held, counter to the arguments raised by the petitioner, that by virtue of the seizure provision of the Financial Institution Act, the National Bank of Liberia was vested with the authority to manage and control the operations and assets of the petitioner, a seized bank, and that under the said authority the National Bank had the legal right to receive summons for and on

behalf of the petitioner, as well as prosecute claims for and defend claims brought against the petitioner. The service of the summons, the Court said, was therefore valid and binding on the petitioner.

On the issue of whether the summary proceeding was the appropriate form of action, the Court held that it was. The Court noted that the lease agreement upon which the petitioner relied for asserting that summary proceedings was the wrong form of action had already expired under its terms which provided that the agreement would be deemed as having expired if the petitioner ceased its operations in Liberia. The Court observed that the petitioner has ceased operating in Liberia several years prior to the institution of the action, and that by the said act of the petitioner the agreement had expired and the petitioner no longer had title to the premises. Con-sequently, the Court said, the petitioner was holding the property without any clear right or title, and hence summary proceeding to recover real property was the proper action to bring to evict the petitioner from the premises.

The Court rejected the petitioner's contention that the co-respondent church had not been given notice of petitioner ceasing operations in Liberia, noting that the church had received constructive notice, as opposed to actual notice, by publications in the local papers of the ceasing of petitioner's operations and by announcements made by the National Bank that it had seized the petitioner bank, growing out of the ceasing of operations by petitioner.

The Court also disagreed with petitioner's contention that its failure to pay the rent for the demised premises was not a ground for the eviction of petitioner. The Court held that although it is the general rule that the failure to pay rent does not constitute a basis for evicting a tenant from leased premises, yet, where the lease agreement predicates the peaceful enjoyment of the premises by the tenant and non interference or eviction by the lessor on the payment of rent, a failure to pay the rent vests in the lessor the right to evict the tenant from the premises. The Court noted that the agreement had provided for such eventuality and that the petitioner had failed to pay the rent. Hence, the co-respondent church had the legal right to evict the petitioner from the demised premises.

Finally, the Court held that the petitioner had failed to show that the trial court had no jurisdiction over the case or that it had proceeded by rules other than those which should be observed at all times, the conditions necessary for issuance of the writ of prohibition. Accordingly, the Court affirmed the ruling of the justice in chambers and ordered the enforcement of the trial court's judgment.

Benedict F. Sannoh of Sannoh & Associates appeared for the petitioner. N. Oswald Tweh of the Pierre, Tweh & Asso-ciates Law Firm appeared for the first & third respondents. Isaac E. Wonasue appeared for the second respondent.

MR. JUSTICE SACKOR delivered the opinion of the Court.

These prohibition proceedings are before us on appeal from the ruling of our distinguished colleague, Mr. Justice Jangaba presiding in Chambers during the March, A. D. 1999 Term of this Honourable Court, denying petitioner's petition for the writ of prohibition, as well as the motion to strike and the motion to modify.

These proceedings grew out of the final judgment of His Honour Joseph W. Andrews, assigned circuit judge for the Sixth Judicial Circuit Court, Montserrado County, in an action of summary proceedings to recover possession of real property brought by the Episcopal Church of Liberia. The records in this case show that the trial judge granted the Co-respondent Church complete legal possession of the premises, subject of the proceedings before the said court. A writ of possession was issued on the 3rd day of March, A. D. 1999, served, and returned served. The sheriff returns to the writ of possession show that although the 3rd Respondent, the Episcopal Church of Liberia, was placed in complete legal possession of the subject property on March 11, 1999, the two (2) vaults on the banking floor were not touched, primarily because they were locked and could not be opened.

The Meridien Bank, under seizure by the National Bank of Liberia at the time, filed a petition for a writ of prohibition before Mr. Justice Jangaba, presiding in the Chambers of this Honourable Court. The petition, amended on March 29, 1999, contained the prayer that this Court restrains the trial court from further acting on and enforcing of the writ of possession.

The respondents, National Bank of Liberia and the Episcopal Church of Liberia filed returns respectively to the petition. Thereafter, the petitioner also filed a motion to modify the alternative writ and a second motion to strike a portion of the third respondent's returns. Subsequently, the respondents filed resistance respectively to the petitioner's motion to modify the alternative writ and the motion to strike a portion of the third respondent’s returns.

When the case was called for hearing, the amended petition, the returns, the motion, the resistance and other pleadings were consolidated at the request of the respondents. The pleadings were therefore heard together to avoid unnecessary costs and delay since they involved common issues of law and facts.

On the 29th day of June, A. D. 1999, Mr. Justice Jangaba denied the petitioner's petition for a writ of prohibition, the motion to modify the alternative writ, and the motion to strike portion of the third respondent's returns. The petitioner excepted to the ruling and appealed to this Court en banc for a review and final determination.

The records in this case and the arguments of both parties before this Court present four cardinal issues for the considera-tion of the Court and the determination of the case. They are:

1. Whether or not prohibition will lie under the peculiar facts and circumstances stated in the case.

2. Whether or not summary proceedings to recover pos-session of real property was the proper action brought by the Episcopal Church against the petitioners to recover its property.

3. Whether or not the trial court acquired jurisdiction over the seized bank, by and thru the National Bank of Liberia and;

4. Whether or not it was within the discretion of the Chambers Justice to determine the terms of the alterna-tive writ of prohibition.

We shall decide these issues in the reverse order. As to the issue of whether or not it is within the discretion of the chambers Justice to determine the terms of the alternative writ of prohibition, this Court observes from the records in this case that the petitioner filed a motion to modify the alternative writ, contending basically that the Chambers Justice should have included a stay order in the alternative writ of prohibition. The respondents, in their respective resistance, contended that it was within the discretion of the Chambers Justice to determine the terms of the alternative writ of prohibition as warranted by the particular facts and circumstances in the case. The Chambers Justice, in his ruling denying petitioner's motion to modify the alternative writ, held that upon the filing of the petition for the issuance of the alternative writ of prohibition, a Justice in Chambers may in a valid exercise of his discretion do any of the following, depending upon the particular facts and circumstances:

a) Issue the writ as prayed for in the petition;

b) issue the writ on such terms and conditions as he in his discretion may determine, including orders that the matter remain at status quo, or that the matter be returned to status quo ante;

c) Refuse to issue the writ; or

d) Cite the parties to a conference."

We are in full agreement with the ruling of the Chambers Justice denying petitioner's motion to modify the alternative writ, in that it was a valid exercise of his discretion in chambers when he elected to have the matter remain in status quo since the writ of possession was issued, served and returned served, and the Church was completely placed in possession of the property. Thus, the facts and circumstances in this case did not warrant the Chambers Justice returning the matter to status quo ante. The Chambers Justice also correctly declined to entertain petitioner's motion to strike a portion of the Third Respondent's returns due to factual issues raised therein, which cannot be decided without taking evidence.

As to the issue of whether or not the trial court acquired jurisdiction over the seized bank, by and thru the National Bank of Liberia, petitioner's counsel contended that the service of the precepts in the summary proceedings to recover real property on the National Bank of Liberia on its behalf was erroneous because, irrespective of the fact that it is a seized financial institution, it continued to remain a corporate entity, and that the National Bank of Liberia lacked the authority to act for the petitioner pending the final determination of the proceedings to lift the seizure order.

The respondents counter argued that the legal status of the corporation which was also a seized financial institution, was not governed by the Liberian Business Corporation Act, but rather solely and exclusively by the provision of the Financial Institutions Act. The Chambers Justice in his ruling conceded that petitioner is a corporate entity organized under the Associations Law of Liberia, but held that "section 1.3(2) of the Associations Law expressly and specifically provides that in the determination of the legal status of corporations which are organized for banking purposes . . . the banking law . . . shall prevail over the conflicting provisions of the Business Corporation Act." We are also in full agreement with the ruling of the Chambers Justice on this issue, which we hereunder quote verbatim for the benefit of this opinion.

"Section 49 of the Act provides, inter alia: After entering into possession of a financial institution, the National Bank, and subsequent to appointment by the court, the officer shall be vested with full and exclusive power of management, control of that financial institu-tion, including the power to . . . initiate and defend and conduct in its name, any action or proceedings to which the financial institution may be a party.

The above quoted provision of the Financial Institution Act authorizes and empowers the National Bank of Liberia to enter into possession of a financial institution being seized, to exercise full and exclusive power of management and control of such financial institution, and to institute and defend and conduct in its name any action or proceedings to which the financial institution may be a party. However, the National Bank cannot exercise such full and exclusive power of management control of a seized financial institution where the court appoints an officer to exercise such full and exclusive power of management control of said financial institution.

This Court therefore disagrees with the assertion of the full and exclusive power of management control of petitioner bank under seizure or to defend a cause or proceeding to which petitioner is a party pending the hearing and final adjudication of the proceedings to lift the seizure order or suspension of petitioner's license. To do so would defeat the very purposes for which the National Bank was originally authorized and empowered by the Legislature under section 44 of the Act. We hold that pending the lifting of the seizure order by the circuit court, the seizure order is conclusive, final and binding.

It is further the holding of this Court that the National Bank of Liberia had the full and exclusive power under the provisions of section 4.9 of the Financial Institutions Act to act on behalf of petitioner in the proceedings in the court below, and service of precepts on the seized bank by and through he National Bank of Liberia, pursuant to section 44 of the Financial Institutions Act

constitutes a valid service on the petitioner. The trial court therefore did acquire jurisdiction over the seized bank, by and through the National Bank of Liberia. Thus, the petitioner bank had its day in court."

The third issue for the determination of this case is whether summary proceedings to recover possession of real property was the proper action brought by the Episcopal Church against the petitioner to recover its property. This Court observes from the records in this case that the First Episcopal Church and the petitioner bank entered into and executed a lease agreement as lessor and lessee on the 28th day of October, A. D. 1988 for the period of fifteen (15) years certain, commencing from January 1, 1988 up to and including December 31, 2002, with the right of renewal for twenty (20) years, on the same terms, covenants, and conditions of the lease. The lease agreement provides terms, covenants and conditions which are binding upon the parties in this litigation. This Court will therefore decide the issue upon the provisions of the lease agreement executed by the parties in this case without any duress or coercion having been brought upon them.

The petitioner strongly argued before this Court that the Episcopal Church of Liberia is barred from resorting to legal action by virtue of the arbitration clause in the lease agreement, and that the action to recover possession of real property is a wrong form of action brought by the Church against the petitioner to recover its property since title was an issue by virtue of the lease agreement. The Church, on the other hand, contended vehemently that the lease agreement between the parties was terminated by petitioner's cessation of its banking activities in Liberia over the period of two years and by the non-payment of rental for the period of ten years by the petitioner bank. The Chambers Justice ruled that the trial judge properly entertained the action of summary proceedings to recover possession of real property on the ground that the said lease agreement by its provision was terminated.

We are in agreement with the ruling of the Chambers Justice and hereunder quote word for word said ruling on this issue and incorporates the same as an integral part of the opinion of this Court.

"A recourse to section twelve of the lease agreement executed between the Episcopal Church, as lessor, and the petitioner, as lessee, shows that it provides for automatic termination of the agreement . . . in the event of cessation of lessee's business in Monrovia." The lessee was required to give the lessor 360 days notice upon the happening of this event. It is important to emphasize that although the lessee had officially and legally ceased to operate as a banking institution since the date of the formal seizure on January 27, 1997, a period of more than two years prior to the filing of the summary proceedings by the Episcopal Church, the petitioner deliberately failed and refused to give the notice of its cessation of business, as required under section 12 of the agreement.

In the mind of this Court, the failure and refusal of the petitioner to give its lessor the required notice in keeping with section 12 of the agreement is irrelevant and immaterial. As a matter of

law, the agreement was terminated as of January 28, 1998, 361 days after the issuance and service of the notice of seizure by the National Bank of Liberia. This Court says that clearly no issue of title was involved since the self executing provision of section 12 had terminated the agreement based upon the petitioner's cessation of business.

The question that comes to the mind of this Court is, did the Church have notice that the petitioner had ceased its banking activities in Monrovia due to its liquidity problem and subsequent seizure by the National Bank of Liberia for more than a year? The answer to this question is in the affirmative. It is contended by the respondents that the petitioner closed its door to its customers because of liquidity problem prior to its seizure on January 27, 1997 by the National Bank of Liberia, which notice of seizure was published in a newspaper in Monrovia. A recourse to the records in this case reveals that the interim report of examination of the bank in 1995 discovered a severe shortage of liquidity of the petitioner bank since 1993. It is observed on page 6 thereof that there are two options open to the management of the National Bank of Liberia. They are: 1. Seizure/Liquidation and 2. Resusci-tation/Reorganization".

This interim report of the petitioner is evidence of the assertion of the respondents that the petitioner bank ceased its banking activities due to liquidity problem prior to its seizure on January 27, 1997 by the National Bank of Liberia, which fact is not denied by the petitioner. Thus, the co-respondent Church had notice that the petitioner had ceased its banking activities.

A notice, ‘in its full legal sense, is a term which embraces a knowledge of circumstances that ought to induce suspicion or belief or put a prudent person on inquiry, as well as direct information of the fact’. (emphasis ours). 66 C. J. S., Notice, § 3, page 635. The publication in a newspaper of the seizure order of the petitioner by the National Bank of Liberia was a direct information to the Church of the fact that said financial institution had ceased its banking functions. The lease agreement was terminated upon the publication of the seizure order despite the failure of petitioner to notify the Church, the lessor, for reason that it had actual notice that indeed the Bank had ceased its operation over two years since the seizure. It is held that ‘generally a notice is regarded in law as actual when the person sought to be affected by it knows of the existence of the fact . . .’ 66 C. J. S., Notice, § 3, page 635: Actual Notice.

This brings us to the issue of constructive notice which is defined as "a fiction by which, for the presumption of sound policy or purpose, the legal rights and interests of the parties are treated as though they have actual notice or knowledge". 66 C. J. S., Notice, § 6, page 639-640. A constructive notice is one which is also " presumed because of the facts that a person has knowledge of certain facts which should impart to him, or lead to, knowledge of the ultimate fact". Ibid., Notice, § 6. page 640.

The Church had notice of the existence of the fact about the petitioner's cessation of business upon publication of the seizure order. Hence, the legal rights and interest of the lessor and the lessee can be treated as though the lessee did give its lessor notice of the cessation of banking activities in Monrovia due to its seizure by the National Bank of Liberia.

It therefore follows that there is no title in dispute subsequent to the termination of the lease agreement as stated hereinabove that would warrant a cancellation proceeding of said lease by the lessor. Thus, summary proceedings to recover possession of real property is the proper remedy wherein title is not in dispute, as in the instant case.

The Court also takes judicial notice of section 17 of the agreement of lease which provides for petitioner's eviction upon failure of the petitioner to pay the agreed annual rental. A specific allegation made by the Episcopal Church in the summary proceedings was the failure of the petitioner to pay the rent. The petitioner contends that non payment of rent is not ground for summary eviction, which principle this Court recognizes. However, the parties to the lease agreement mutually agreed in section 17 thereof that the lessee shall have peaceable and quiet enjoyment of the premises free from any eviction or interference by lessor if the lessee pays the rent provided therein, and otherwise fully and punctually performs the terms and conditions imposed on lessee. A specific allegation by the Episcopal Church in the summary proceedings was the failure of petitioner to pay rental for a period of almost ten (10) consecutive years. The records in this case are devoid of any evidence that the petitioner herein paid its annual rental under the terms and conditions of the lease. The word “if”, as used in the lease means that the peaceable and quiet enjoyment of the leased premises by the petitioner is conditional upon the payment of its rental to the lessor. It was incumbent upon the petitioner to perform fully and punctually the terms and conditions of the lease imposed on it by paying its annual rental, failing which, the lessor, Co-respondent Church herein, has every right under the lease to evict the petitioner bank from the premises through a court of competent jurisdiction as mutually agreed upon by the contracting parties to the lease. The lessee is therefore subject to an eviction for its failure to pay its annual rental as a precondition to enjoying a peaceable and quiet possession of the subject property. The Court must adhere to the sanctity of the contract of the parties herein. The issue of arbitration is therefore untenable as the jurisdiction of the trial court is not ousted by a private agreement, as in the instant case. Grant v. Foreign Mission Board of the National Baptist Convention, [1949] LRSC 20; 10 LLR 209, Syl. 2, text at 218 (1949).

Since the remedy agreed upon by the parties in section 17 of the lease agreement was eviction of petitioner from the subject property upon failure to pay the annual rental, this possession of real property was not the wrong form of action. Therefore, this Court holds that the trial court properly entertained the action of summary proceedings".

The petitioner also argued that the National Bank of Liberia disposed of its leasehold, which is an asset representing the right of the lessee to use the leased property. The respondents, on the other hand, contended that there was no leasehold between the petitioner and the Church after the termination of the lease agreement. A leasehold is defined by law writers as "an estate in real property held by lessee/tenant under a lease .... The asset representing the right of the lessee to use the leased property". BLACK’S LAW DICTIONARY 889, (6th ed. 1990). This Court is mindful of the provision of the Financial Institutions Act which forbids writs of execution being levied against the assets of a seized financial institution. However, this Court observes that the

asset or leasehold which the peti-tioner contended that the National Bank terminated pending the final determination of the seizure proceedings, was already terminated by sections 12 and 17 of the lease agreement prior to the institution of action of summary proceedings to recover possession of real property by the Episcopal Church of Liberia, the third respondent herein.

This Court therefore perceives no parity of legal reasoning that the National Bank unlawfully disposed of petitioner's leasehold right when said leasehold had been terminated by virtue of its own provision. The National Bank also did not transfer any asset of petitioner under the facts and circum-stances in this case, with the intent to effect a preference as argued by counsel for petitioner. Hence, the act of the National Bank of Liberia is not violative of the Financial Institutions Act and therefore constitutional.

It is a universal principle of law that "ordinarily the landlord may not reenter for breach of covenant unless the covenant is valid and enforceable, and there is a stipulation that the breach shall work a forfeiture or termination of the tenant's interest or confer on the landlord the right of re-entry". 52 C.J.S., Landlord & Tenant, § 718, pp. 581-582, on Breach of Covenant or Condition.

Section 12 of the lease agreement clearly provides that said lease shall be terminated if the petitioner bank ceases its banking activities in Monrovia for any reason whatsoever, upon the giving of 360 days notice to the lessor by the lessee. A recourse to petitioner's count 17 of its amended petition reveals among other things, that the petitioner bank was looted during the April 6, 1996 crisis in Monrovia, and that as a consequence thereof, it was forced to close its doors long before the seizure. This indeed was an admission that the petitioner ceased its banking activity in Monrovia long before it was seized by the National Bank of Liberia. A notice of seizure of the petitioner by the National Bank of Liberia was published in a reputable newspaper in Monrovia, stating that the petitioner bank has been seized due to the collapse of the Meridien International Bank Limited and Meridien BIAO Bank, S.A., evidenced by the absence of a complete visible management team and the continuous closure of the doors of the petitioner herein. By the publication of the seizure order, the Church was given actual, as well as constructive, notice of petitioner's banking activity being ceased in Monrovia, and that the petitioner had also been seized by the National Bank of Liberia, thereby terminating the lease agreement pursuant to section 12 of said lease. The parties to this litigation also stipulated in section 17 of the lease agreement that the lessee, petitioner herein, shall be granted peaceable and quiet enjoyment of the premises free from any eviction or interference by lessor if lessee pays the rent provided therein, and otherwise fully and punctually performs the terms and conditions imposed on lessee. This provision of the lease agreement clearly subjected the lessee to eviction if it did not pay the rent to lessor for the premises, and did not perform fully and punctually the terms and conditions imposed on the petitioner. Thus, there was no lease agreement between the parties upon breach of the terms and conditions of the lease agreement by the lessee that would warrant cancellation proceedings. It therefore follows that there was no title in issue after termination of the lease agreement upon its own provisions, for which the trial judge could have

refused jurisdiction in the summary proceeding to recover possession of real property. This Court recognizes the principle of law that nonpayment of rent is not a remedy for summary ejectment. We are also mindful of the sanctity of the valid and enforceable contract between the parties in this case. A landlord may re-enter a demised premises for nonpayment of rent by a lessee under an express provision in the lease. 52 C. J. S., Landlord and Tenant, § 718(b), page 582.

The final issue for our determination is whether or not prohibition will lie under the peculiar facts and circumstances in this case. The answer to this question is in the negative. This Court has held in a long line of cases that prohibition is the proper remedial process to restrain an inferior court or administrative tribunal from taking action in a case over which it does not have jurisdiction, or where it acts beyond its jurisdiction, or attempts to proceed by rules different from those which ought to be observed at all times. Parker v. Worrell, [1925] LRSC 9; 2 LLR 525 (1924); Boye v. Nelson, [1978] LRSC 33; 27 LLR 174 (1978). In the case at bar, the trial judge acquired jurisdiction over the seized defendant bank, and further properly entertained the summary proceedings to recover possession of real property. The issue of the two vaults is subject to section 9 of the lease agreement which provides, among other things, that installations such as vaults shall, upon completion, become the property of the lessor without payment therefor by lessor; provided, however, that the lessee, at its sole cost and expense, removes all such alterations, installations or additions, and vaults, upon termination of the lease agreement, and restores the demise premises to the condition it was in at the beginning of the terms thereof upon notice by the lessor requiring such removal. Prohibition cannot therefore lie in the instant case.

Wherefore and in view of the foregoing, it is the considered opinion of this Court that the ruling of the Chambers Justice denying the petition for the writ of prohibition is hereby confirmed. The alternative writ is ordered quashed and the peremptory writ is denied. The final judgment of the trial court is confirmed. The Clerk of this Court is hereby ordered to send a mandate to the court below informing the judge presiding therein to resume jurisdiction over the case and give effect to this opinion. Costs are ruled against the petitioner. And it is hereby so ordered.

Petition denied.

Gibson v Kontee et al [2000] LRSC 24; 40 LLR 217 (2000) (21 December 2000)

CHRISTINE V. GIBSON, Appellant, v. HIS HONOUR J. BOIMA KONTOE Assigned Circuit Judge, Sixth Judicial Circuit, Montserrado County and the NATIONAL HOUSING AUTHORITY, represented by its Managing Director, Appellees.

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

Heard: November 13, 2000. Decided: December 21, 2000.

1. The National Housing Authority is required by law to promulgate rules and regulations for the management and maintenance of Liberian Government housing units in the Republic.

2. Tenants of government housing units are subject to expulsion by the National Housing Authority for violation of its rules and regulations regarding the occupancy and maintenance of the units.

3. A lease agreement is prima facie evidence of title and is a defense in a summary ejectment action.

4. Summary ejectment cannot be granted where title is in issue.

5. Section 62.21 of the Civil Procedure Law states that where title is not in issue, a special proceedings to recover possession of real property may be maintained in the circuit court, a court of a justice of the peace, or a magisterial court.

6. The magisterial court has jurisdiction to hear and determine special proceedings to recover possession of real property where title is not in issue and the amount involved does not exceed three hundred dollars.

The appellant, a tenant of the Liberian Government low cost housing unit managed by the National Housing Authority, was sued by the Authority in summary proceedings in the Magisterial Court for Gardnersville to recover possession of real property because of alleged violations of the rules and regulations of the Authority governing occupancy and maintenance of the unit. The appellant filed a motion to dismiss the action, stating that she had a lease agreement with the National Housing Authority and that a lease agreement is tantamount to title, therefore where title to real property is involved in any property dispute, the magisterial lacked jurisdiction to determine the matter. The magistrate denied the motion, holding that the agreement to which the appellant referred was a compilation of housekeeping rules and not a lease agreement, and that the court did have jurisdiction.

The appellant instituted summary proceedings against the magistrate, praying the Circuit Court for the Sixth Judicial Circuit, Montserrado County, to overrule the decision of the magistrate. The Circuit court denied the summary proceedings and appellant appealed to the Supreme Court.

The Supreme Court agreed with the ruling of the Circuit Court, holding that while it was true that the magisterial court has no jurisdiction over a case in which title is in dispute, in the instant case title was not involved, and hence the Gardnersville Magisterial Court, under a grant of jurisdictional powers by the statute, was vested with jurisdiction over the matter, the amount involved in the action not being more than three hundred dollars. The Court held that

housekeeping rules promulgated by the National Housing Authority under authority granted by law did not constitute a lease agreement, and hence, that the National Housing Authority had the power to have the tenant expelled from the occupied unit for any violation of those rules relating to the maintenance of the unit. The Court concluded that the trial judge did not err, therefore, in upholding the ruling of the magistrate and in denying the summary proceedings brought by the appellant against the magistrate.

Cooper W. Kruah of the Henries Law Firm appeared for the appellants. Marcus R. Jones of the Jones and Associates Legal Consultants appeared for the appellees.

MR. JUSTICE SACKOR delivered the opinion of the Court.

This case is before us on appeal from the judgment of His Honour J. Boima Kontoe, Assigned Circuit Court Judge, Sixth Judicial Circuit Court, Montserrado County, affirming the judgment of Magistrate Wellington Sayee, Jr. of the Gardners-ville Magisterial Court, in an action of summary proceedings to recover possession of real property.

The genesis of this case is that on September 11, 1999 the National Housing Authority, appellee herein, filed an action of summary proceedings to recover possession of real property against Appellant Christine V. Gibson, tenant of Unit F-62 in the Barnersville Estate, owned and managed by the National Housing Authority.

Appellant Gibson filed a motion to dismiss the suit, stating as reason that the magisterial court did not have jurisdiction over the cause of action by virtue of a valid written tenancy agreement executed and entered into by and between the National Housing Authority and Appellant Gibson. The National Housing Authority resisted the motion, contending that there was no title at issue and that the housekeeping rules of the Authority did not constitute a lease agreement. The magisterial court agreed with the appellee and denied the motion to dismiss the action. Whereupon, Appellant Gibson filed summary proceedings before the Sixth Judicial Circuit Court, Montserrado County, contending that Magistrate Wellington Sayee had committed a reversible error in denying the motion.

On December 8, 1999, the summary proceedings against the magistrate was argued before Judge J. Boima Kontoe, an Assigned Circuit Court Judge succeeding Judge Kaba, before whom the summary proceedings were filed. On the 11th day of January, A. D. 2000, Judge Kontoe rendered judgment holding that the tenancy agreement was not a lease agreement, and that as such the magistrate had not proceeded irregularly. The judge held further that the magistrate did have jurisdiction to hear the summary proceedings to recover possession of real property.

Appellant Gibson excepted to the judgment and announced an appeal to this Court of last resort. The trial judge denied the appeal. This Court, upon a petition for a writ of certiorari, ordered the trial judge to grant appellant's appeal as a matter of right. The appeal was accordingly granted and subsequently perfected within the statutory period. Hence, the case is before us for appellate review and final determination upon a seven-count bill of exceptions, counts 5 and 6 of which this Court deem relevant for the determination of the case.

Appellant alleged in count 5 of her bill of exceptions that the trial judge had erred when he ruled that the tenancy agreement conferred no title on her, a decision which she said was contrary to the statutory and decisional laws of Liberia. The appellant argued that a tenancy agreement and a lease agreement are one and the same, and are governed by the same principle of law. Appellant further maintained that a lease agreement and a tenancy agreement for property vest title to the property in a third party over a specific period of time.

In count 6 of the bill of exceptions, appellant contended that a magistrate cannot exercise jurisdiction over a valid written agreement, contrary to the opinion of this Court. Appellant argued before this Court that magistrates and justices of the peace cannot try summary ejectment action in which the issues of title is raised, such act being against the statute and several opinions of this Court. Appellant therefore prayed the Court to reverse the judgment of the trial court and to order that the said court hears the case de novo.

The appellee, for its part, raised and argued three points before this Court. We consider points 1 and 3 to be relevant for the determination of this case.

The first contention asserted by the appellee was that the possession of the tenancy agreement by tenants of the National Housing Authority conferred no title to the units, and that as such the magisterial court had jurisdiction to try the action of summary proceedings to recover possession of real property based upon the tenant’s violation of the agreement. The appellee maintained that the agreement was not a lease agreement, as contended by appellant, but instead was house-keeping rules of the units. Thus, appellee argued that tenants residing in the units were subject to summary eviction for violation of such rules, pursuant to section 20 of the agreement.

The second contention advanced by the appellee was that the magisterial court has the right to exercise jurisdiction over a written instrument, be it valid or not and that, as such, the trial judge did not commit reversible error in upholding the magistrate's ruling. The appellee vehemently argued that the management of the National Housing Authority reserved to itself the right to institute an action of summary proceedings to recover possession of real property in the event of any breach of the terms and conditions of the agreement. Thus, the appellee said, the parties to this litigation are bound by the agreement and summary proceedings would lie to oust and eject a tenant who failed to adhere to the conditions of the housekeeping rules. The appellee prayed this Court to confirm the judgment of the trial court upholding the ruling of the magisterial court, and to order the magisterial court to resume jurisdiction and proceed with the hearing of the case.

The facts and circumstances in this case present two paramount issues for the determination of this case. They are:

Whether or not the possession of a tenancy agreement by a tenant of the National Housing Authority confers title to the units?

Whether or not the trial judge committed a reversible error in his ruling upholding the magistrate's ruling?

We shall decide the above stated issues in the manner in which they are raised. As to the issue of whether or not the possession of a tenancy agreement by a tenant of the National Housing Authority confers title to the units, this Court is mindful of the historical fact that the Government of Liberia, through the National Housing Authority, decided to provide its low-income earning citizens with adequate housing units at reasonable monthly rental payments. The Government, in establishing the project to provide housing facilities to the Liberian citizens earning low income, created the National Housing Authority to administer the project and the units. The National Housing Authority is required by law to promulgate rules and regulations for the management and maintenance of all Liberian Government housing units in the Republic of Liberia. It is in this regard that the National Housing Authority promulgated what it refers to as tenancy agreement for the management and maintenance of the Barnersville Estate units.

The National Housing Authority is a specialized autono-mous housing development agency of the Government of Liberia. Its rights and powers include, but are not limited to, setting standards upon which to base plans for the erection of housing projects and regulations for their maintenance in providing dwelling accommodation to persons of low income. National Housing Authority serves as the government's custodian, manager, and supervisor of the housing programs in Liberia. See sections l and 2 of the Act Creating the National Housing Authority (1960). Section 3(b) of the aforesaid Act provides that "where a family has to leave the premises for any reason other than expulsion by the NHA, an application must be submitted to the Board requesting retention of equity in the property while occupancy is had by another." Thus, tenants of government housing units in Liberia are subject to expulsion by the National Housing Authority for violation of any of its rules and regulations regarding the occupancy and maintenance of said units.

Section 20 of the agreement makes it crystal clear that the tenants are subject to summary ejectment by the National Housing Authority for a violation of any of the terms and conditions of the agreement. The agreement was signed on the 8th day of September, A. D. 1997 by Christine V. Gibson, and was approved by the management of the National Housing Authority on the 12th day of January, A. D. 1998, without any legal disability of the parties to this litigation.

It is the law, practice and procedure hoary with age in our jurisdiction that a lease agreement is prima facie evidence of title and is a defense in a summary ejectment action. Civil Procedure Law, Rev. Code 1:62.21; Ajavon v. Bull et al, 14 LLR 178 (1960); Williams v. Horton, 13 LLR

444 (1960), text at 449. We therefore agree with the contention of the appellant that summary ejectment cannot be granted under our laws where title is an issue.

A recourse to the tenancy agreement before this Court reveals that such instrument does not confer title to the tenants of the Barnersville Estate units. The provisions of said document are intended for the management and maintenance of the housing units by the tenants therein. It is not considered in any form or shape a lease agreement within the contemplation of the law. Hence, the agreement does not confer any title to the tenants of the housing units as owners thereof.

The second issue for our determination is whether or not the trial judge committed a reversible error in upholding the ruling of the magistrate.

The records in the case indicate that the management of the National Housing Authority instituted an action of summary proceedings to recover possession of real property at the Gardnersville Magisterial Court. The magistrate, after a hearing, ruled that he had jurisdiction over the subject matter as there was no title in issue. The appellant then filed summary proceedings against the magistrate before the assigned judge for the Sixth Judicial Circuit Court, Montserrado County. The essence of the summary proceedings was that title was at issue by virtue of the tenancy agreement, and that this precluded the magistrate from hearing summary proceedings to recover the possession of real property. The summary proceedings before the circuit court were assigned, heard and denied by the circuit judge who then confirmed the ruling of the magistrate, noting that he felt that there was no title in issue. The judge therefore ordered the magistrate to resume jurisdiction over the case and to proceed with the matter. From this ruling, the appellant appealed to this Court.

Section 62.21 of the Civil Procedure Law states that "where title is not an issue, a special proceeding to recover possession of real property may be maintained in a circuit court, a court of a justice of the peace or a magistrate. The court of a justice of the peace or magistrate shall have jurisdiction only of cases in which the amount of the judgment demanded does not exceed three hundred dollars".

The magisterial court has jurisdiction to hear and determine special proceedings to recover possession of real property where title is not at issue and the amount of the judgment demanded does not exceed three hundred dollars. The magistrate therefore acquired jurisdiction over the subject matter of the case as there was no title at issue. Hence, the judgment of the trial judge upholding the ruling of the magistrate was sound in law.

Wherefore, and in view of the foregoing, it is the considered opinion of this Honourable Court that the judgment of the lower court be and the same is hereby affirmed. The case is remanded to the magisterial court for hearing in keeping with law. Further, the Clerk of this Court is hereby ordered to send a mandate to the court below informing the judge presiding therein to resume

jurisdiction and give effect to this judgment. Costs are assessed against the appellant. And it is hereby so ordered.

Judgment affirmed.

Intrusco Corp. v Fantastic Store [1984] LRSC 33; 32 LLR 215 (1984) (28 June 1984)

INTRUSCO CORPORATION, by and thru its Vice President, VINCENT McCANN, Appellant, *v.* **FANTASTIC STORE,** by and thru its Proprietor, AHMED H. AHMED, Appellee.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: April 9, 1984. Decided: June 28, 1984.

1. The name of the depositor on a bank certificate may be inferred as per the wording of the bank certificate.
2. It is an elementary principle that both the surety and the guarantor promise to perform or answer for the obligation of the principal in the event the principal defaults on the obligation.
3. When the bond required to file precepts on appeal is a cash bond, and not an appeal bond, it is not necessary that it is signed by natural person (s) and be accompanied by a real property valuation from the Ministry of Finance.
4. A bond secured by two or more natural persons requires a real property valuation from the Ministry of Finance indicating that the property offered as security is owned by the sureties in fees, a statement of the total amount of the lien (s); unpaid taxes and other encumbrances against such properties offered; and a statement showing the assessed value of the property.
5. If an appellant tenders an appeal bond and an affidavit of sureties when only a cash bond is required, it is considered a mere surplusage and, if defective, will not invalidate the cash bond tendered as a security in the case.
6. A court of justice will only decide on points of law or facts that are raised expressly by the parties in their written pleadings which, of course, include motions.
7. In applying the principle of *stare decisis*, the issue(s) raised in the previous case must be specifically traversed in the pleading of the subsequent case.

The appellee filed a motion to dismiss the appellant's appeal against an adverse judgment in the Sixth Judicial Circuit Court, Montserrado County, in an action of damages for breach of contract. The appellee moved to dismiss the appeal stating that: (1) the certificate filed with the appeal bond, even though designated a "certificate", was actually a guaranty, and not a surety as required by law; (2) the "certificate" did not clearly indicate that the amount of the bond had actually been deposited in the bank; it simply stated that the depository bank guarantees that the appellant will comply with the judgment and costs in this case; and (3) that the Agricultural and Cooperative Development Bank ("ACDB") cannot act as surety for the appellant since the former is not an insurance company authorized to execute surety bonds.

Resisting the motion, the appellant contended that it had complied with the law as evidenced by the "bank certificate" which unequivocally showed that it was prepared to comply with a judgment to the tune of US$675,000.00 out of monies available at the Agricultural & Cooperative Development Bank if final judgment is in favor of the appellee. The appellant further stressed that the "guaranty" was issued expressly for the purpose of the appeal bond.

The majority of the Court decided that the bond posted was sufficient and in keeping with the statute. Therefore, the motion to dismiss was denied.

Mr. Justice Smith, with whom Mr. Chief Justice Gbalazeh concurred, dissented. Both justices concurred with the appellee's position that the document offered to support the bond was a guaranty and not a certificate as required by law, since there was no indication on the document that any money had actually been deposited in the bank. The "certificate," they further observed, was a legal nullity and of no negotiable value, thereby rendering the bond defective. They also contended that the surety on a bond must be accompanied by real property valuation to the value of the bond and either two natural persons, or an insurance company, as sureties. Since the ACDB is neither a real person nor an insurance company, and no real property valuation accompanied the bond, it was the opinion of the minority that the motion to dismiss should have been granted.

Joseph A. Dennis for appellant. *Toye C. Bernard* and *George E. Henries* for appellee.

MR. JUSTICE YANGBE delivered the opinion of the Court.

The appellee has filed a motion to dismiss the appeal in this case on the following grounds to wit: (a) the certificate of deposit does not state that any money was deposited in the bank by the appellant; (b) the certificate states that the bank guarantees that Intrusco Corporation, the appellant, will comply with the judgment in this case together with costs up to the sum of $675,000.00; (c) the appeal statute does not provide for guaranty by the bank; (d) the bank certificate does not show that the cash has been deposited in the bank to the value of the bond as evidenced by the bank certificate; (e) the certificate attached to appellant's appeal bond is a "bank guaranty" and not a "bank certificate" as contemplated by statute, therefore rendering the appeal bond detective; (f) the Agricultural and Cooperative Development Bank is not legally authorized to stand as surety to an appeal bond since it is not an insurance company authorized to execute surety bond.

In its resistance, appellant contended, *inter alia*, that a bond may be secured by giving cash to the value of the bond, or cash deposited in a bank to the value of the bond as evidenced by a bank certificate. Appellant contended that it has complied with the latter as evidenced by the bank certificate in which it is unequivocally stated that appellant "will comply with the judgment together with costs up to the sum of $675, 000, 00, out of monies available at this bank if final judgment should be rendered in favor of Fantastic Store, the above appellee." Further, "this guaranty is issued for the purpose of the appeal bond of Intrusco Corporation, the said appellant in this case".

With respect to issue (a) above in the motion to dismiss, it is admitted by both parties that one of the four ways of posting a bond is cash deposited in a bank to the value of the bond, as evidenced by the bank certificate. There is absolutely nothing in the sentence referred to above which suggests that the person or appellant's name must be expressly stated in the certificate as the depositor of the amount. What the sentence does require is that the sum of money equivalent to the value of the bond, that is $675,000.00, must be deposited in a bank and there must be proof to that effect, such as a bank certificate, which has been fully met by appellant in this case.

It is plausible that the depositor or appellant's name should be specifically stated in the certificate. The bank is a business institution, organized and only existing to manage and control the funds of its customers, and only the interest derived there-from is what the bank uses to meet its financial obligations. It is therefore inconceivable that the bank will obligate itself as follows:

"KNOW ALL MEN BY THESE PRESENTS: That we, the Agricultural & Cooperative Development Bank, Monrovia, Liberia, hereby guarantees that Intrusco Corporation, the above named appellant, will comply with the judgment together with cost, up to the sum of $675,000.00, out of monies available at this bank if final judgement shall be rendered in favor of

Fantastic Store, the above named appellee, the same being the principal sum of $675,000.00 awarded the appellee as damages in the above case, plus interest."

"This guarantee is issued for the purpose of the APPEAL BOND of Intrusco Corporation, the said appellant in this case."

Without first receiving any money from the depositor, appellant herein, as contended by the appellee in the motion to dismiss. Certainly it is not logical and a court of justice should not encourage what appellant has referred to in the resistance as "far fetched and a hair string technicality" designed to dissuade the court from hearing the case on its merits. *Liberty* v. *Horridge*[1923] LRSC 3; , 2 LLR 422 (1922). In our opinion, the name of the depositor or appellant on a bank certificate may be inferred as per wording of the bank certificate.

As to paragraphs (b) and (c) of the motion mentioned above concerning the fact that there is no provision in the appeal statute for "guaranty," we will examine the question of forms.

Our only statute on forms is the Old Blue Book which consists of laws that were enacted prior to 1847, and another on forms is the Revised Statute Volume II. Those books are the nucleus of forms in this jurisdiction, but they are completely out of print and there are very few practitioners, if any, who have seen or have copies of those books. In any case, none of those books contain any form on a bank certificate. It is important to mention also that there is no specific wording provided in the current appeal statute as to how a certificate showing bank deposit should be framed, except that the statute requires evidence of deposit to the value of the bond, the purpose of the deposit and, of course, indication of the title of the relevant case. Civil Procedure Law, Rev. Code 1:63.1(a) and 8.1(3) *idem.* These pertinent data clearly appear on the certificate issued by the bank in this case. Further to the argument that there is no provision in the statute referable to the word "guaranty", this reminds us to ascertain what is "guaranty". It is defined thus:

"An undertaking or promise, on the part of one person called the guarantor, which is collateral to a primary or principal obligation on the part of another, and which binds the guarantor to performance in the event of nonperformance by such other person, the latter being primarily bound to perform. Concisely, a promise to answer for the debt, default, or miscarriage of another person, provided such person does not respond by payment or performance..."

"The fundamental difference between a contract of guaranty and one of suretyship is that the guarantor's contract is collateral to, and independent of the contract the performance of which he guarantees, while that of a surety is an original obligation." BALLENTINE'S LAW DICTIONARY 539.

In our opinion, therefore, the word "guaranty" as used in the certificate, does not negate but, rather, fortifies the intent of the document as well as the statute on appeal.

Our learned colleagues who dissented, quoting from 38 AM. JUR. *Guaranty*, 2d, § 5, at 1011, have defined the words "guaranty" and "surety" pointing out the difference between the two and their respective obligations. In either case, neither one can be required to perform or answer for the debt or obligations of the principal unless the principal defaults and every effort to secure performance has been exhausted. It is an elementary principle that both the surety and the guarantor promise to perform or answer for the obligation of the principal, with the provision that the principal fails or defaults. Thus, the difference between the two, or how their respective obligations are created is not what is vital. What is important is whether the appellee is sufficiently secured, in accordance with the appeal statute, or whether the judgment in this case will be fully complied with in the event the appellate court confirms same in accordance with the proviso specified in the certificate of deposit? The question posed in this respect has been fully answered as per the certificate of deposit and as required by the procedural statute.

We have already discussed at length the effects of (d) and (e) of the paragraph in the motion to dismiss *supra.* Nevertheless, we wish to reiterate that the appellee has attacked the certificate of deposit for being defective because of the word "guaranty" thereon, and this argument is sustained by the minority of this Court. However, in the opinion of the minority, a certificate of deposit is defined, quoting from 7 AM. JUR. *Banks*, § 491, at 351, thus:

"...No particular form is necessary to constitute a certificate of deposit. For instance, a letter of advice written by the cashier of one bank to another stating that a person therein has deposited with the former bank a sum of money therein stated, to the credit of the latter bank for the use of another, has been held to be a certificate of deposit. The words "promise to pay" are not essential. The law implies such promise when the fact of deposit is established."

In the minority opinion, it is held also that the certificate of deposit does not "show on its face that Intrusco Corporation, the appellant, deposited any money with the Agricultural & Cooperative Development Bank; instead the bank certificate states that the bank guarantees that

Intrusco Corporation will comply with the judgment together with costs out of monies available at the Agricultural & Cooperative Development Bank, and not sum of money deposited in said bank by the appellant to the value of the bond as mandatorily required by statute. There being no money deposited in the Agricultural & Cooperative Development Bank by the appellant as shown by the so-called certificate of deposit, said certificate falls short of the statutory requirement that a bond may be secured by cash to the value of the bond or cash deposited in the bank as evidence by a bank certificate."

We have already quoted earlier the pertinent part of the certificate of deposit in this case. In our opinion, the certificate is clear and fully meets all the requirements of the statute. To hold otherwise, therefore, will be a denial of due process of law and a defeat of the primary intent of the statute we have already cited above, which is relied upon in both this majority and the dissenting opinions in this case. *See also Wolo* v. *Wolo*[1937] LRSC 12; , 5 LLR 423, 426 and 427 (1937).

Appellee also cited for reliance the opinion of this Court handed down in its October Term, 1982, in the case *The Management of International Trust Company (ITC) v. Wiah et. al. and The Board of General Appeals*[1983] LRSC 32; , 30 LLR 751 (1982), which opinion apparently influenced the minority of this Court in arriving at its conclusion in this case. In our opinion, there are many material dissimilarities in points of facts and law featuring in the two cases. In *The Management of the International Trust Company* case, the appellees moved the Court to dismiss the appeal on the grounds that (1) appellant had deposited the cash with itself and had issued its own certificate, and (2) that as the appellant was the same appealing party in the case, it therefore could not at the same time be a surety to its own appeal bond.

In the resistance to the motion in that case, the appellant contended that ITC was not the same entity as the International Trust Company Bank, and it was the latter that issued the certificate of deposit as the banker of the former.

In that opinion, this Court, in granting the motion to dismiss, held *inter alia* that:

"We do not agree, in the absence of any 1egal proof, that the appellant, ITC, is not the same entity that issued the certificate in question. We also disagree that the certificate in question was issued by ITC Bank or any other bank for that matter, as claimed by the appellant, because the subject bank certificate does not indicate on its face that it was issued by ITC Bank and signed

by an authorized officer, that is to say, the president, or manager, of said bank. Under the circumstances, count three of the resistance is not sustained."

In the instant case, the appellant parted possession with the $675,000.00, cash which is an amount equaled to the value of the bond, and been deposited in another bank, which is not a party in this case before us, but rather a perfect stranger. The bank is 1egally authorized to do banking business in and under the laws of Liberia. Accordingly, the certificate of deposit duly signed by its general manager, and approved by the trial judge, was obtained and filed within the time allowed by statute. Therefore, that case, *The Management of the International Trust Company* v. *Wiah et. al.* and The Board of General Appeals, is not applicable in the case at bar.

Coming now to summary "B" of the motion to dismiss, it should be remembered that the subject of the motion to dismiss in this case is cash bond provided for the Civil Procedure Law, Rev. Code 1: 63.1(a), and not an appeal bond covered in sections 63.1 (b), (c) and (d), which provision requires that the natural persons (sureties) who sign the appeal bond must own unencumbered real property on which taxes have been paid, and which is held in fee by the person furnishing the bond. That section also requires that valuables to the amount of the bond which are easily converted into cash, as well as sureties who meet the requirements of section 63.2 idem. However, where a bond is secured by two or more natural persons, a statement is required from the Ministry of Finance, indicating that the property offered as security is owned by the sureties in fee, the total amount of the liens on the property, unpaid taxes and other encumbrances against such properties offered, and a statement showing the assessed value of each property offered. Consequently, the appeal bond, as well as the affidavit of sureties referred to in the minority opinion, were not accompanied by a statement from the Ministry of Finance. Thus, they are left wondering whether or not the bond is a cash bond, for which the case should be dismissed. They do not have a valid ground for dismissal. Certainly, the appeal bond and the affidavit of sureties issued by the appellant, as found in the record before us, are mere surplusage, and if defective, do not vitiate the cash bond tendered as a security in this case. The majority opinion in those cases did not deal with the issue of cash bonds, as in this case, but rather, bonds signed by natural persons in accordance with the Civil Procedure Law, Rev. Code 1:63.1 (b), *idem*. Hence, it is quite clear that the four cases *supra* are not analogous to the case at bar in which adequate cash bond was executed, and the sufficiency of the cash deposited in the bank is not questioned in the motion to dismiss.

Another reason for the position that we have taken in this case is that a court of justice only decides points of law or facts that are raised expressly by the parties in their written pleadings which, of course, include motions. *Clark* v. *Barbour*[1909] LRSC 1; , 2 LLR 15 (1909). We have already summed up earlier in this opinion the grounds contained in the motion to dismiss the appeal in this case and there is no allegation therein to the effect that the certificate of deposit was presented to the sheriff as mandated by section 63.1 of the current statute on appellate

procedure. Therefore, it must have been an oversight by the majority of the Court when it was held that:

"When the appellant elects to deposit cash in the bank to the value of the bond as provided in section 63.1(a) quoted *supra*, the certificate obtained by him from the bank as evidence of the deposit is equivalent to cash and must be presented to the sheriff."

Appellant has filed the certificate of deposit in the sum of $675,000.00 as the value of the bond and the bank has acknowledged receiving the amount named in the certificate, stating that it is available and the bank promised to pay upon affirmation of the final judgment in the case in favor of appellee. Yet, it is the holding of the minority of this Court that:

“The so-called certificate of deposit issued by the bank is not a certificate based on money deposited by the appellant and received by the bank to the value of the appeal bond. Instead, it is in the nature of a guaranty and cannot be taken as a negotiable instrument for which the Agricultural and Cooperative Development Bank could be bound to release money available in the bank not belonging to, and deposited by, Intrusco Corporation, the appellant. The certificate could not have been received by the Sheriff as cash and by him deposited in the government depository or in any reliable bank as the law directs, because it is not equivalent to cash which the bank could release upon orders of the court.”

In view of the certificate of deposit issued, the availability of the adequate amount deposited in the bank, and the bank’s promise to pay same in accordance with the terms and conditions stated in the certificate as provided by statute, can this Court of last resort hold that the amount stated in the certificate was not deposited by appellant, and that the bank is not bound by its own certificate, duly signed by the general manager of the Bank? There is only one answer to these inquiries, in my humble view and conscience, and that is no.

Before concluding this opinion, we have observed that in the minority opinion, Mr. Justice Yangbe is quoted in *Liberia Indus-trial Development Corporation* v. *El Nasr Export and Import Company*[1982] LRSC 61; , 30 LLR 295 (1982), decided by this Bench during the March 1982 Term of this Court, as follows:

"Why today in this case, under the same circumstances and principle, the very Justice who spoke for the Court in the *Liberia Industrial Development Corporation* case has inconsistently spoken against that opinion of the Court which he wrote and delivered?"

We observe further that this quoted portion of the dissenting opinion has not clarified the alleged inconsistency, and in what respect the position of Justice Yangbe is against that opinion which he wrote and delivered, referred to above, for the benefit of scholars.

There are many factors, in respect to the application of the doctrine of *stare decisis*, which have not been taken into consideration by the minority in its opinion which are: (1) Mr. Justice Yangbe is quoted out of context in the minority opinion to begin with, and (2) in the *Liberia Industrial Development Corporation* case, a motion was filed which attacked the appeal bond signed by sureties since the statute requires that in the surety affidavit accompanying the appeal bond, the property offered as security must be described therein. As a result, in *West Africa Trading Corporation* v. *Alrine[1975] LRSC 16;* , 24 LLR 224 (1975), this Court stressed the wordings of the statute to the effect that the realty offered as security to the appeal bond must be described by its metes and bounds, which was not done in that case. Consequently, appellee contended that the property was not sufficiently described, and therefore, the appeal bond was defective. It was this defect in the affidavit of sureties that this Court dealt with, and not a cash appeal bond, nor a certificate of deposit as in the case before us.

We wish also to observe that earlier in this opinion, we also mentioned and held that in case of cash bond, as in this case, the affidavit of sureties and appeal bond are legally and absolutely unnecessary. Therefore, in our opinion, if the affidavit of sureties and the appeal bond filed by the appellant in this case are defective, same are mere surplusage and do not invalidate the cash deposited in the bank and available to satisfy the judgment in this case, in the event the appellant failed to prosecute, or did not prevail in the appellate court.

Furthermore, the statute which provides for a bank certificate as evidence of deposit of cash bond was enacted in 1971, while Mr. Justice Grimes delivered the opinion in *Cavalla River Company, Ltd.* v. *Fazzah*, 7 LLR (1939), relied on and quoted in the minority opinion, in 1939. This therefore presents an obvious discrepancy in the minority opinion, for it was nearly thirty-two years after Justice Grimes' opinion that the current statute of appeal was enacted and published. Furthermore, Chief Justice Grimes died in 1943. Obviously, Justice Grimes, in 1939, did not have to decide any issue concerning appeal bond as cash deposited in the bank, and evidenced by a bank certificate. Therefore, in our view, the *Liberian Industrial Development Corporation* case cited *supra*, and all other cases cited in the minority opinion, are not applicable, and the facts,

circumstances and laws in those cases, in which Mr. Justice Yangbe and Chief Justice Grimes spoke for the Court, are not pertinent to this case.

We wish also to put on the record that in *The Management of the International Trust Company* case, decided by this Court during its October Term 1982, Mr. Justice Yangbe consistently held a similar view in accordance with the position that the majority of this Bench has taken today in this case. Therefore, in our view, clearly there is no inconsistency with respect to the position Mr. Justice Yangbe has taken in both cases.

It is important to hold here that in applying the principle of *stare decisis,* the issues that were raised in the former case must be specifically traverse in the subsequent pleading. The Court must, of necessity, pass upon and decide same, otherwise, the mere expressions in an opinion in the absence of the above, are mere *dictum,* and not the holding of the Court. The issues of cash bond and alleged defect of the bank certificate, not having been raised nor decided in the case cited in the minority opinion, the principle of *stare decisis* is inapplicable to the case before us.

Therefore, in view of the narration above and the citations of law contained herein, we are of the opinion that there is absolutely no factual or valid reason for this Court to refuse jurisdiction in this case and to dismiss the appeal. Hence, the motion to dismiss is denied and the Clerk of this Court is ordered to re-docket the case to be heard on its merits. And it is so ordered
Motion denied.

MR. JUSTICE SMITH, with whom CHIEF JUSTICE GBALAZEH concurs, *dissents.*

I withheld my signature from the judgment just read because I disagree with the holding of my distinguished colleagues of the majority. I am strongly of the opinion that by such holding on their part, this Court has been rendered inconsistent by its departure from the doctrine of *stare decisis*, which tends to make meaningless our statutory law on bonds and security.

The defect on the appeal bond, as pointed out in appellee's motion to dismiss appellant's appeal, is not a mere legal technicality as held by the majority, but rather it is a material defect which cannot be cured without damage to the long line of opinions of this Court. I think our feeling and desire to hear a case on its merits should not be imposed against the requirements of the statute. Courts of justice will not construe any provision of the statute beyond the legislative intent. If we

disagree with the specific statute, we have no choice and authority whatsoever to add to, or subtract from it, but to follow the command of the statute unless it breaches a constitutional provision.

In this case, appellee attacked appellant's appeal bond as being materially defective because it failed to comply with the provisions of the statute on bonds and security. For the benefit of the future, I will recite, as follows, the relevant counts of the motion to dismiss:

"2. And also because appellee says that the appellant has failed to perfect its appeal as provided by statute, in that the statute has laid down certain provisions by which an appeal bond can be secured. One of the provisions required is cash to the value of the bond or cash deposited in the bank to the value of the bond as evidenced by a bank certificate. In the instant case, the appellant has obtained a certificate of deposit from Agricultural & Cooperative Development Bank but the said certificate of deposit does not show that any money was deposited in the Agricultural & Cooperative Development Bank by the appellant, Intrusco Corporation. Instead the so-called certificate of deposit states: 'That we, the Agricultural & Cooperative Development Bank, corner of Carey & Warren Streets, Monrovia, Liberia, hereby guarantee that Intrusco Corporation, the above named appellant, will comply with the judgment together wish cost up to the sum of $675,000.00 (Six Hundred Seventy-five Thousand Dollars) . . . Appellee submits that the statute governing appeal bond does not provide for any guaranty by the bank. The statute specifically states that the certificate of deposit must show that cash has been deposited in the bank to the value of the bond as evidenced by the bank certificate. The certificate attached to appellant's appeal bond being a bank guarantee and not a bank certificate as contemplated by the statute, renders the appeal bond defective and therefore the appeal should be dismissed. A copy of the so-called certificate of deposit is hereto attached and marked exhibit "B" to form a part of the motion.

"3. And also because appellee says further that the appeal bond is further defective because the Agricultural & Cooperative Development Bank is not legally authorized to stand as surety to an appeal bond, it not being an insurance company authorized to execute surety bond within the Republic. The affidavit of sureties attached to appellant's appeal bond shows that the Agricultural & Cooperative Development Bank has represented itself to be surety to the appeal bond filed by the appellant. The appeal bond itself indicates that the Agricultural & Cooperative Development Bank is representing the appellant as its surety, which is contrary to the statute. Copies of the affidavit of sureties and the appellant's appeal bond are hereto attached and marked exhibits"C" and "D", respectively, to form part of this motion.

"4. And also because appellee says that appellant has failed to file a proper appeal bond and therefore has not met one of the essential statutory requirements for the perfection of an appeal. This Honourable Court, consequently, has not acquired jurisdiction over the case. Hence, the appeal should be dismissed.

To this motion appellant filed a six-count resistance in which it denied that the appeal bond is defective and fails to meet the requirement of the statute. It is also contended in the resistance, and counsel for appellant strongly argued, that the averments that appellant has failed to perfect its appeal as provided by statute "is far fetched and a hair-string technicality", and that the only grounds on which an appeal could be dismissed under the statute are by the non-filing of the bill of exceptions, non-filing of an appeal bond, insufficient indemnification, that is, where the bond does not state an amount or an amount sufficient to cover the principal and costs, and non-service of a notice of completion of the appeal. The counsel for appellant argued that the statutory requirements, having been met, the motion to dismiss should be denied.

The contentions raised in the appellee's motion to dismiss are that, this Court is without jurisdiction to open the record and hear the case on its merits because one of the jurisdictional steps in taking an appeal to this Court was not complied with, in that no cash to the value of the bond was deposited in the Agricultural & Cooperative Development Bank, the said bank which has presented itself as surety is not an insurance company authorized by law to execute a surety bond, and that the appeal bond and the affidavit of sureties do not meet the statutory requirements, which make the appeal bond materially defective and subjects the appeal to dismissal. These are the questions to which this Court is bound to address itself and which can only be answered by our statute law on bonds and security, but not by what we feel should have been the law, or to allow our sympathy to supercede the command of the statute.

Firstly, I will discuss the question of the certificate of deposit raised in count two of the motion quoted *supra* before coming to the question of suretyship raised in the third count of the motion, so as to arrive at the conclusion as to whether or not this Court has been given jurisdiction to hear the appeal on its merits. The certificate of deposit which appellee attacked as not having shown on the face that money was deposited by appellant in the Agricultural & Cooperative Development Bank reads as follows:

CERTIFICATE OF DEPOSIT

"KNOW ALL MEN BY THESE PRESENTS: That we, the Agricultural & Cooperative Development Bank, corner of Carey and Warren Streets, Monrovia, Liberia, hereby guarantee that Intrusco Corporation, the above named appellant, will comply with the judgment together

with costs up to the sum of $675,000.00 (Six Hundred Seventy-five Thousand Dollars) out of monies available at this bank if final judgment shall be rendered in favor of Fantastic Store, the above named appellee, the same being the principal sum of $675,000.00 (Six Hundred Seventy-five Thousand Dollars) awarded the appellee as damages in the above case, plus costs.
This guarantee is issued for purpose of the appeal of Intrusco Corporation, the said appellant in this case . . . "

A careful scrutiny of this certificate quoted *supra* reveals that (1) it is not a certificate of deposit because it does not show on its face that any cash was deposited in the bank by the appellant to the value of the bond as the law commands; (2) it is much more a certificate of guaranty than a certificate of deposit because it states in its body that "the Agricultural & Cooperative Development Bank, corner of Carey & Warren Streets, Monrovia, Liberia, hereby guarantees ... " And further states that "this guarantee is issued for purpose of the appeal bond . . ."; and (3) it tends to be a guaranty but lacks a binding indemnity clause on part of the bank to pay the $675,000.00 in the event Intrusco Corporation fails to comply with the judgment.

The relevant statute on bonds and security reads, as follows:
"Except as otherwise provided by statute, any bond given under this title shall be secured by one or more of the following:

(a) Cash to the value of the bond; or cash deposited in the bank to the value of the bond as evidenced by a bank certificate;

(b) Unencumbered real property on which taxes have been paid and which is held in fee by the person furnishing the bond.

(c) Valuables to the amount of the bond which are easily converted into cash or

(d) Sureties who meet the requirements of section 63.2". Civil procedure Law, Revised Code 1 :63.1.

By the provisions of this statute, a bond may be secured by one or more of the ways listed, depending on the choice of the person furnishing the bond, he may choose more than one provision as surplusage does not vitiate, and the choosing of only one way will not be insufficient, so long the security offered does not fall short of the amount of the bond, and so long the statutory requirements are strictly adhered to. By the statute quoted *supra*, the appellant should have deposited the $675.000.00 named as the amount of the bond and not to simply rely on the money belonging to the bank, and available thereat, contrary to the statute on bonds and security. Cash to the value of the bond, or cash deposited in the bank to the value of the bond, as evidenced by a bank certificate, is the command of the statute, and this requirement should have been strictly complied with by the appellant. The requirement of the statute is not a bank certificate *per se*; the depositing of cash in the bank to the value of the bond is the command, and the certificate is only the evidence to substantiate that cash has been deposited in the bank to the value of the bond.

Black's Law Dictionary 286 (4th ed.), has defined a certificate of deposit as: "A written acknowledgment by a bank or banker of a deposit with promise to pay to the depositor, to his order, or to some other person or to his order . . . A bank's promissory note". Bouvier Law Dictionary (3rd Revision), has also defined a certificate of deposit as: "Written statement from a bank that the party named therein has deposited the amount of money specified in the certificate and that the same is held subject to his order in accordance with the terms thereof".

A certificate of deposit, ordinarily, is defined as a written acknowledgment by a bank of the receipt of a sum of money on deposit, which the bank or banker promises to pay to the order of the depositor, or to some other person or to his order whereby the relation of the debtor is created between the bank and the depositor. For instance, a letter of advice, written by the cashier of one bank to another stating that the person therein had deposited with the former bank a sum of money therein stated to the credit of the latter bank for the use of another, has been held to be a certificate of deposit". *See* 7 AM. JUR., *Banks*, § 491 (1973).The certificate of deposit, quoted *supra*, does not show on its face that Intrusco Corporation, the appellant, deposited any money with the Agricultural & Cooperative Development Bank whereby the relationship between the bank and the depositor is created; instead, the bank in its certificate states that, it guarantees that Intrusco Corporation will comply with the judgment together with costs, when our statute on bonds and security does not require a bank guaranty as one of the means to secure a bond. In fact, the bank is not shown to be a guaranty company authorized to give guaranty on bonds.

If the Legislature intended to include "guaranty" as one of the means by which a bond may be secured in Liberia, it would have included it in the provision of the statute on bonds and security; but a guaranty, not being one of such means, its issuance as a bond renders the bond defective and the appeal dismissible. A guaranty company, according to Black's Law Dictionary 834 (4th ed.), is a corporation authorized to transact the business of entering into contract of guaranty and

suretyship as one, for fixed premiums, may become surety on judicial bonds, fidelity bonds and the like.

Guaranty and suretyship do not create the same legal obligation concurrently with the principal debtor. Guaranty is a collateral agreement for performance of another's undertaking, according to Black's Law Dictionary 813 (4th. ed.). It is a contract by which the guarantor undertakes to do, to pay damages for such failure. It is distinguished from an engagement of suretyship in this respect, in that, a surety undertakes to do this very thing which the principal has promised to do, in case the latter defaults. In 38 AM. JUR. 2d, *Guaranty*, § 15, it is provided that:

"A guarantor, not being a joint contractor with the principal, is not bound like the surety to do what the principal has contracted to do, but answers only for the consequences of the default of the principal. There are certain well-defined distinctions and defenses in the nature of the legal obligations created. A surety is primarily and jointly liable with that of the principal debtor. An action can be maintained against both jointly, even without statutory authority so to do. But the obligation of a guarantor is collateral and secondary to that of the principal debtor to discharge the obligation for which he is primarily liable. The contract of surety is made at the same time with that of the principal, while that of the guarantor is a contract separate and distinct from that of the principal. Unless authorized by statute, a guarantor cannot be sued jointly with the principal debtor".

Where an appellant in a case elects to deposit cash in the bank to the value of the bond as provided by the law quoted *supra*, the certificate so obtained by him is only an evidence of the deposit and is equivalent to cash and must be presented to the sheriff who is required to receive it as cash and, by him, deposit in the government depository or in any other reliable bank for the cash to be withdrawn by orders of court. Here is our statute on the point:

"The sheriff receiving cash, a bank certificate, stocks or other negotiable securities or valuables, shall deposit it or them in the government depository or a reliable bank and secure a receipt therefor showing the amount deposited and the purpose of deposit and containing a statement that the deposit will be released only upon the written order of a judge of the court". Civil procedure Law, Rev. Code 1: 63.1.

In the instant case, there was no cash deposited in the bank by the appellant for the purpose of its appeal. The certificate of deposit in question is therefore a nullity and is of no negotiable value to be received and deposited by the sheriff in the government depository or in any reliable bank in

Liberia, and the court, therefore, would be without legal authority to order the release of any money available at the Agricultural & Cooperative Development Bank in which the appellant did not deposit any money for the purpose of the appeal bond in this case. The certificate aforesaid cannot be considered as a certificate of deposit as defined herein above because no cash was deposited in the bank by the appellant to the value of the bond. Since the bank had money available, and if it intended to help the appellant, it should have issued a manager's check to the value of the bond which is negotiable and the amount of such a check, when deposited in the government depository or in any other reliable bank, could be withdrawn therefrom by order of court, and this would have sufficed. But the certificate aforesaid is more of a guaranty because the bank itself refers to it as a guarantee issued for the purpose of the appellant's appeal bond. It cannot be considered a certificate of deposit simply because it is captioned "certificate of deposit." In such a situation, the so-called certificate of deposit is like a bat which is neither a bird nor an animal. It can only be correctly classified as a fiasco instrument which does not fulfill the requirements of the statute on bonds and security. The certificate is intended, in my opinion, not only to deceive the courts of Liberia, but to also test the legal ability of the judges of our courts, and I regret very seriously that my distinguished colleagues of the majority, whom I know very well, had to succumb to the feeling that suretyship and guaranty have the same meaning and purpose, and lost sight of the fact that our statute on bonds and security does not require guaranty. The terms "guaranty" and suretyship", according to text writers, are sometimes used interchangeably, but they should not be confounded. The contract of a guarantor is his own separate contract. It is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done, not merely an engagement jointly with the principal to do the thing. The original contract of the principal is not his contract, and he is not bound to take notice of its nonperformance. A guarantor of a bill or note (as in the instant case), is said to be one who engages that the note shall be paid, but he is not an endorser or surety. Guaranty is a collateral agreement, and so a collateral guaranty is a contract by which the guarantor undertakes that the debtor will pay debt or perform the obligation. In such a case the guarantor undertakes, in case the principal fails, to do what the principal had promised or undertaken to do, or pay damages for such failure. Distinguished from engagement of suretyship in the respect that, a surety undertakes to do the very thing which the principal has promised to do, in case the latter defaults. *See* BLACK'S LAW DICTIONARY 833 (4th ed.)

I now take recourse to the appellant's appeal bond and the affidavit of sureties thereto attached. For the benefit of the future, I quote both the appellant's appeal bond and the affidavit of sureties which read, respectively, as follows:

"APPELLANT'S APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS: That we, Intrusco Corporation, Monrovia, Liberia, the above named appellant/principal, and Agricultural & Cooperative Development Bank, represented by its general manager, Samuel R. Divine, "CERTIFICATE OF DEPOSIT" SURETY, being freeholder and householder within the Republic of Liberia, are held firmly bound unto the sheriff for Montserrado County, in the sum of Six Hundred Seventy-five

Thousand ($675,000.00) Dollars, to be paid to the above named appellee or his legal representatives for which payment we bind ourselves and our personal representatives jointly and severally, firmly by these presents.

The condition of this obligation is that we will indemnify the said appellee from all costs and from all injuries arising from the appeal taken by the above named Appellant, and will comply with the judgment of the court to which said appeal is taken or any other court to which said action may be removed....."

"AFFIDAVIT OF SURETIES
PERSONALLY APPEARED BEFORE ME, Agricultural & Cooperative Development Bank, represented by its general manager, Samuel R. Divine, 'CERTIFICATE OF DEPOSIT', surety, to the attached bond duly sworn deposes and says:

1. That said Bank is a freeholder and householder within the Republic of Liberia and has possession of the amount of Six Hundred Seventy-five Thousand ($675,000.00) Dollars given as security to the attached bond;

2. That the said amount is in cash in American currency or Liberian coins being in Monrovia, Montserrado County, Republic of Liberia;

3. That there are no claims or other encumbrances on the said amount . . . ."

By the appeal bond and the affidavit of sureties tendered by the appellant and quoted supra, it is assumed that the appellant has also elected to tender a surety bond. A surety bond, under our statute, is that type of bond which only natural persons qualified under the law on bonds and security can execute. A surety bond must be accompanied by an affidavit of sureties and only real property to the value of the bond is offered and accepted as security. The affidavit of sureties must describe the metes and bounds of such property in its body. The affidavit must contain a statement that the sureties are the owners of the property offered, the amount of the lien on the bond, unpaid taxes and encumbrances against the property, and the assessed value thereof. It must be accompanied also by a certificate of property valuation obtained from the Bureau of Internal Revenues, Ministry of Finance, to the effect that the surety or sureties to the bond are the owners of the property and that said property is of the assessed value as stated in the sworn

affidavit. Unless the court orders otherwise, a surety on a bond must be either two natural persons who fulfill the requirements as stated above, or an insurance company authorized to execute surety bonds within the Republic. Civil Procedure Law, Rev. Code 1: 63.2(1), (3) and (4).

From the provision of the statute cited supra, anything that falls short of its requirements renders the bond defective and subjects the appeal to dismissal. The surety on the appellant's appeal bond quoted above is not a natural person as contemplated by the law, no real property is offered as a security and the assessed value thereof stated in the affidavit of sureties, substantiated by a certificate of property valuation from the Ministry of Finance. In the case *Ghandour Brothers, Inc.* v. *Breckwoldt & Company, Ltd.* as reported in [1970] LRSC 34; 20 LLR 34 (1970), this Court held that: "When the sureties on an appeal bond are not legally qualified under statutory provisions, the appeal bond is defective and the appeal is subject, therefore, to dismissal". Also in the case *Baky* v. *Nah[1970] LRSC 35;* , 20 LLR 38 (1970), this Court held that: "An appeal bond is defective when not accompanied by an affidavit of the sureties complying with the provisions of the Civil Procedure Law . . . and is further defective when not accompanied by a certificate from the Bureau of Internal Revenues, required under paragraph four of the same section, rendering the appeal, therefore, subject to dismissal". The sureties named in an appeal bond must be owners of the property pledged and their affidavit accompanying the bond must bear evidence to that effect. When the documents accompanying the bond do not precisely show that the sureties named are owners of the pledged property, the bond will be considered defective and the appeal subject to dismissal. *Jarboe* v. *Jarboe[1975] LRSC 30;* , 24 LLR 352 (1975).

The appellant's appeal bond as quoted supra states in its body, as follows: "We, Intrusco Corporation, Monrovia, Liberia, the above named appellant/principal and Agricultural & Cooperative Development Bank, represented by its general manager, Samuel R. Divine, "Certificate of Deposit" Surety, being freeholder and householder within the Republic of Liberia ...." By this statement in the bond, it is difficult to understand as to who is the surety on the bond. Is it the bank, represented by its General Manager or the certificate of deposit referred to therein? It cannot be the bank because it is not a natural person required and qualified to be a surety on a surety bond, neither is it an insurance company authorized to execute surety bonds within Liberia, nor is it a guaranty corporation organized for that purpose. It cannot be the certificate of deposit either, because a certificate of deposit does not form part of a surety bond. A certificate of deposit is only evidence that cash has been deposited in the bark. This non-compliance with the requirement of section 63.2 as cited *supra* makes the appeal bond the more defective and cannot, therefore, be treated and considered as a mere technicality.

In *Liberia Industrial Development Corporation* v. *El Nasr Export & Import Company*[1982] LRSC 61; , 30 LLR 295 (1982), decided during the March A. D. 1982 Term of this Court, the appellee filed a motion to dismiss the appellant's appeal on the ground that the real property

offered was not described in the affidavit of sureties, contrary to law, neither did the bond name two natural persons, one or both of whom were owners of real property offered as security on the bond, nor was the surety an insurance company authorized by law to execute surety bonds within Liberia. Just as in the case of *El Nasr Export & Import Company* so it is in the instant case: no natural person is named as surety on the bond neither is there any real property offered as security and described in the affidavit of sureties, nor has the Agricultural & Cooperative Development Bank been shown to be an insurance company authorized to execute surety bonds in Liberia. The Agricultural & Cooperative Development Bank is also not shown to be a guaranty company authorized to engage in guaranty and suretyship in Liberia.

The surety on the appeal bond in the case *Liberia Industrial Development Corporation v. El Nasr Export & Import Company*, referred to hereinabove, was the commercial bank, and Mr. Justice Yangbe, speaking for the Court, correctly said at page 3 of that opinion that:

"An insurance company which is authorized by law may execute a surety bond; otherwise, there must be at least two or more natural persons who must meet the requirements of section 63.2 of the Civil Procedure Law, Rev. Code 1: There is no showing that the commercial bank is authorized by the statute to execute a surety bond. The affidavit of sureties attached to the appeal bond in this case does not contain a description of the property sufficiently identified to establish the lien of the bond".

The learned Justice cited in support of the Court's position Civil Procedure Law, Rev. Code 1: 63.2(2), and the cases *West Trading Corporation v. Alraine (Liberia) Ltd.*, [1975] LRSC 16; 24 LLR 224 (1975) and *Taylor* v. *Pasi et al.[1977] LRSC 9;* , 25 LLR 453 (1977). The motion to dismiss was granted by the unanimous votes taken in which the other two Justices, now forming the majority in this case, participated.

Why today in this case, under the same circumstance and principle, the very Justice who spoke for the Court in the *El Nasr Export & Import Company* case, has inconsistently spoken against that opinion of the Court which he wrote and delivered? In the case *Cavalla River Company* v. *Fazzah*, 7 LLR 13 (1939), Mr. Chief Justice Grimes, speaking for this Court said, and I quote to remind my distinguished colleagues, that:

Statutory requirements governing appeal bonds must be complied with, and the Supreme Court is powerless to dispense with such requirements, no matter who is the principal on the bond and no

matter what amount is fixed in the bond. It is stated in 73 AM. JUR.2d, *Statutes*, § 145, p. 351 that:

"In the interpretation of statutes, the legislative 'will' is the all-important or controlling factor. Indeed, it is frequently stated in effect that the intention of the Legislature constitutes the law. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the Legislature, and to carry such intention into effect, to the fullest degree. A construction adopted should not be such as to nullify, destroy, or defeat the intention of the Legislature."

Today, this bench has gone on record, by the majority opinion just delivered, to set aside the principle followed in the long line of opinions of this Court and, as such, has subtracted from, and added to, the statutory provisions on bonds and security to include guaranty, by accepting as genuine a certificate of deposit on which no money was deposited contrary to the normal internationally accepted business practice.

To conclude, and for the benefit of those who confuse the purpose and functions of bond with guaranty, with whom the majority of this sacred bench share view, I want to reiterate that we are talking about the appellant's failure to deposit money in the bank as required by statute, as security to satisfy the primary purpose of indemnity. We are talking about an instrument containing a clause with a sum fixed therein as penalty, binding the parties to pay the same, conditioned, however that the payment of the penalty may be avoided by the performance by one or more of the parties of certain acts, one which is intended to protect the assured from liability for damages or to protect the persons damaged by injuries occasioned by the assured as specified, when such liability should accrue and be imposed by law, as by court. We are talking about a kind of contract between two parties entered before a court of justice whereby one party undertakes and agrees to indemnify the other against loss or damages arising from such contemplated act on the part of the indemnitor, or from some responsibility assured by the indemnitee, or from the claim or demand of a third party, that is, to make good to him such pecuniary damages as he may suffer. But such a contract is not intended to be such as are sought in case one intends to borrow money and is required to secure collateral agreement--a guarantee to insure payment of debt.

Under the law in our jurisdiction, which I have already quoted hereinabove, a judicial bond may be secured by giving to the sheriff cash to the value of the bond against a receipt, or cash deposited in the bank to the value of the bond, according to the election of the party, and obtain a certificate therefor. The certificate is to serve as evidence that cash, to the value of the bond, has been deposited in the bank by the party, and by such certificate the bank is prepared to release the money only upon orders of court. This is commonly referred to as cash bond. On the other

hand, the party may elect to give valuables to the sheriff to the value of the bond, that is, valuables which are easily converted into cash. Some evidence of ownership of the valuables must be shown. Another means is that appellant could offer to the sheriff, not merely by words of mouth but by presenting to him, the deed or deeds to real property owned by him indicating in writing the reason for so parting with such documents on condition. The real property so offered must be to the value of the bond, and there must be no encumbrances on them, taxes thereon must have been paid. This will also serve as security on the bond. Lastly, the party may give a surety bond. A surety bond is where two or more natural persons, who are sureties, are owners of real property to the value of the bond. This type of bond must be supported by affidavit of the sureties showing that the property is theirs, and the assessed value thereof stated. The affidavit must show if there are any encumbrances on such property, and the unpaid taxes thereon, if any. The property must be described in the affidavit by their metes and bounds to be easily identified on the ground, and must be accompanied with the bond a certificate from the Real Estate Tax Division, Ministry of Finance, to the effect that the property as described in the affidavit of sureties are owned by the sureties, and the certificate must indicate the value of each of the property so offered, and that taxes thereon have been paid and there is no lien on said property. A surety bond may also be executed for a party by an insurance company authorized by the Legislature to execute suretyship bonds; but no insurance company or any banking institution or corporation can elect to engage in the execution of bonds in Liberia without being authorized specifically by its charter from the Legislature. These are the only statutory requirements in securing a bond in Liberia. We have no provision in our statute that a secondary or collateral contract of the bank can substitute for security on bonds. A guaranty or guarantee may be generally defined as a collateral promise or undertaking by one person to answer for the payment of some debt, or the performance of some contract or duty, in case of the default of another person, who, in the first instance, is liable for such payment or performance. It is a collateral promise or under-taking to pay a debt owed by a third person in case the latter does not pay. It is an agreement by one person to answer to another for the debt, default, or miscarriage of a third person, and as has been pointed out, the latter is the definition given by statute in a number of jurisdictions. 32 C.J.S., *Guaranty*, § 1. In our jurisdiction, a guaranty is not required by our statute to secure a bond. And also, a contract of guaranty is not a bond which our statute requires to be given to either secure the presence of a party when needed by court until judicially discharged, or to indemnify the appellee from injuries, damages, or cost, and to comply with the judgment of court. In the case *Durham* v. *Greenwold,* 3 SE 2d 555, it was held that:

"A contract of guaranty exists where one lends his credit for the benefit of another, but under an obligation which is separate and distinct from that of the principal debtor, whereby he renders himself secondarily or collaterally liable on account of any inability of the principal to perform his own contract".

A contract of guaranty not being one of the requirements of our statute on bonds and security, I am in total disagreement with the holding of my distinguished colleagues of the majority. Hence, I dissent.

Hansen & Soehne Ltd v Reeves et al [1988] LRSC 32; 35 LLR 10 (1988) (29 July 1988)

JOS HANSEN & SOEHNE (LIBERIA) LTD., by and thru its Managers, **E. AYOMANOR** and **B. SILLA,** Petitioner/Appellant, v. **HER HONOUR CHARLENE A. REEVES,** Judge, Debt Court, Montserrado County, and **CITIBANK, N.A.,** by and thru its Vice President, **LEONARD MAESTRE,** Respondents/Appellees.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE DENYING THE ISSUANCE OF THE WRIT OF CERTIORARI.

Heard March 24, 1988. Decided July 29, 1988.

1. The property security to an attachment bond is defective and renders the entire bond defective if the property valuation certificate shows that taxes have not been paid on the property for the taxable year in which the attachment bond is executed.

2. When taxes have not been paid on the property offered to secure an attachment bond for the taxable year in which the bond is executed, the property is deemed to have a lien on it and it cannot therefore be used to secure the bond.

3. A party attacking an attachment bond on the ground that the taxes have not been paid on the property offered as security, and that therefore a lien exist on the said property, is not required by the statute to file exceptions to the bond or to file for a justification of sureties.

4. Justification of and exceptions to sureties are distinguishable from an attack on a bond because taxes have not been paid on the property offered as security to the bond.

5. Notice is of two grades: Actual and constructive. Actual notice is defined as the notice expressly and actually given, and brought home to the party directly. Constructive notice, on the other hand, is defined as information or knowledge of fact imputed by law to a person, although he may not actually have it, because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it.

6. A party filing an attachment bond must give actual notice by serving on his adversary a copy of the bond, together with the security attached to the sureties affidavit.

7. The statute does not require the opposing party in whose favour an attachment bond is filed to seek information relating to the filing of such bond.

8. Certiorari will not lie to review a ruling of the debt court denying and dismissing a defendant's attachment bond for reason that the said bond was secured by real property on which taxes had not been paid up to date.

Co-respondent Citibank, N. A. instituted an action of debt by attachment in the Debt Court for Montserrado County against Appellant/petitioner Jos **Hansen** & Soehne (Liberia) Ltd. for payment of the amount of $137,646.56 which the co-respondent claimed was due it by the appellant/petitioner. Thereafter, the petitioner filed an attachment bond secured by real property to the value of $188,200.00, which was approved by the trial judge. The petitioner's warehouse, which had been closed as a result of the attachment placed on it, was ordered opened and petitioner's parts released to it in the light of the attachment bond filed by it. However, the appellee challenged the order as being irregular in that the petitioner had not filed a motion to dissolve the attachment, and that there was a lien on the property offered as security to the bond since the taxable year on which taxes for the property had been paid had expired when the property was offered as security. The challenge was sustained by the trial court.

Subsequently, the appellant filed a motion to dissolve the attachment. That motion was resisted by Citibank, heard and denied by the trial judge. From this denial, petitioner applied to the Justice in Chambers for a writ of certiorari. A hearing was had on the petition and the same was denied by the Justice. Whereupon, a further appeal was taken to the Full Bench.

The Supreme Court upheld the ruling of the Justice in Chambers, noting that under the new taxable year, taxes were due and had not been paid, thus creating a lien on the property. The Court rejected the contention that Co-respondent Citibank should have filed exceptions to or justification of sureties within the three-day period allowed by statute and not wait until the filing by petitioner of its motion to dissolve. The Court noted that the statutory provisions relating to exceptions to and justification of sureties did not apply in the instant case because they related to the sufficiency of the bond rather than to tax liens held on the property by the government.

The Court also rejected the contention that Citibank had notice of the irregular approval of the bond and therefore should have taken action against the judge. The Court observed that the statute did not impose on the opposite party the obligation to seek and find out information regarding the bond which had been filed; rather, it was the responsibility of the petitioner to give notice of the filing of the bond by serving a copy on the op-posing party. This, the Court said, the petitioner had failed to do.

Lastly, the Court ruled that certiorari could not lie to review the ruling of the debt court judge denying and dismissing petitioner's attachment bond on the ground that the attachment bond was secured by real property on which taxes had not been paid up to date. Accordingly, the petition to the writ of certiorari was denied.

M Fahnbulleh Jones appeared for appellant. *H Varney G. Sherman* of the Maxwell & Maxwell Law Offices appeared for appellees.

MR. JUSTICE BELLEH delivered the opinion of the Court.

This is an appeal from a ruling of the Chambers Justice on a petition for a writ of certiorari. The records certified to this Court on appeal reveal that Co-respondent/appellee Citibank, on March 5, 1986, instituted an action of debt by attachment against Petitioner/appellant Jos **Hansen** in the Debt Court for Montserrado County to recover the amount of $137,646.56, being the outstanding balance due from a certain overdraft credit facility which, according to the records submitted to us, Appellant Jos **Hansen** is alleged to have enjoyed from Co-appellee Citibank from July 1, 1982, to November 1983. The records further show that upon the service of the writ of summons and the writ of attachment by the sheriff of the Debt Court for Montserrado County, Appellant Jos **Hansen** identified its warehouse containing spare parts. The warehouse was attached by the sheriff. On July 29, 1986, Appellant Jos **Hansen** filed its attachment bond which was secured by real properties to the value of $188,200.00. The bond was approved by the debt court judge.

Immediately upon the approval of appellant's attachment bond, the sheriff proceeded to the premises to open the warehouse. However, counsel for Co-appellee Citibank brought to the attention of the court, through an application made on the minutes of the court, that the procedure was irregular, in that Appellant Jos **Hansen** had not filed a formal motion to dissolve the

attachment. Co-appellee counsel's application was granted by the court and the sheriff was ordered not to release the spare parts to Appellant Jos **Hansen**.

Subsequently, Appellant Jos **Hansen** filed a motion to dissolve the attachment, the relevant portions of which we hereunder quote word for word:

"MOTION TO DISSOLVE ATTACHMENT

1. Because defendant says that it has filed a verified answer to the complaint and requests court to take judicial notice of its records.

2. Because defendant says that it has filed an approved defendant's attachment bond which is one and a half times the amount sued for, in keeping with law. The law specifically provides that if a defendant files an approved attachment bond equal to the amount sued for, the attachment shall be dissolved or discharged. Defendant requests court to take judicial notice of its records."

Co-appellee Citibank filed its resistance to appellant's motion to dissolve the attachment, count three of which reads:

"COUNT 3. That plaintiff/respondent also says that according to the certificate from the Ministry of Finance for the payment of taxes on the properties posted as security for the defendant/movant's attachment bond, said certificate states that taxes on the properties have been paid only up to and including June 1986. Since the bond was filed July 29, 1986, the taxes for the 1986/1987 taxable year has already accrued and therefore the property has the lien of the tax on it and could never be sold to satisfy any judgment of this Honourable Court or any other order of this Honourable Court without first settling the lien of the tax."

The debt court judge, having heard the motion and its resistance, denied and dismissed the same, thereby sustaining the resistance. Appellant Jos **Hansen**, being dissatisfied with the ruling, excepted to same and fled to the Chambers Justice of this Court on a petition for a writ of certiorari containing 14 counts. Because of the importance we attach to counts 8 and 10 of the petition, the rest of the counts contained in the petition not being relevant and therefore not

worthy of our consideration for the final determination of this case, we shall deal only with counts 8 and 10. Counts 8 and 10 read as follows, to wit:

COUNT 8. Your petitioner says that in keeping with the records made by the judge, Co-respondent Citibank had full knowledge of the approval and filing of petitioner's attachment bond on the 29t h of July 1986, the date on which the bond was approved and filed, for reason that it challenged the procedure adopted by the judge in approving the bond without notice to it in the absence of petitioner. This being the case, Co-respondent Citibank, having had knowledge and notice of the filing of the approved bond on the 29th of July 1986, should have either filed exceptions to the sureties, in keeping with section 63.5, or justification of sureties in keeping with section 63.6, and not wait until your petitioner had filed his motion to dissolve. Especially so, in the Civil Procedure Law, Rev. Code 1:63.3, it is expressly provided that the bond shall become effective when approved by the court. And if Co-respondent Citibank felt that the co-respondent judge had approved petitioner's attachment bond irregularly and illegally which was prejudicial to it interest, it should have then proceeded by remedial process against the co-respondent judge. But the bond having been approved and therefore became effective, and the Co-respondent Citibank having failed to except to the bond or file justification of sureties, it was *estopped* from resisting petitioner's motion to dissolve the attachment. But the respondent judge did not take these legal and factual issues into account when she denied petitioner's motion to dissolve the attachment. This was greatly prejudicial to petitioner's interest and therefore certiorari will lie, and for which petitioner so prays. Copy of the ruling is hereto attached and marked exhibit "P15."

COUNT 10. Your petitioner says that in the resistance Co-respondent Citibank contended that because the revenue certificate stated on its face that taxes on the real properties offered as security to petitioner's attachment bond had been paid up to June 1986, there was a lien of taxes on the property as of July 1, 1986, which position the co-respondent judge upheld in her ruling and denied the motion. Your petitioner says that this was gross error and prejudicial to it interest for reason that if taken, the fiscal year of the Government taxes are not due and collectable for fiscal 86/87 until at the end of June 1987. Therefore, for payment of real taxes and liability for the same, the government uses the calendar year January 1 to December 31. Besides the revenue would not have given a certificate to your petitioner for a bond if there were only, any lien of taxes on the properties. Recourse to the certificate shows on its face "Attachment Bond in favour of Jos **Hansen** & Soehne (Lib) Ltd." The co-respondent judge's ruling sustaining this count of the resistance and thereby denying the motion was therefore illegal, improper and prejudicial, for which certiorari will lie."

Co-respondent Citibank filed its returns to the petition for a writ of certiorari. Although there are many issues raised in the said re-turns, we however consider only counts 5 and 16 of the returns

to be worthy of our consideration for the final determination of this case. We hereunder quote, word for word, the said counts.

"COUNT 5. That as to count 3 of the petition, Corespondent Citibank says that it is false and misleading for petitioner to allege that inability to pay taxes caused the delay in the posting of bond because, as a matter of law, the taxes have not yet been paid. According the Revenue & Finance Law, Rev. Code 36:13.3, taxes on real property become due on July 1 of each year; and according to the same Revenue and Finance Law, Rev. Code 36:13.8, the taxes become a lien on the property on the due date (July 1). So since the Statement of Property Valuation says that taxes have been paid only up to June 30, 1986, then the taxes which became due on July 1, 1986 had not been paid when the bond was filed on July 29, 1986.

COUNT 16. That also as to count 10 of the petition, Corespondent Citibank says that when the Government of Liberia's fiscal year was from January 1 December 31, the real property tax became due on January 1, of each year. (Section 35:444, Revenue & Finance Law, III LCL, 1956). The Government of Liberia's fiscal year was changed in 1972 from the calendar year (January - December) to July 1 of one year to June 30 of the following year. Revenue & Finance Law, Rev. Code 36:81.4 (1979). It was in consonance with this change of the fiscal year of Liberia that real property taxes became due on July 1 (the date of the commencement of the fiscal year). Revenue and Finance Law, Rev. Code 36:13.3 (1979); and that taxes on real property automatically constitute a preferred lien on due date. Revenue & Finance Law, Rev. Code 36:13.8 (1979). Co-respondent Citibank again reiterates its challenge to the petitioner to show any law to the contrary."

Immediately upon the filing of the petition for a writ of certiorari, the Chambers Justice ordered the issuance of the alternative writ. He further ordered the co-respondent judge to release the spare parts to Petitioner Jos **Hansen**, and directed that the judge stay all further proceedings until otherwise ordered.

There are two main issues presented for our consideration and final determination of this case, and they are:

(1) Whether or not there is a tax lien on the properties posted as security to petitioner's attachment bond; and

(2) Whether or not Co-respondent Citibank had knowledge regarding the approval and filing of petitioner's attachment bond.

In count 10 of the petition, petitioner contended that the debt court judge grossly erred when she upheld Co-respondent Citibank's contention that "because the revenue certificate stated on its face that taxes on the real properties offered as security to petitioner's attachment bond had been paid up to June 30, 1986, there was a lien of taxes on the properties as of July 1, 1986," and thereby denied the motion to dissolve the attachment.

Co-respondent Citibank, on the other hand, contended in count 16 of its returns that as to count 10 of the petition, when the Government of Liberia's fiscal year was from January 1 December 31, the real property tax became due on January 1, of each year. Revenue & Finance Law, 1956 Code 35:444; and that the Government of Liberia's fiscal year was changed in 1972 from the calendar year (January-December) to July 1 of one year to June 30 of the following year (Revenue and Finance Law, Rev. Code 36:81.4); that it was in consonance with this change of the fiscal year of Liberia that real property taxes "became due on July 1, the date of the commencement of the fiscal year (Revenue and Finance Law, Rev. Code 36:13.3; and that it was also under the Revenue and Finance Law that taxes on real property automatically constitute a preferred lien on the due date. Revenue & Finance Law, Rev. Code 13.8 (1979). Co-respondent Citibank therefore reiterated its challenge to the petitioner to show any law to the contrary.

For the benefit of this opinion, we hereunder quote verbatim the Statement of Property Valuation attached to Petitioner Jos **Hansen**'s attachment bond, dated July 22, 1986:

"TO WHOM IT MAY CONCERN. STATEMENT OF PROPERTY VALUATION "LOT NO:LOCATION: VALUATION: ACREAGE: PROPERTY OWNER "N/N Paynesville, Mont. C 1111,700.00 N/N Noah, Mac S. "N/N Paynesville, Mont. Co. 76 500,00 N/N Nimley, David B188,200.00-Q.

"(ONE HUNDRED EIGHTY-EIGHT THOUSAND TWO HUNDRED DOLLARS)" THIS IS TO CERTIFY THAT THE REAL ESTATE OF THE AFOREMENTIONED PERSONS ARE REGISTERED AND VALUED AS SHOWN ABOVE. TAXES THEREON ARE PAID UP TO AND INCLUDING JUNE 30, 1986."

ATTACHMENT BOND IN FAVOR OF: JOS **HANSEN** & SOEHNE, (LIB) LTD."

Certified By:
ACCOUNT SUPERVISOR Signed:
DEPUTY COMMISSIONER, R. L.
T.D. APPROVED:
ASST. MINISTER FOR REVENUES, R. L.

Section 13.3 of the Revenue and Finance Law, Rev. Code 36, with respect to *payment date, interest, and penalty on late payment,* reads: "The real property tax prescribed by this chapter covers the period from January 1 to and including December 31 of each year and shall become due on July 1 of the year in which it is levied. It may be paid without the imposition of interest or penalty at any time prior thereto from January 1. Interest at the rate of 6 percent per annum, in accordance with section 4.4 shall be charged thereon if the tax is not paid on or before July 1 of the year in which it is levied and if it is not paid on or before July 31 of the year in which it is levied, the Minister, in addition, shall assess and add to the amount due, or to any underpayment thereof, an administrative penalty of 5 percent per month for each month or part of a month elapsing after July 31 that it remains unpaid, but not to exceed 25 percent in the aggregate."

According to the above Section of our Revenue and Finance Law, taxes on the properties posted as security to the attachment bond had not been paid up to date, and therefore, there was a tax lien on the properties. This rendered the attachment bond materially defective for the purpose of indemnification. Therefore, the debt court judge did not err when she upheld Corespondent Citibank's contention regarding the defectiveness of petitioner's attachment bond.

In Count 8 of the petition, petitioner contended that because Co-respondent Citibank had knowledge of the approval and filing of petitioner's attachment bond on the 29t h day of July, 1986, Co-respondent Citibank should have either filed exceptions to the sureties in keeping with section 63.5, or justification of sureties as specified by section 63.6, and not wait until petitioner had filed its motion to dissolve; that if Co-respondent Citibank felt that the respondent judge had approved petitioner's, attachment bond irregularly and illegally, Co-respondent Citibank should then have proceeded by remedial process against the co-respondent judge; that the bond having been approved, it became effective; and that therefore Co-respondent Citibank was *estopped* from resisting petitioner's motion to dissolve the attachment.

Section 63.5 and section 63.6 of the Revenue and Finance Law, Rev. Code 36, provide as follows:

"SECTION 63.5, EXCEPTION TO SURETY; ALLOWANCE WHERE NO EXCEPTION TAKEN:

1. Exceptions. A party may except to the sufficiency of a surety by written notice of exceptions served upon the adverse party within three days after receipt of the notice of filing of the bond. Exceptions deemed by the court to have been taken unnecessarily, or for vexation or delay, may, upon notice, be set aside, with costs."

"SECTION 63.6, JUSTIFICATION OF SURETY.

1. Motion to justify. Within three days after service of notice of exception, the surety excepted to or the person on whose behalf the bond was given shall move to justify, upon notice to the adverse party. The surety shall be present upon the hearing of such motion to be examined under oath. If the court finds the surety sufficient, it shall make an appropriate endorsement on the bond."

In keeping with the above mentioned provisions of our statute, exceptions to sureties and justification of sureties are inapplicable in the instant case, in that both sections 63.5 and 63.6 relate to the sufficiency of the bond. The contention of Corespondent Citibank is not against the sufficiency of the bond; rather, it is against the tax liens on the properties posted as security to the bond.

According to the respondents, taxes on the properties posted as security had not been paid when the bond was submitted and approved. As we have stated earlier in this opinion, we have carefully perused the Statement of Property Valuation obtained by petitioner from the Bureau of Internal Revenues and have found that the contention of the respondents to the effect that the bond has a tax lien on it is supported by the Statement of Property Valuation attached to the petitioner's attachment bond.

Under these circumstances, we can not uphold the contention of petitioner regarding the failure of Co-respondent Citibank to file a motion for justification of sureties or exceptions to the sureties.

The next point to be considered is petitioner's contention regarding notice. Petitioner contended that Co-respondent Citibank had notice of the approval and filing of the bond and therefore it should have taken the necessary steps against the judge for approving the bond irregularly. Regarding this contention, we must define the word "notice."

Notice, according to Black's Law Dictionary 1210 (4 th ed.), is of two grades, namely, actual and constructive. *Actual notice* is defined as "the notice expressly and actually given, and brought home to the party directly." *Constructive notice,* on the other hand, is defined as "information of knowledge of fact imputed by law to a person, although he may not actually have it, because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." BLACK'S LAW DICTIONARY 1210 (4 th ed.)

Section 7.26 of the Civil Procedure Law, Rev. Code 1, provides "a defendant whose property has been levied upon under an order of attachment may move upon notice to the plaintiff and the sheriff for an order discharging the attachment as to all or a part of the property upon payment of the sheriff s fees and expenses. On such a motion, the defendant shall give a bond in an amount equal to the value of the property sought to be discharged, that the defendant will pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding the amount of the bond."

From the wordings of the above quoted statutory provision, it can clearly be seen that the party filing an attachment bond must give an actual notice by serving on his or her adversary a copy of the bond, together with the security attached to the sureties' affidavit. The statute does not require the opposing party in whose favour the bond is filed to seek the information relating to the filing of such bond.

In the instant case, petitioner's attachment bond was filed on July 29, 1986, without any notice to appellee and without a motion to dissolve the attachment predicated upon which Corespondent Citibank objected to the procedure. The court, after conducting an investigation, sustained the objection and ordered the sheriff not to release the spare parts to the petitioner.

It is worthy to mention that after the application and/or, objections interposed by Corespondent Citibank was granted, the petitioner, it would seem, conceded that the application of the co-respondent was in consonance with law and, therefore, petitioner subsequently filed its motion to dissolve. That motion, after a hearing, was denied and dismissed by the trial court.

As we have earlier said in this opinion, the principal issue in this case is that Co-respondent Citibank attacked petitioner's attachment bond on the ground that taxes on the properties posted as security had not been paid. This attack was not sufficiently rebutted by petitioner by a showing *of prima facie* evidence to the effect that the bond was valid and that there was no tax lien on the same. *See* Civil Procedure Law, Rev. Code 1:63.3.

Under these circumstances, petitioner's contention regarding notice is unwarranted and cannot therefore be upheld by this Court.

Certiorari will not lie to review a ruling of the debt court denying and dismissing a defendant's attachment bond for reason that the defendant's attachment bond was secured by real properties on which taxes had not been paid up to date.

In view of what we have narrated and the laws cited, it is our considered opinion that the ruling of the Chambers Justice be, and the same is hereby affirmed, with costs against Petitioner Jos **Hansen**. The Clerk of this Court is hereby ordered to send a mandate to the Debt Court for Montserrado County, with instructions to it to resume jurisdiction over the cause and to continue with the trial thereof. And it is hereby so ordered.

Petition denied.

Teah v Andrews et al [1999] LRSC 17; 39 LLR 493 (1999) (1 July 1999)

JULIANA AND COMFORT TEAH, Appellants, v. **HIS HONOUR JOSEPH ANDREWS**, Assigned Circuit Judge, Civil Law Court, Sixth Judicial Circuit, Montserrado County, **HIS**

HONOUR K. K. ZOGAN, Associate Magistrate, New Kru Town Magisterial Court, and **SAM A. NETTEY**, Appellees.

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

Heard: April 19, 1999. Decided: July 1, 1999.

1. One judge cannot review or reverse the ruling or action of another judge of concurrent jurisdiction.

2. Appeals in cases of summary proceedings to recover possession of real property do not serve as a stay to the enforcement of a judgment in the circuit court; however, appeals to the circuit court in cases of summary proceedings against the arbitrary or illegal conduct of magistrates serve as a stay to enforcement of an adverse judgment.

3. The relief sought or the remedy to be accorded in an action to recover possession of real property is the eviction of the defendant, whereas in an action complaining against the illegal or arbitrary act of the magistrate, the solution is to correct the magistrate's erroneous conduct and remand the case with instructions for his further proceedings.

4. It is not sufficient to merely allege that one has title; he must show or produce it to be examined and inspected by the court and traversed by the adverse party.

5. He who alleges the existence of a fact must prove it and must do so by the best available evidence.

7. The law requires that complaints for summary proceedings against illegal or arbitrary conduct of magistrates and Justices of the Peace are cognizable before the circuit court within the appropriate jurisdiction.

Appellees instituted an action of summary proceedings to recover possession of real property in the New Kru Town Magisterial Court against appellants, Juliana and Comfort Teah, and obtained a default judgment in an *ex parte* trial due to the failure of the appellants to appear.

Consequently, appellants filed a complaint for summary proceedings against the magistrate in the Civil Law Court of the Sixth Judicial Circuit, who heard the complaint, reversed and set aside the default judgment, and ordered a new trial by the magistrate. When the case resumed at the New Kru Town Magisterial Court, the defendants filed a motion to dismiss the action or to refuse jurisdiction over this case because title was in issue. The magistrate heard the motion, but before he could rule, the defendants filed a complaint for summary proceedings in Criminal Court B, which upon hearing ordered that the documents be transferred to the Civil Law Court since the defendants were contending that title was involved. The Civil Law Court subsequently dismissed the petition for summary proceedings and ordered the magistrate to resume jurisdiction and enforce the earlier judgment. When the magistrate was in the process of enforcing this mandate, defendants filed another petition for summary proceedings, alleging that the judgment sought to be enforced had earlier been set aside by the Civil Law Court, hence it was non existent. The Civil Law Court heard and denied the petition, from which ruling, petitioner announced an appeal to the Supreme Court. The appeal was granted but the judge ordered the ruling enforced since the matter grew out of an action of summary proceedings to recover possession of real property. Not satisfied with this ruling, appellants/petitioners petitioned the Chambers Justice for a writ of prohibition.

The Chambers Justice declined to issue the writ, but ordered the Civil Law Court to resume jurisdiction and proceed according to law. Upon receipt of this mandate, the judge of the Civil Law Court again mandated the magistrate to enforce the earlier default judgment. After filing two complaints for summary proceedings in Criminal Court "B" and Criminal Court "C", respectively, without success, appellants filed a bill of information before the Full Bench of the Supreme Court.

The Supreme Court refused to issue the writ and have the information docketed, but rather ordered appellants to proceed and perfect their appeal from the judgment of the Civil Law Court. Upon perfection of their appeal, and after argument by the parties and review of the records, the Supreme Court noted that there was no ruling which could have been enforced as the first default judgment was set aside by Judge Reeves then presiding over the Civil Law Court and that when the retrial was called, a motion to refuse jurisdiction was filed on which the court has yet to rule. Hence the Court held that the order of Justice Henries to have the default judgment enforced after it had already been set aside by Judge Reeves was illegal and void *ab initio* and concluded that it was error and a travesty of justice for Judge Henries to have insisted on enforcing the judgment and evicting the appellants even though appellants had appealed from their respective judgments. Accordingly, the Supreme Court *granted* the appeal, *reversed* the judgment rendered by Judge Henries, *reinstated* the ruling made by Judge Reeves, mandated the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, to resume jurisdiction and to return the case and parties to the New Kru Town Magisterial Court by a mandate, ordering the magistrate to resume jurisdiction and conduct a new trial commencing from the re-hearing and determination of the defendants' motion to refuse jurisdiction.

Thompson Jargba appeared for the appellants. *Cooper W. Kruah and James C.R. Flomo* of the Henries Law Firm appeared for appellee.

MR. JUSTICE WRIGHT delivered the opinion of the Court.

This case is on appeal from a ruling of His Honour Joseph W. Andrews, assigned circuit judge of the Civil Law Court, after a circuitous and roller coaster ride from Criminal Court B twice, to the Civil Law Court, then to Criminal Court C, and then twice to the Chambers Justice of the Supreme Court and back to the Civil Law Court, all at the instance of the appellants and their Counsel.

The facts, briefly stated, are that on January 24, 1998, Mr. Sam Nettey instituted an action of summary proceedings to recover possession of real property, in the New Kru Town Magisterial Court against Juliana and Comfort Teah. After several assignments duly acknowledged by both parties, the case was heard *ex parte* and a judgment by default rendered against defendants on January 28, 1998 by Magistrate Moses Tandanpolie.

A complaint for summary proceedings against Magistrate Tadanpolie was filed in the Civil Law Court before Judge Charlene Reeves, who heard the complaint and granted summary proceedings and reversed and set aside the default judgment. Judge Reeves, in a Mandate dated March 4, 1998, ordered a new trial by the magistrate. The parties conceded this ruling, and returned to the New Kru Town Magisterial Court and the case was regularly assigned for this new trial. By this time, Magistrate Tandanpolie had been succeeded by Magistrate K. Karvin Zogan. At the call of the case for the new trial, the defendants filed a motion praying the magistrate to dismiss the action or to refuse jurisdiction over this case because title was in issue. Magistrate Zogan heard the motion but before he could rule, appellants, through their counsel, Counsellor Thompson Jargba, filed a complaint for summary proceedings in Criminal Court B, then presided over by Resident Judge Timothy Z. Swope, whose term expired without having heard the summary proceedings.

Judge Wynston O. Henries succeeded Judge Swope in Criminal Court B, and heard the summary proceedings, and on April 17, 1998 ordered Magistrate Zogan to transfer the case to the Civil Law Court since the complainants, now appellants, were contending that title was in issue. The magistrate obeyed and transferred the records to the Civil Law Court on April 21,1998; by then,

Judge Henries was assigned to the June 1998 Term of the Civil Law Court, succeeding Judge Reeves who had presided over the March Term. Judge Henries assigned this case several times but appellants and their counsel failed to appear and the Judge dismissed the summary proceedings on July 15, 1998 and mandated the magistrate to resume jurisdiction and enforce the earlier judgment placing appellee in possession of the subject premises. When this mandate was being enforced, i.e. the appellants were being evicted, appellants again returned to the Civil Law Court with another complaint for summary proceedings against Magistrate Zogan on the ground that the judgment sought to be enforced had earlier been set aside and reversed by Judge Reeves during the March Term, hence non-existent.

Judge Henries, after several assignments, heard and denied the summary proceedings in a ruling dated October 20, 1998. Defendants excepted to the ruling and announced an appeal to the Supreme Court. The appeal was granted but the judge ordered the ruling enforced since the matter grew out of an action of summary proceedings to recover possession of real property in which an appeal does not operate as a stay to enforcement.

Appellants fled to the Chambers of the Supreme Court with a petition praying for a writ of prohibition. The parties were cited to a conference and Mr. Justice Sackor, then presiding in Chambers, declined to issue the writ but verbally ordered the parties to return to the Civil Law Court and have the defendants perfect their appeal. A mandate from Justice Sackor, dated December 16, 1998, was sent down ordering the Civil Law Court to resume jurisdiction and proceed with the case in keeping with law. Defendants had Judge Henries approve their bill of exceptions on October 30, 1998. By this time, Judge Joseph W. Andrews had succeeded Judge Henries for the December Term of the Civil Law Court, and, upon receiving the said mandate, Judge Andrews had same read on February 12, 1999. On February 24, 1999, the case was assigned for ruling on February 26, 1999.

At the call of the case as per assignment, which was duly signed by both parties, Counsellor Thompson Jargba was absent and the court deputized Counsellor James W. Zotaa, Jr. to take the ruling for Counsellor Jargba. Judge Andrews ruled that the ruling made by Judge Henries on October 20, 1998 should be enforced. Defendants filed a bill of information to inform Judge Andrews that the judgment of Magistrate Tandanpolie, dated January 28, 1998, had been set aside and reversed by Judge Reeves on March 4, 1998 and that Judge Henries had erroneously ordered it enforced on October 20, 1998. Judge Andrews heard and denied the information on the ground that he could not review the act of Judge Henries, and he held Counsellor Jargba in contempt for attempting to have him review his colleague and predecessor's ruling. Judge Andrews ordered the enforcement of the ruling for the eviction of the appellants.

To avoid being evicted, appellants fled back to the Chambers of the Supreme Court with another petition for a writ of prohibition. By this time, Mr. Justice Sackor had been succeeded by Mr. Justice Jangaba as Chambers Justice, and he also declined to issue the writ but had the parties cited to a conference wherein they were verbally told to return to the Civil Law Court and have the defendants proceed with their appeal. A written mandate, dated February 3, 1999 from Justice Jangaba, was sent down to the Civil Law Court ordering Judge Andrews to resume jurisdiction and proceed with the case according to law. In obedience to the mandate, Judge Andrews sent a mandate to the magistrate ordering the enforcement of the judgment.

Counsellor Jargba then filed a complaint for summary proceedings in Criminal Court B, against Magistrate Francis Fayiah who had then succeeded Magistrate Zogan in New Kru Town. Judge Varney Cooper dismissed the summary proceedings and ordered the magistrate to resume jurisdiction. Counsellor Jargba then filed a complaint for summary proceedings against the Magistrate in Criminal Court C, presided over by Judge Yussif Kaba, who likewise heard and dismissed the summary proceedings on March 22, 1999 and held Counsellor Jargba in contempt and ordered the magistrate to resume jurisdiction and enforce the judgment.

At this point, having exhausted all the circuit courts, Counsellor Jargba then filed a bill of information before the Full Bench of the Supreme Court on March 24, 1999. The Chief Justice on March 27, 1999 cited the parties to a conference on March 30, 1999. During the conference, the Chief Justice, like the other Justices before her, declined to issue the writ and have the information docketed, but rather ordered the appellants to proceed and perfect their appeal. Based on the above, the case was duly assigned for argument before the Full Bench and the parties filed their respective briefs. The case was argued on April 19, 1999 and even though the parties raised several issues, many of which are not decisive of this case, there are certain points this Court determines to be relevant to the disposition of this case.

First of all, we observe that this case is on appeal in this Court from a ruling of the Civil Law Court wherein Judge Henries first, then Judge Andrews later, sought to enforce the eviction of the defendants growing out of a default judgment entered by Magistrate Tandanpolie on January 28, 1998. When the said judgment was first sought to be enforced, the defendants filed summary proceedings against the magistrate before Judge Reeves on February 7, 1998, and Judge Reeves set aside and reversed the magistrate's default judgment and ordered a new trial. None of the parties appealed but rather conceded and returned to the magisterial court for the new trial. It was when the new trial was commenced that defendants moved the court to dismiss the action because title was involved, contending that they too had title to the same property claimed by appellee. The magistrate heard defendants' motion but never ruled until defendants brought him on summary proceedings.

Hence, from the foregoing facts and the records, it is clear that there is or was no ruling which could have been enforced as the first default judgment was set aside by Judge Reeves and when the retrial was called there was the motion to refuse jurisdiction on which the court has yet to rule. Two questions then come to mind: (a) What judgment was it that Judge Henries ordered enforced on October 20, 1998? (b) If it were the default judgment of January 28, 1998, how could he order it enforced when Judge Reeves had earlier set it aside on March 4, 1998? Did he have legal authority to enforce said judgment?

The answer to these questions are obvious. As far as the records show, there was no enforceable judgment which Judge Henries could have enforced as has been discussed above, and his order of October 20, 1998 to have the default judgment enforced after it had already been set aside by Judge Reeves was illegal and void *ab initio.* The age old overused assertion that one judge cannot review or reverse the conduct or action of another judge of concurrent jurisdiction squarely comes into play, and therefore the ruling of Judge Henries is hereby reversed for want of legal authority. *Republic v. Aggrev,.* 13 LLR 469 (1960); also *Kiazolu v. Conneh,* [1968] LRSC 22; 18 LLR 369 (1968).

The second point worthy of comment and raised by appellants in this Court is that there is a difference between an appeal from an adverse ruling in the case of summary proceedings against the illegal or arbitrary act or conduct of a magistrate, as opposed to an appeal from an adverse ruling in an action of summary proceedings to recover possession of real property. Appellants concede that appeals in cases of summary proceed-ings to recover possession of real property do not serve as a stay to enforcement of a judgment in the circuit court; however, it is appellants' contention that appeals from the circuit court in cases of summary proceedings against the arbitrary or illegal conduct of magistrates definitely serve as a stay to enforcement of an adverse judgment.

This Court wholly agrees and is in complete concurrence with the contention of the appellants, and says therefore that it was error and a travesty of justice for Judge Henries first, and later Judge Andrews, to have insisted on enforcing the judgment and evicting the appellants even though appellants had appealed from their respective judgments.

The facts must be clearly set forth and the case understood in its proper perspective. It must be remembered that the action before the Civil Law Court (and for that matter in all the criminal circuits) was merely an action of summary proceedings complaining against the illegal act of the magistrate in attempting to enforce a ruling set aside by Judge Reeves. There was never an action of summary proceedings to recover possession of real property filed and pending before the circuit court(s). Therefore, an appeal from the circuit court's rulings was not on the parent case of

ejecting the appellants but on the illegal enforcement of a reversed judgment. In that event, the appeal should have operated as a stay to the enforcement of the circuit court's rulings. The right of appeal is preserved inviolate. LIB. CONST., Art. 20(b); Civil Procedure Law, Rev. Code 1. 51.2.

The relief sought or the remedy to be accorded in an action to recover possession of real properly is the eviction of the defendant, whereas in an action complaining against the illegal or arbitrary act of the magistrate, the solution is to correct the magistrate's erroneous conduct and remand the case with instructions for his further proceeding.

Thus, when the defendants felt offended by Magistrate Tandanpolie's default judgment, they brought a complaint for summary proceedings and Judge Reeves in her wisdom decided to reverse and set it aside and order a new trial. When Judge Henries, in Court B, ordered all the records transferred to the Civil Law Court and, by coincidence, he too was assigned to preside over the Civil Law Court, if he wanted, he could have conducted a trial *de novo* or remand the case for a new trial by the magistrate but he could not order the magistrate to enforce a judgment which had earlier been set aside. And therefore the defendants' appeal from Judge Henries' ruling was not the result of a trial *de novo* conducted by Judge Henries on the merits as regards the eviction of the defendants but was because of his attempt to enforce a ruling which his predecessor had set aside and reversed. The relief to be sought and obtained in these two situations are different.

One other point worthy of discussion relates to the question of raising the issue of title in the magistrate court.

In other words, how should an objection to jurisdiction be raised in the magisterial court where the defendant contends that title is in issue?

In the instant case, when Judge Reeves set aside the January 28,1998 default judgment on March 4, 1998, the parties returned to the magisterial court and at the call of the case for the new trial, the defendants moved the court to refuse jurisdiction and dismiss the case because they also had title to the same property as did the plaintiff.

During oral arguments before this Court, and also in their brief, appellees contended that from the time the case was called for the new trial and throughout all the various proceedings in all the respective courts, the appellants have never produced any title document or other form of evidence to establish their title, other than their verbal assertion that they had title. Appellees have argued that it is not sufficient to merely allege that one has title; he must show or produce it to be examined and inspected by the Court and traversed by the plaintiff. We are in agreement with the appellees that appellants were under obligation to present copy of their title documents to convince the magistrate that title was in issue. He who alleges the existence of a fact must prove it and must do so by the best available evidence. Civil Procedure Law, Rev. Code 1: 25.5 and 25.6.

Even though the magistrate court cannot try a real property case on the merits where title is contested, yet it is not sufficient for the defendants to merely allege that they have title, but they must show it. The magistrate is not determining the genuineness or validity of the title but just to be able to see that something exists, which would then form the basis for him to forward the matter to the proper forum.

Fumbah v Karbeh [1970] LRSC 7; 19 LLR 423 (1970) (30 January 1970)

DAVID M. FUMBAH, Appellant, v. MADAM GARWU KARBEH, Appellee.
APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued November 17, 1969. Decided January 30, 1970. 1. In order for an appeal bond to be valid under the provisions of section 6301 et seq. of the Civil Procedure Law, L. 1963-64, ch. III, when natural persons are the sureties therefor, the bond must be secured by real property they own, whose assessed valuation free of encumbrances, shall be at least equal to the amount of the bond. The bond is thereafter to be recorded in the office of the clerk of the Circuit Court in the county where the realty is situated, together with the factual information required to be given at the time of recordation under the aforesaid section 6302, as set forth in subdivisions 2a, b, c, d, and e thereof. 2. The Supreme Court holds to the maxim, "that which is not legally done is not done at all."

The appellee was the sucessful petitioner in an action for reformation of a lease, and the respondent appealed from the judgment entered against him in the trial court. During the pendency of the appeal the appellee brought a motion to dismiss the appeal, on the ground that the appeal bond was defective under the provisions of sections 6301 et seq. of the Civil Procedure Law, L. 1963-64, ch. III. The motion was granted and the appeal was dismissed. Michael M. Johnson for appellant. Perry for appellee. MacDonald M.

MR. JUSTICE
SIMPSON delivered the opinion of the court. During the June 1969 Term of the Circuit Court for the Sixth Judicial Circuit, Montserrado
County, Madam Garwu Karbeh, a resident of the City of Monrovia, in the County of Montserrado, filed a bill in equity for relief
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against fraud, against one David M. Fumbah, of the City and County aforesaid. The petitioner alleged
that in 1966 she requested the respondent to negotiate a house spot for her at Perry Street in the Bishop Brooks area of the City
of Monrovia, and to do this gave the respondent sundry sums of money. In accordance with the request, the lease was negotiated but
the name of the respondent appears thereon as lessee instead of the name of the petitioner, who had requested him to act in her behalf.
The petition additionally averred that subsequent to entry upon the premises petitioner proceeded to improve the property and subsequent
thereto lived thereon for a considerable period of time. It was not until a substantial period of time had elapsed that respondent
accosted her and endeavored to evict her from the premises. Thereupon, this petition was filed, praying the court to effect reformation
of the agreement by removing therefrom the name of the respondent and substituting hers in his stead. Thereafter, respondent answered
the petition, alleging the averments contained therein were false and misleading, for both parties to the action had lived together
on the premises in question but due to certain questionable acts of the petitioner she had been asked by the respondent to quit the
premises. The answer further said that the agreement of lease was executed between respondent and the lessors for consideration out
of the resources of the respondent and predicated upon his request for lease of these premises in his own behalf. After pleadings
had rested and the case was ruled to trial, Judge Emmanuel N. Gbalazeh, presiding by assignment over the aforesaid court, proceeded
into the hearing of the matter, predicated upon the equity jurisdiction with which he was clothed. The trial culminated in a decree
in favor of the petitioner when the judge ordered the reformation as had been requested. Exceptions were thereupon made to the

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decree and an appeal to this Court prayed for and received as a matter of right. Thereafter, the respondent,
now appellant, proceeded to perfect the appeal. The bill of exceptions, appeal bond and notice of appeal were thereafter prepared
and filed. However, when the case was called for hearing by us, we observed that a motion to dismiss the appeal had been filed by the appellee predicated upon one count, which states : "Because appellee says that the purported.
bond as filed by the appellant does not conform with the

statutory requirement relating to the tender of the bond by natural persons ; that is to say, the appellant failed to make any showing that the sureties on the appeal bond were real property owners." For authority the movent cited the Civil Procedure Law, L. 1963-64, ch. III, with specific reference to sections 6201 through 6203. The appellant filed a three-count affidavit in opposition to the motion to dismiss. The first count was not a specific traverse and, therefore, does not merit our attention. The second count contended that the motion should be overruled because appellee in the motion had failed to close the count, or the prayer, with the legally required sentence, "All of which appellee is ready to prove." Count three was a general denial of the allegations contained in the motion and the law relied upon. Let us turn, therefore, to the law relied upon by appellee in his motion to dismiss for the purpose of determining whether or not it entitled him to have his motion sustained. The following is found in L. 1963-64, ch. III, Civil Procedure Law, § 6301 et seq.: "6301. Security for bonds. Except otherwise provided by statute, any bond given under this Title shall be secured by one or more of the following: "(a) Cash to the value of the bond ; or cash de-

posited in the bank to the value of the bond as evidenced by a bank certificate; "(b) Unencumbered real property on which taxes have been paid and which is held in fee by the person furnishing the bond ; "(c) Valuables to the amount of the bond which are easily converted into cash; or "(d) Sureties who meet the requirements of section 63oz. . . ." "6302. Legally qualified sureties. "1. Who may be sureties. Unless the court orders

otherwise, a surety oil a bond shall be either two natural persons who fulfill the requirements of this section or an insurance company authorized to execute surety bonds within the Republic. "2. Lien on real property as security. A bond upon which natural persons are sureties shall be secured by one or more pieces of real property located in the Republic, which shall have an assessed value equal to the total amount specified in the bond, exclusive of all encumbrances. Such a bond shall create a lien on the real property when the party in whose favor the bond is given has it recorded in the docket for surety bond liens in the office of the clerk of the Circuit Court in the county where the property is located, or if it is in the Hinterland, in the office of the clerk of the Circuit Court in the nearest county. Each bond shall be recorded therein by an entry showing the following: "(a) The names of the sureties in alphebetical order ; "(b) The amount of the bond; "(c) A description of the real property offered as security thereunder, sufficiently identified to clearly establish the lien of the bond; "(d) The date of such recording; "(e) The title of the action, proceeding, or estate.

"3. Affidavit

of sureties.

The bond shall be ac ; companiedbyfvtohsureicnag

the following: "(a) A statement that one of them is the owner or that both combined are the owners of the real property offered as security; "(b) A description of the property, sufficiently identified to establish the lien of the bond ; "(c) A statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered ; and " (d) A statement of the assessed value of each property offered. "A duplicate of the original affidavit required by this section shall be filed in the office where the bond is recorded. . . ." From the above-cited law, it is quite clear that the provisions heretofore applying to the filing of appeal bonds have been substantially modified by the inclusion of additional prerequisites to the making of a valid appeal bond. In the case at bar, the appellant had produced no evidence when attacked to show this Court that the natural persons signing as sureties have real property equal to the amount of the bond and that the bond had been recorded in the docket for surety bond liens in the office of the clerk of the Sixth Judicial Circuit, decribing the real property that was being used as collateral to secure the obligation, which recordation would include the provisions stipulated in the aforesaid section 63oz (2 a, b, c, d, e). It is quite clear that counsel for appellant was totally unfamiliar with the provisions of the new Civil Procedure Law when he prepared, filed and argued the motion to dismiss. Since it is patently clear that the bond before the court is defective for failure to comply with the statutory requirements, we must hold that which is not legally done is not done at all. Therefore, this Court must refuse

jurisdiction over the hearing of the merits of the case and sustain the motion to dismiss. Costs in these proceedings are ruled against appellant. And it is hereby so ordered. Motion granted, appeal dismissed.

Int'l Trust Co. v Wiah et al [1983] LRSC 32; 30 LLR 751 (1983) (4 February 1983)

THE MANAGEMENT OF THE INTERNATIONAL TRUST COMPANY OF LIBERIA, Appellant, v**. MOSES WIAH** et al. and THE BOARD OF GENERAL APPEALS, Appellees.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: January 20, 1983. Decided: February 4, 1983.

1. Our statute provides four ways by which one may secure a bond. These are: (1) by offering cash to the value of the bond, or by depositing cash in the bank to the value of the bond as evidenced by a bank certificate or a certificate of deposit. This type of bond is commonly referred to as "cash bond"; (2) by giving unencumbered real property on which taxes have been paid up to date and which property is held in fee by the person(s) furnishing the bond; (3) by giving valuables to the amount of the bond which can be easily converted into cash; and (4) by two or more sureties who are owners of real property in the Republic of Liberia and who meet the requirements of the statute with respect to legally qualified sureties. Civil Procedure Law, Rev. Code, 1: 63.2.

2. Where the bond is insufficient, the remedy available to the appellee is to except to the sufficiency of the bond within three days so as to allow the appellant to move to justify.

3. Where the trial court loses jurisdiction by reason of the perfection of the appeal, and the bond is found to be insufficient, appellee cannot except to the sufficiency of the bond in the trial court.

4. A certificate of deposit is a written statement from a bank that the party therein has deposited the amount of money specified in the certificate, and that the same is held subject to his order in accordance with the terms thereof. It is the bank’s promissory note.

5. The obligation of a guarantor is collateral and secondary to that of the principal to discharge the obligation for which he is primarily liable. A guarantor is not bound like a surety to do what the principal has contracted to do, but answers only for the consequences of the default of the principal.

6. The contract of suretyship is made at the same time and usually with that of the principal, while that of the guarantor is a contract separate and distinct from that of the principal. Hence, unless authorized by statute, a guarantor cannot be sued jointly with the principal debtor.

7. Where the appealing party elects not to furnish a surety bond, the statute requires that he must part with the cash to the value of the bond; or he may part with the valuables offered to the amount of the bond, or he may part with unencumbered real property to the value of the bond; but he is not permitted to keep in his custody the security offered pending final decision of the court.

8. Generally there can be no surety without a principal. It is the principal who is originally and primarily liable for the payment of the debt or the performance of the act for which the surety is bound in an accessory or collateral capacity. Thus, it may be said that the surety, as distinguished from the principal, is the one who undertakes to pay the debt or perform any other act for which the principal has bound himself by contract in the event that the latter fails therein.

9. The general rule is that an appellant is not a competent surety on the appeal bond or undertaking, although one who is a nominal party to the appeal may act as surety. An appellant cannot be surety on his bond.

10. A corporation cannot act as surety on an appeal bond or undertaking unless empowered to do so by statute.

11. Where a statute empowers a corporation to act as a surety, it cannot act as its own surety, or if it is a party to the case appealed from or party to the appeal.

Growing out of a final judgment of the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, confirming the decision of the Board of General Appeals in an action of unfair labor practice, the defendant, Appellant ITC, noted its exceptions and announced an appeal to the Supreme Court.

Upon perfection of the appeal, appellee filed a motion to dismiss the appeal on the grounds that the appeal bond is defective. Appellee contends that the bank certificate, evidencing the deposit of cash, and relied upon as security for the bond, was issued by The International Trust Company of Liberia, which is the same entity as appellant. In other words, appellant has deposited the cash with itself, contrary to the appeal statute. Appellee further contends that appellant has positioned itself as both principal and surety on its own bond.

The Supreme Court upon review of the records held that the bank certificate in support of the bond is not a certificate of deposit as required by the appeal statute, but rather a contract of guaranty, which is contrary to the appeal statute. The Court also found that the bond was not signed by any surety; that it is not accompanied by affidavit of sureties; and that it has no certificate of property valuation, all of which are statutory requirements for the perfection of an appeal. Accordingly, the Supreme Court granted the motion and dismissed the appeal.

MacDonald J. Krukue and Tuan Wreh appeared for appellant. Toye C. Barnard with Raymond A. Hoggard and George E. Henries appeared for appellees.

MR. JUSTICE SMITH delivered the opinion of the Court.

The records we have before us in connection with the motion to dismiss appellant's appeal show that the management of The International Trust Company of Liberia (ITC), appellant therein, had petitioned the People's Civil Law Court for the Sixth Judicial Circuit, Montserrado County, for a judicial review of an administrative decision rendered against the appellant by the Board of General Appeals, Ministry of Labor, growing out of a complaint of unfair labor practices filed against the appellant Company by its employees, appellees herein.

The court below heard the petition and on the 15th day of October, 1982, entered final judgment confirming the administrative decision of the Board of General Appeals. To this final judgment of the court, the appellant excepted and announced an appeal to the Honourable the Supreme Court of Liberia. The appeal was granted and appellant has perfected its appeal for review by this Court.

The appeal having been perfected, appellees have filed a motion to dismiss the appeal on the ground of defective appeal bond. For the benefit of this opinion, we quote hereunder counts one

and two of the six-count motion which, in our opinion, cover the contention of the appellees in the motion. The other four counts are a repetition of the averments contained in counts one and two of the motion. The two counts read, as follows:

"1. Because appellees say that appellant has failed to perfect its appeal as provided by statute; in that, the statute has laid down certain procedures by which an appeal bond can be secured. One of the procedural requirements is cash to the value of the bond or cash deposited in the bank to the value of the bond as evidenced by a bank certificate. In the instant case, the appellant has elected to deposit cash in the bank and has attached a bank certificate to the appeal bond. But in doing so, the appellant has allegedly deposited the cash with itself and has issued its own certificate, which is contrary to the intent and purposes of the statute. There-fore, the appeal bond filed by the appellant is defective.

2. And also because appellees say that the appeal should be further dismissed, because the appellant is the appealing party in this case and cannot, at the same time, be a surety to its own appeal bond. Under the law, an appellant is not a competent surety on an appeal bond."

According to the averments of counts one(1) and two (2) of the motion, the appellees are contending substantially that, appellant allegedly deposited cash with itself as security for the appeal bond, contrary to the statute relating to depositing cash in the bank to the value of the bond, evidenced by a bank certificate, and that the appealing party cannot be both principal and surety at the same time to an appeal bond; for, under the law, an appellant is not a competent surety to an appeal bond.

To this motion of the appellees, appellant filed an eight count resistance contending in substance that all the procedural steps required by law to perfect an appeal have been taken by appellant, that is, by depositing cash in the bank as evidenced by a bank certificate. Therefore, appellant prayed the dismissal of appellees' motion for being unmeritorious. We only deem counts one, three and four of the resistance necessary for our consideration; the other five counts are repetition of the contention raised in the three counts to be considered.

In count one of the resistance, the appellant contends that appellees should have filed a notice of exception to the insufficiency of the appeal bond within three days after being notified of the filing of said bond, and not having done so, they have waived their right to raise any objection to the insufficiency of the bond.

Count one of the resistance cannot be sustained, because in the first place, appellees have not attacked the insufficiency of the bond; but rather, appellees contend that the appeal bond is materially defective. A defective bond is quite different in nature from an insufficient bond. Under justification of surety as found in Civil Procedure Law, Rev. Code 1: 63.6, a party should except to the sufficiency of a surety within three days to allow the said surety or sureties to file motion to justify; but the appellees are not questioning the sufficiency of the surety on the appeal bond. In fact, appellees could not have filed a notice of exception when the trial court had already lost jurisdiction by reason of the perfection of the appeal. Appellees contend that the appeal bond is defective because of the reason stated in counts one and two of the motion. It is, therefore, our holding that count one of the resistance should be, and the same is hereby overruled.

In count three of the resistance, appellant contends, and its counsel argued, that The International Trust Company of Liberia (ITC), appellant herein, is not the same entity as the International Trust Company Bank, which issued the bank certificate under attack; rather, International Trust Company Bank is the banker of The International Trust Company of Liberia. That ITC Bank is banker for The International Trust Company of Liberia and INTRUSCO; hence, ITC Bank is capable of issuing a bank certificate to The International Trust Company of Liberia.

The averments in count three of the resistance that, the appellant, The International Trust Company of Liberia, is a separate and distinct entity from ITC Bank is not supported by any documentary evidence under the principle of notice and in fairness to the appellees as well as the Court. Taking for granted that the management of The International Trust Company of Liberia, appellant, and ITC Bank, are two separate and distinct entities, does our law require a certificate of cash as guarantee for a bond, or that cash to the value of the bond must be deposited in a bank as evidenced by a certificate of deposit? Is the certificate under attack a certificate of deposit or a certificate in the form of contract of guaranty?

We do not agree, in the absence of any legal proof, that the appellant, ITC, is not the same entity that issued the certificate in question. We also disagree that the certificate in question was issued by ITC Bank, or any other bank for that matter, as claimed by the appellant, because the subject bank certificate does not indicate on its face that it was issued by ITC Bank and signed by its authorized officer, that is to say, the president or manager of said bank. Under the circumstances, count three of the resistance is not sustained.

In count four of the resistance, the appellant has said that there is no law that precludes an appellant from being his own surety. Whilst we intend to expound on this issue, we must state here briefly that we disagree with the appellant; for, if one elects to file a surety bond, the law requires two or more qualified sureties besides the principal. Therefore, in surety bond the principal cannot be both principal and surety at the same time.

For the benefit of this opinion, we hereunder quote word for word the appeal bond and the bank certificate as tendered by the appellant, which appellees have attacked for being defective; they read, as follows:

"APPEAL BOND
"KNOW ALL MEN BY THESE PRESENTS: That we, the management of ITC, appellant-Principal; and, by virtue of Bank Certificate Cash Guarantee to appellant's Appeal Bond, dated November 17, 1982, deposited in The International Trust Company of Liberia, Monrovia, Liberia; as evidenced by the aforesaid Bank Certificate hereto attached to the Bond, and are hereby bound unto the Sheriff for Montserrado County in the sum of $606,898.20 (six hundred and six thousand, eight hundred & ninety-eight dollars and twenty cents)--constituting one and one-half of the principal amount awarded the appellees, current money of this Republic, to be paid to Moses Wiah et al., appellees or their legal representatives, jointly and severally firmly by these presents.

The condition of this obligation is, we will indemnify the appellees from all costs and all injuries arising from the appeal taken by the above named appellant from the ruling/judgment of His Honor Napoleon B. Thorpe on the 15th day of October, 1982, in the case. The Management of ITC v. the Board of General Appeals and Moses Wiah et al., judicial review, and will comply with the Final ruling/judgment to which said appeal is taken or any other court to which the said action may be removed.
The penalty of this bond is: $606,898.20 (six hundred and six thousand, eight hundred and ninety-eight dollars and twenty cents).

In Witness whereof, we have hereto subscribed this 30th day of November, 1982. "IN THE PRESENCE OF:
_____ sgd. (illegible)
THE MANAGEMENT OF ITC
APPELLANT-PRINCIPAL
_____ BANK CERTIFICATE CASH
GUARANTEE TO APPEAL

BOND NOVEMBER 17, 1982
"APPROVED FOR; $606,898.20

Sgd. Napoleon B. Thorpe
ASSIGNED CIRCUIT JUDGE, SEPTEMBER TERM, CIVIL LAW COURT, 1982, November 30, 1982."

"BANK CERTIFICATE
CASH GUARANTEE TO PETITIONER'S APPEAL BOND

"KNOW ALL MEN BY THESE PRESENTS that we, The International Trust Company of Liberia (ITC), of the City of Monrovia, Republic of Liberia, hereby certify that, we undertake to fully indemnify Moses Wiah et al., the above named co-respondents, in an amount not exceeding $606,898.20 (SIX HUNDRED AND SIX THOUSAND EIGHT HUNDRED AND NINETY-EIGHT DOLLARS AND TWENTY CENTS)--constituting one and one-half of the principal amount awarded the co-respondents, out of monies available and set aside in this Bank for and in respect of all costs and injuries which the said co-respondents might suffer by reason of the judicial review prayed for by the petitioner against the said co-respondents in the event it is finally determined that the co-respondents are entitled to recover in the said judicial review; otherwise, these presents shall remain null and void.

Issued in the City of Monrovia,
Liberia, this 17th day of November, A. D. 1982.
The International Trust Company of Liberia
Sgd. (illegible)
80 Broad Street
Monrovia, Liberia."

Our statute provides four ways by which one may secure a bond, that is: (1) by offering cash to the value of the bond, or by depositing cash in the bank to the value of the bond as evidenced by a bank certificate or a certificate of deposit. This type of bond is commonly referred to as "cash bond"; (2) by giving un-encumbered real property on which taxes have been paid up to date and which property is held in fee by the person furnishing the bond; (3) by giving valuable to the amount of the bond which can be easily converted into cash; and (4) by two or more sureties who are owners of real property in the Republic of Liberia and who meet the requirements of the statute with respect to legally qualified sureties. Civil Procedure Law, Rev. Code 1: 63.2. This

type of bond is commonly referred to as "paper or surety bond". Our statute on the point reads as follows:

"(a) Cash to the value of the bond; or cash deposited in the bank to the value of the bond as evidenced by a bank certificate;

(b) Unencumbered real property on which taxes have been paid and which is held in fee by the person furnishing the bond;

(c) Valuables to the amount of the bond which are easily converted into cash; or

(d) Sureties who meet the requirements of section 63.2.

The sheriff receiving cash, a bank certificate, stocks or other negotiable securities, or valuables shall deposit it or them in the government depository or a reliable bank, and secure a receipt therefor showing the amount deposited and the purpose of the deposit and containing a statement that the deposit will be released only upon the written order of a judge of the court." Ibid., 1: 63.1.

It would seem that appellant elected to tender its appeal bond as provided by subsection (a) or (d) of section 63.1 of the statute quoted supra, and hence, the other two ways by which a bond may be secured will not be discussed in this case.

There is, in the records, a paper or surety bond tendered by the appellant and approved by the trial Judge for $606,898.20. We also find in the records a bank certificate certifying that cash to the value of the appeal bond had been set aside to indemnify the appellees. With these documents and in view of appellees motion, the question that has arisen is, whether or not appellant has posted a valid appeal bond in keeping with the requirements of the statute quoted supra?

Recourse to what appellant termed to be its appeal bond and which was approved by the trial judge for the amount of $606,898.20 shows that said bond is not signed by any surety neither is it accompanied by affidavit of sureties nor certificate of property valuation as required by our statute on surety bond. Appellant's appeal bond in question to which the bank certificate is attached is defective, and therefore renders the appeal dismissible.

An inspection of the bank certificate reveals that it is not a certificate of deposit, because it shows on its face: "Bank Certificate Cash Guarantee to appellant's appeal bond, November 17, 1982"; instead, it is a contract of guaranty, which is not one of the requisites of our statute to secure a bond. A certificate of deposit is defined by Bouvier Law Dictionary to be: "A written statement from a bank that the party therein has deposited the amount of money specified in the certificate, and that the same is held subject to his order in accordance with the terms thereof." And according to Black's Law Dictionary 286 (4th ed), certificate of deposit is "a written acknowledgment by the bank or banker of the deposit with promise to pay to depositor, to his order, or to some other person or to his order. It is the bank's promissory note."

According to our statute on bond as quoted supra, the sheriff receiving cash, a bank certificate, stock or other negotiable security or valuables, shall deposit it or them into the government depository or a reliable bank, and secure a receipt therefor, showing the amount deposited and containing a statement that the deposit will be released only upon the written order of a judge of the court. Civil Procedure Law, Rev. Code 1: 63.1.

In the instant case, it is not shown on the face of the certificate that any cash was deposited by the appellant, nor does the certificate contain a statement of promise to pay the depositor, or to his order or to some other person as is required by statute; the certificate is also not signed by the president or manager of any banks, not even the ITC Bank which appellant claimed to be a separate and distinct entity from The Inter-national Trust Company of Liberia; instead, the certificate is in the nature of a contract of guaranty which is contrary to our statute on bonds and security, and, hence, unenforceable as against the guarantor unless proof is made of liability and default on part of the principal debtor.

Assuming that The International Trust Company of Liberia, the appellant, that issued the certificate was a guarantor as the certificate indicates and the appellant as principal was someone other than the management of ITC, Common Law writers have held, and we quote:

"A guarantor not being a point contractor with the principal, is not bound like a surety to do what the principal has contracted to do, but answers only for the consequences of the default of the principal. There are certain well-defined distinctions and defenses in the nature of the legal obligations created. A surety is primarily and jointly liable with that of the principal debtor. His obligation is created concurrently with that of the principal debtor. An action can be maintained against both jointly, even without statutory authority so to do. But the obligation of a guarantor is collateral and secondary to that of the principal debtor to discharge the obligation for which he is primarily liable. The contract of surety is made at the same time and usually with that of the principal, while that of the guarantor is a contract separate and distinct from that of the principal. Unless authorized by statute, a guarantor cannot be sued jointly with the principal debtor." 38 AM. JUR. 2d, Guaranty, §15.

In this cases, the principal and the guarantor being the self-same entity, in the event of any default, against whom would the contract of guaranty be enforced without infringement upon the rights of the guarantor? In fact, our law does not require a contract of guaranty in securing an appeal bond, and therefore any appeal bond secured contrary to the statute is defective to all intents and purposes.

Appellees contend, and their counsel strongly argues, that the appellant is both principal and surety on its own appeal bond by reason of the certificate which it issued on its own behalf, contrary to the statute. Our distinguished colleague who is dissenting from us feels that the appellant being a banking institution, there was nothing wrong with it setting aside the amount of the bond in the bank to indemnify the appellees. Counsel for appellant contended that the management of ITC is a separate and distinct entity from The International Trust Company Bank where the amount of the bond is allegedly set aside to indemnify the appellees.

In the first place, if ITC Bank is not the same entity as the Management of ITC, appellant in this case, and it is true that appellant deposited money in ITC Bank, sufficient to indemnify the appellees, appellant should have issued a manager's check drawn on the ITC Bank, certified by ITC Bank, and presented to the court or sheriff. This would have definitely satisfied the provisions of the statute, requiring the offering of cash to the value of the bond; otherwise, cash to the value of the bond should have been deposited and a certificate of deposit issued by the bank, satisfying that the appellant, the management of The International Trust Company of Liberia, had deposited cash to the value of the bond in keeping with statute. The certificate under attack reveals that it is not issued by the ITC Bank nor does it bear the signature of the president or manager of any bank; to the contrary, it shows on its face that The International Trust Company of Liberia, appellant herein, issued the certificate and not any bank, and, therefore, it is no bank certificate of deposit as contemplated by statute. From our interpretation of the statute on bonds and security, it is not intended for the appealing party to be his own surety at the same time. The different ways by which a bond may be secured in our jurisdiction makes no mention

that a principal furnishing a bond can at the same time be his own surety. The only requirement, as already stated, is that the person furnishing the bond may either give cash to the value of the bond, or may deposit cash in the bank to the value of the bond as evidenced by a certificate of deposit; or give unencumbered real property on which taxes have been paid up to date and which property is held in fee by the person furnishing the bond; or he may give valuables to the amount of the bond; or he may secure the bond by two or more qualified sureties. There is no where provided in the statute that the person furnishing the bond should set aside and retain the amount of the bond in his custody.

In the second place, we hold that where the appealing party does not elect to furnish surety bond, the statute requires that he must part with the cash to the value of the bond; part with the valuables offered to the amount of the bond, or he may part with the unencumbered real property to the value of the bond; but he is not permitted to keep in his custody the security offered pending final decision of the court.

In 50 AM. JUR., Suretyship, § 3, it is provided that: "The relation created by the suretyship agreement is a tripartite one between the party insured, the principal obligor/debtor, and the surety; and generally speaking, there can be no surety without a principal. The principal is the one who enters into the main contract with the obligee and who is directly interested in and benefitted thereby. He, and not the surety, is the one to whom or from whom the consideration for the main obligation flows, and so one who receives and retains the consideration or benefit of a contract cannot occupy the position of a surety. It is the principal who is originally and primarily liable for the payment of the debtor or the performance of the act for which the surety is bound in an accessory or collateral capacity. Thus, it may be said that the surety, as distinguished from the principal, is the one who undertakes to pay the debt or perform any other act for which the principal has bound himself by contract, in the event that the latter fails therein."

For further authority as to whether the appealing party can be a competent surety for himself, we have the following:

"The general rule is that an appellant is not a competent surety on the appeal bond, or undertaking although one who is a nominal party to the appeal may act as surety. An appellant cannot be surety on his bond... ." 4A C.J.S., Appeal and Error, § 536.

The management of The International Trust Company of Liberia is a corporation organized and operating under the laws of the Republic of Liberia, and here is what legal authorities say:

"CORPORATION. A corporation cannot act as surety on an appeal bond or undertaking unless empowered to do so by statute. However, statutes do sometimes empower corporations to act in such capacity. Thus, there are statutes creating corporations for the express purpose of acting as sureties on bonds and undertakings, and these corporations can generally act as sureties on appeal bonds and undertakings, but not if it is a party to the judgment appealed from or to the appeal. The offer of a corporation to become surety on an appeal bond should not be accepted if there is any doubt as to the power of the corporation to act in that capacity" (emphasis ours) 4A C.J.S., Appeal and Error, §536.

Appellant contends, and its counsel strongly argued that the International Trust Company Bank is banker for the appellant, International Trust Company of Liberia. This could be true, but there is no showing that International Trust Company Bank is an insurance company authorized by law to execute surety bonds within the Republic of Liberia in keeping with Civil Procedure Law, Rev. Code, 1: 63.2(1). When a question was propounded by the bench to counsel for appellant to say which officer of the bank signed the certificate, he answered that it might have been the Vice President, but could not exactly say because the document was prepared in his absence.

From all that we have discussed and the legal authorities cited, it is our considered opinion that there is neither a surety bond filed by the appellant nor a cash bond tendered to indemnify the appellees in keeping with our statute.

In the case Talery and Cooper v. Wesley, [1972] LRSC 14; 21 LLR 116 (1972), this Court held that defective appeal bonds render appeals subject to dismissal. See also Cole v. Peabody, 13 LLR 252 (1958).

In as much as we would have liked to hear this case on its merits and decide the same upon the evidence, we are forbidden by law from doing so, because of the negligence and failure of the appellant to adhere to the mandatory requirements of the appeal statute in order to have given this Court jurisdiction to do so. The subject appeal bond of the appellant being materially defective, the motion to dismiss the appeal must be, and the same is hereby granted and the appeal dismissed, with costs against the appellant. And it is hereby so ordered.

Motion granted.

MR. JUSTICE YANGBE dissents.

This Court has held in many cases that an appeal should not be dismissed on any ground except those specifically provided by statute. It is universally agreed that statute regulates all procedures in courts and where the statute is fully complied with there is no reason to inject anything into the statute that is not provided therefor. According to the statute on security for bond, it is provided as follows:

"Except as otherwise provided by statute, any bond given under this title shall be secured by one or more of the following:

(a) Cash to the value of the bond; or cash deposited in the bank to the value of the bond as evidenced by a bank certificate;

(b) Unencumbered real property on which taxes have been paid and which is held in fee by the person furnishing the bond;

(c) Valuable to the amount of the bond which are easily converted into cash; or

(d) Sureties who meet the requirements of section 63.2. The Sheriff receiving cash, a bank certificate, stocks or others negotiable securities, or valuables shall deposit it or them in the government depository or a reliable bank, and secure a receipt therefor showing the amount deposited and the purpose of the deposit and containing a statement that the deposit will be released only upon the written order of a judge of the court." Civil Procedure Law, Rev. Code 1:63.1.

Any bond given under this title shall be secured by one or more of the following enumerated above; therefore, it is obvious that appellant had a choice to elect paragraph (a) only of the statute hereinabove.

According to subparagraph (c) above, the sheriff receiving cash, stock or any other negotiable sureties, or valuable shall deposit it or them in the government depository or a reliable bank and secure a receipt showing the amount and the purpose for them and containing a statement that the deposit will be released only upon a written document from a judge of the Court.

In my opinion, it is not the intent of statute, in case of a cash bond where the appellant is authorized to deposit the cash in the bank and exhibit evidence by a bank certificate for such deposit, and again authorized the sheriff to deposit the same amount in the bank and obtain a certificate; to hold otherwise, will be an obvious contradiction. In this case, no stock or other negotiable sureties or valuables were offered as a bail bond, therefore, the portion of the statute, that is, (c) above is not applicable.

The appeal bond that is posted by the appellant in this case, and quoted in the majority opinion, is simply to obligate appellant, and to obtain some evidence of approval thereof by the trial judge as well as for the full compliance with the judgment rendered against it in this case, in case the judgment is upheld by the Supreme Court. According to that bond, the space provided thereon for surety to sign, it is written "BANK CERTIFICATE CASH GUARANTEE TO APPEAL BOND, NOVEMBER 17, 1982" and above it the representative of appellant sign as appellant principal and not surety. Therefore, it is crystal clear that according to the records before us, appellant did not sign any appeal bond as surety in the case in which it is a party. As I have said earlier, this is a cash bond and according to statute I have quoted supra, "Cash to the value of the bond; or cash deposited in the bank to the value of the bond by a bank certificate", is what the statute requires.

The law cited by appellees and relied upon in the majority opinion to the effect that appellant can not be a surety to the bond in the case in which it is a party, in my opinion, is not applicable in this case because the bond in this case is a cash bond which does not require a natural person in keeping with the statute. Ibid., 1: 63.2.

According to the two count motion, as quoted in the majority opinion, for the final determination of the controversial issue raised in the motion, there is no attack on the bank certificate for not bearing the authorized signature, the sole contention of the appellees is that appellant is a party to

the suit and therefore, although it is a banking institution, it should have deposited the amount in another bank and obtain a certificate therefor.

It is holding of this Court repeatedly in several cases, including Clark v. Barbour, [1909] LRSC 1; 2 LLR 15 (1909), that court of Justice will only decide upon issues joined between the parties specifically set forth in their pleadings.

There was no attack on the bank certificate for not bearing authorized signature; therefore, it should not be injected sua sponte by the Court in its decision and should restrict itself only to the points of contentions raised in the motion. For, to do otherwise, will be a departure from the cardinal rule laid in the second volume of our law reports since 1909 and a violation of the doctrine of stare decisis.

With respect to appellant's depositing the money with its bank, and at the same time being a party to this suit, there is no inhibition in the statute that a banking institution which is a party to a suit should not deposit money in its bank and obtain a certificate therefor as evidence of cash bond. We should remember that what the law does not prohibit, it permits. Additionally, it is admitted in the motion to dismiss, that appellant is a banking institution and it is obvious that appellant was incorporated for that purpose under the laws of the Republic of Liberia. The holding, therefore, that appellant should have deposited the funds in another bank and obtain a certificate because it is a party appellant is to the effect that appellant should not exercise the function of the banking institution for which it was incorporated, especially so, when there is no complaint before us that appellant has acted ultra vires.

In its resistance, appellant contended that it has complied with all the requirements of the appeal statute.

It is quite clear that the question of inadequate indemnification of the amount of the bond is not assailed in the motion and no allegation has been made about the bank's inability to reproduce the amount when it become necessary to comply with the terms and conditions of the recognizance.

I would like to make further reference to the contention that appellant should have deposited the money into another bank and obtained certificate as evidence thereof because appellant is a party

in this case. In Tubman v. Greenfield, 29 LLR 199 (1981), decided by this Court during March Term, 1981, the appellant in that case had two sureties on the appeal bond namely, John Hilary Tubman and Isabella Gibson, who were not fee simple owners of any realty within the Republic of Liberia. Appellant himself signed the appeal bond as surety and offered unencumbered real properties of his own with affidavit of sureties signed by himself and supported by a certificate from the Bureau of Internal Revenue of the Republic of Liberia. In that case, the appellant had physical custody of the properties and only exhibited evidence of the unencumbrancy of the properties, the valuation thereof and locations. This court held the bond valid and denied the motion to dismiss the appeal. Similarly, the cash in this case was deposited with the appellant bank referred to above.

In view of what I have stated and the law cited above, I have withheld my signature from the judgment in this case. Hence, I dissent.

LEC v Tamba [1988] LRSC 54; 35 LLR 248 (1988) (29 July 1988)

THE LIBERIA ELECTRICITY CORPORATION (LEC), by and thru its Managing Director, SAMUEL N. BURNETTE, JR., Appellant, v. **JOSIAH TAMBA**, Appellee.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard Mar 18-23, 1988. Decided July 29, 1988.

1. A bond upon which natural persons are sureties shall be secured by one or more pieces of real property located in the Republic, which shall have an assessed value equal to the total amount specified in the bond, exclusive of all encumbrances.

2. A bond must show the names of the sureties, the amount of the bond, a description of the real property offered as security, sufficiently identified to clearly establish the lien of the bond, the date, and the title of the action, proceeding, or estate.

3. A surety to a bond represented as freeholder and householder is required to satisfy the requirements listed for a valid bond so as to guarantee proper ans sufficient indemnification in favour of the appellee.

4. Where a surety is represented as a freeholder and householder and such surety fails to comply with the statutory provisions under section 63.2(2), the bond will be declared as being materially defective, unless otherwise shown to be legally sufficient.

5. Typographical errors which do not actually affect the legal rights of party litigants are no grounds for the dismissal of an appeal.

6. An insurance company may be surety to a bond if so authorized by law.

7. The law does not require that an insurance company, to be surety to a bond, be a freeholder.

The Liberia Electricity Corporation, appellant herein, against whom a judgment had been rendered by the Civil Law Court for the Sixth judicial Circuit, Montserrado County, appealed to the Supreme Court fo a review of the judgment. Upon the call of the case for hearing, the Court was informed that a motion to dismiss had been filed praying the Court to dismiss the appeal on the ground that the appeal bond was defective. The bases for the claim were (1) that the insurance company, surety to the bond, had represented that it was a freeholder when in fact it was not, (2) that the affidavit of surety attached to the appeal bond had failed to state that the surety was the owner of property, to describe the property, to give the total lien, unpaid taxes and other encumbrances against the property, and to give an assessed value of the property; and (3) that the affidavit of surety had stated that the surety would indemnify the appellant rather than the appellee.

The Supreme Court disagreed with the contentions of the appellee and denied the motion to dismiss the appeal. The court held that the articles of incorporation and the certificate of authorization clearly authorized the surety, Mutual Assurance of Africa, Inc., to stand as surety to a bond, and the Court noted that under the Civil Procedure Law of Liberia, it was bound to take judicial notice of the documents. The Court observed that while the statute did prescribe that a freeholder or householder had to meet certain requirements as to the indemnification of the appellee and value of a lien on the property, those requirements were not applicable to the Mutual Assurance of Africa, Inc. as the statute did not require that an insurance company situated in the position as Mutual Assurance of Africa, Inc. should meet the requirements of a freeholder or householder.

With regard to the affidavit of surety stating that the surety would indemnify the appellant rather than the appellee, the Court said that this was a mere typographical error and that the bond and supporting documents clearly showed that the bond was intended to indemnify the appellee rather than the appellant. The Court therefore denied the motion and ordered the case docketed for hearing on the merits.

J. Emmanuel R. Reny appeared for the movant/appellee. The Steele & Steele Law Firm appeared for the respondent/appellant.

MR. JUSTICE BELLEH delivered the opinion of the Court.

The Liberia Electricity Corporation, appellant herein, appealed from the judgment of the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, in an action of damages. The appellant having satisfied the legal requirements for placing the cause under the jurisdiction of this Court of denier resort, the case was assigned for our examination of the issues presented in the respective briefs of the counsels representing the parties concerned. However, when the case was called to be heard by this Bench, counsel for appellee brought to the attention of the Court that he had filed a motion to dismiss the appeal, which we herewith quote as follows:

"APPELLEE'S MOTION TO DISMISS
1. Appellee submits that defendant/appellant's appeal bond is materially defective in that the bond indicates that Mutual Assurance of Africa, Inc. is its surety, and represents the surety thereof to be a freeholder and householder within the Republic of Liberia, and according to law, a bond to which freeholders and householders are sureties shall be accompanied by a revenue certificate indicating that said surety(ies) own the property offered as security, and that said property is of the assessed value stated in the affidavit of sureties, and shown on the face of the revenue certificate but Appellant has failed to attach a revenue certificate or a certificate of the Treasury official to the bond as mandatorily required by law, hence said failure renders said bond materially defective and an obvious legal ground for dismissal of the appeal. FOR RELIANCE: Civil Procedure Law, Rev. Code 1: 63.2(4).

2. And appellee further submits that the affidavit of surety attached to the bond is also materially defective, in that it does not meet the requirement of the law in that, the law provides that the bond shall be accompanied by an affidavit of sureties containing:

a. A statement that one of them is the owner or that both combined are the owners of the real property offered as security;

b. A description of the property sufficiently identified to establish the lien of the bond;"

c. A statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered; and

d. A statement of the assessed value of each property offered, but appellant's affidavit of sureties does not contain any of the foregoing requirements; hence, the bond along with the appeal should be dismissed. FOR RELIANCE: Civil Procedure Law, Rev. Code 1: 63.2(3).

3. And appellee further submits the appellant's affidavit of Sureties is defective in that it indemnifies the appellant instead of the appellee, when in keeping with law the appellant must indemnify the appellee from all costs or injury arising from the appeal, if unsuccessful and that he will comply with the judgment of the appellate Court.... yet, appellant has failed to comply with the controlling law. FOR RELIANCE: Civil Procedure Law, Rev. Code 1: 51.8.

4. And appellee further submits that appellant has failed to show by documentary evidence or otherwise that Mutual Assurance of Africa, Inc. is authorized to execute surety bond as mandatorily required by law, nor has the said Mutual Assurance of Africa, Inc. executed any bond on behalf of appellant as the law requires, hence, the appeal should be dismissed. Appellee contends that the annexation of an insurance certificate to its defective bond is not legal and does it render the bond legally valid. Appellee submits that the insurance certificate attached to appellant's bond merely gives Mutual Assurance of Africa, Inc. ... authorization to engage in the insurance business... and not to execute bonds. FOR RELIANCE: Civil Procedure Law, Rev. Code 1: 63.2.

WHEREFORE, appellee prays that the bond being materially defective, the appeal should be dismissed, appellant be ruled to costs and appellee be granted such other relief as justice and right demand."

In response to the motion to dismiss, appellant filed a five count resistance. For the benefit of this opinion, we hereunder quote verbatim appellant's resistance:

"APPELLANT'S RESISTANCE

1. BECAUSE appellant says that count 1 of the motion is far-fetched and has no legal tenability in law; in that, Mutual Assurance of Africa, Inc. is an insurance company authorized to carry out insurance business in keeping with the laws of Liberia, as can be seen from appellant's exhibit "A" which is a certificate issued said Mutual Assurance of Africa, Inc., and its authority to post a bond like any other insurance company, for and on behalf of a party cannot be impaired. Appellant submits that the bond as posted having the Mutual Assurance of Africa, Inc. as surety, is not defective under the law in view of the fact that said Company is legally qualified in keeping with the statute controlling to do business in Liberia. Appellant says to become a surety is in the context of doing business.

2. AND BECAUSE appellant says further to count 1 of the motion that the terms "freeholder" and "householder" have been interchangeably used with meaning in common; in that, a householder as defined by law is an occupier or inhabitant of a house as its head. The Mutual Assurance of Africa, Inc. has a family and that family has a location at a given place which is a house; consequently, Mutual Assurance of Africa, Inc. is a householder and its articles of incorporation filed with the Ministry of Foreign Affairs serves as a sufficient guarantee for revenue certificate as well as for property valuation.

3. AND ALSO further to count 1, appellant says that the purpose of section 63.2, Civil Procedure Law, Rev. Code 1, is not for legal technicality but for the purpose of identifying a surety to a bond and to be satisfied that such surety is and can be available to be served with foreclosure proceeding should such a bond become foreclosed.

4. AND COUNT 3 of the motion is a mere legal technicality and/or harmless error; in that the purpose of a bond is to indemnify an appellee and not the appellant. For what would be the rationale for a party who files a bond to indemnify itself when sue a party is the principal to the bond. Appellant submits that the bond is filed with the view and intent for appellee to be indemnified from all losses, inconveniences or other injuries appellee may sustain as a consequence of the case. Count 3 of the motion is therefore without legal reasoning and same should be overruled and with it the motion dismissed.

5. AND appellant says that count 4 of the motion is argumentative and should be overruled, and with it the entire motion be denied. Appellant submits that Mutual Assurance of Africa, Inc. has on several occasions and for several persons become surety which of course is a matter of evidence and this Honourable Forum does not hear evidence. Appellee, by its count 4, is attempting for this Court of last resort to hear evidence which is an impropriety to the rule of law and a contravention of the organic law of Liberia by appellee "...nor has the said Mutual Assurance of Africa, Inc. executed any bond on behalf of appellant as the law requires..." Appellant submits that by that statement appellee is introducing a strange (if not novel) practice in the legal system of our courts, by intending for this Court to hear evidence during a hearing. The said count should therefore be overruled and because of this, the entire motion denied.

WHEREFORE, and in view of the foregoing, appellant prays that the motion be denied and the case ordered proceeded with for the promotion of transparent justice to all concerned."

Counts one and two of the appellee's motion attack appellants appeal bond and the affidavit of surety for being materially defective, in that the bond indicates that Mutual Assurance of Africa, Inc, is its surety and represents the said surety thereof to be a freeholder and householder within the Republic of Liberia. Appellee argued that according to law, a bond to which freeholders and householders are sureties shall be accompanied by a revenue certificate indicating that the said sureties own the property offered as security, and that said property is of the assessed value stated in the affidavit of surety, all of which must be shown on the face of the revenue certificate. But appellant has failed to attach a revenue certificate or a certificate of the Treasury official to the bond as mandatorily required by law. Appellee has cited the Civil Procedure Law, Rev. Code 1: 63.2(4) for reliance.

In count one of the resistance, appellant seemed to concede the legal soundness of the contention raised in count one of the motion to dismiss the appeal with respect to the legal requirements for sureties to a bond who are freeholders and householders. However, appellant contended that Mutual Insurance of Africa, Inc. is an insurance company authorized to carry out insurance business in keeping with the laws of Liberia as evidenced by its certificate of authorization issued by the Government of Liberia marked, exhibit "A", and attached to appellant's appeal bond. Appellant further maintained that Mutual assurance of Africa, Inc. is authorized under the laws of Liberia to post bonds like any other insurance company for and on behalf of any party. Therefore, it said, the bond posted having with Mutual Assurance of Africa, Inc. as surety, is not defective.

The Civil Procedure Law, Rev. Code 1: 63.2(2) provides, under LIEN ON REAL PROPERTY AS SECURITY, as follows:

"A bond upon which natural persons are sureties shall be secured by one or more pieces of real property located in the Republic, which shall have an assessed value equal to the total amount specified in the bond, exclusive of all encumbrances. Such a bond shall create a lien on the real property when the party in whose favor the bond is given has it recorded in the docket for surety bond liens in the office of the clerk of the circuit court in the county where the property is located. Each bond shall be recorded therein by an entry showing the following:

(a) The names of the sureties in alphabetical order;

(b) The amount of the bond;

(c) A description of the real property offered as security, sufficiently identified to clearly establish the lien of the bond;

(d) The date of such recording; and.

(e) The title of the action, proceeding, or estate."

A freeholder is defined as "one having title to a realty either of inheritance or for life; either legal or equitable title. A person who possesses a freehold estate; i.e. the owner of freehold." BLACK'S LAW DICTIONARY 398.

Our Civil Procedure Law, Rev. Code 1: 63.2(2), provides that a surety to a bond represented as a freeholder and householder is required to satisfy the requirements listed thereunder as to guarantee proper and sufficient indemnification in favor of the appellee. Where a surety is represented as a freeholder and householder and such surety fails to comply with the statutory provisions under section 63.2(2), the bond must be declared to be materially defective, unless otherwise shown to be legally sufficient.

In count three of the motion to dismiss the appeal, appellant submitted that appellant's affidavit of surety was defective in that it indemnified the appellant instead of the appellee from all costs or injury arising from the appeal, if unsuccessful, and that it will comply with the judgment of the appellate court..." Appellee therefore asserted that the appellant had failed to comply with the controlling law. Appellee relied on the Civil Procedure Law, Rev. Code 1: 51.8.

For the benefit of this opinion, we hereunder quote verbatim the last paragraph on sheet 1 of appellant's appeal bond as well as paragraph (b) of appellant's surety affidavit. The last paragraph of appellant's appeal bond reads:

"The condition of this bond is that the appellant will indemnify the appellee from all costs or injuries arising from the appeal, if unsuccessful, and that it will comply with the judgment of the appellate court or of any court to which the case is removed.

Paragraph "B" of the surety affidavit reads:

"That in view of their authorization as per the attached certificate, they will indemnify Liberia Electricity Corporation, the within named defendant/appellant in the amount of $500,000.00 (FIVE HUNDRED THOUSAND DOLLARS) out of monies and properties set aside and available as stated hereinabove, for and in respect of all costs and injuries which the plaintiff/appellee might suffer by reason of an appeal taken by defendant/appellant against the plaintiff/appellee aforesaid."

A careful perusal of the above quoted portions of both appellant' appeal bond as will as the surety affidavit accompanying the appeal bond, revealed that the appellant and its surety obligated themselves to indemnify the appellee in keeping with our practice and procedure. The error was therefore one of a typo-graphical nature. Under our law, typographical errors which do not actually affect the legal rights of party litigants are no grounds for dismissal of an appeal.

Section 25.1 of the Civil Procedure Law, Rev. Code 1 provides:

"1. Public Law of Liberia. Every court of the Republic of Liberia shall without request tike judicial notice of the Constitution and of the Republic statutes and common law of the Republic.

2. Private law of Liberia and foreign law. Every court may take judicial notice without request of private acts and resolutions of the Liberian Legislature; ordinances and regulations of officers, agencies, or governmental subdivisions of Liberia; and the laws of foreign countries or their political subdivisions. If the court does not take judicial notice of any such law, it shall be an issue to be decided by the court, but the party relying on such law shall give each adverse party notice of his intention to rely on it. Notice shall be given in his pleadings, or at or before the pretrial conference, but at least ten days before trial when there is no pretrial conference; but the court may require other notice. Whether a law is judicially noticed or proof is taken, every matter specified in this paragraph shall be determined by the judge or referee and included with his conclusions of law or charged to the jury. Such findings or charge shall be subject to review on appeal as a finding or charge on a matter of law." Civil Procedure Law, Rev. Code 1: 25.1.

In the light of the above provisions of our Civil Procedure Law, the court was compelled to take judicial notice of the articles of incorporation of the Mutual Assurance of Africa, Inc. dated 15th October, A. D.1986, filed with the Ministry of Foreign Affairs. It was obligated to observe from clause 1 of the said articles of incorporation that the said Mutual Assurance of Africa, Inc. was authorized: "To become surety in and execute any bail bond or guarantee in lieu of bail or any other guarantee for what purpose the same may be required. To execute fidelity and surety bonds within the Republic of Liberia in accordance with the Liberian Code of Laws Revised, Title 1, Chapter 63, Bonds and Securities, section 63.2, pages 266-267, 'Legally Qualified Sureties' to serve as security in garnishment of asset belonging to borrowers."

Section 63.2, sub- paragraph 1 of the Civil Procedure Law, with respect to who may be sureties, provides: "Unless the court orders otherwise, a surety to a bond shall be either two natural persons who fulfil the requirements of this Section or an insurance company authorized to execute surety bond within the Republic." Civil Procedure Law, Rev. Code 1: 63.2(1).

The statutory provisions under sections 63.2, sub- paragraph 1, quoted supra, do not specifically point out other requirements which must be met to qualify an insurance company to become surety to a bond; rather, the statute provides only that the insurance company be authorized by law. There is no showing that such insurance company should be freeholder. In the instant case, the articles of incorporation of the Mutual Assurance of Africa, Inc. was duly approved by the Ministry of Foreign Affairs of the Republic of Liberia and the certificate of authorization to carry on insurance business was also issued by the Ministry of Commerce of the Republic of Liberia. Hence, the Court is convinced that the Mutual Assurance of Africa, Inc. was duly authorized

under our laws to execute surety bonds within the Republic of Liberia. Under these circumstances, the Court is of the opinion that the appeal bond executed by the Mutual Assurance of Africa, Inc. on behalf of the Liberia Electricity Corporation should be and the same is hereby declared valid to all intents and purposes.

WHEREFORE and in view of the foregoing, the appellee's motion to dismiss appellant's appeal is hereby denied and the trial of this case is hereby ordered proceeded with on its merits. Costs to abide final determination of the case. And it is hereby so ordered.

Motion denied.

Moddermann v Roberts [1888] LRSC 3; 1 LLR 218 (1888) (1 January 1888)

DASIA MASSAQUOI, Petitioner/Appellant, v. **ESTHER E. MASSAQUOI**, Executrix of the Last Will and Testament of the Testamentary Late A. MOMOLU MASSAQUOI, Respondent/Appellee.

MOTION TO DISMISS APPEAL FROM THE MONTHLY AND PROBATE COURT FOR

MONTSERRADO COUNTY.

Heard: November 23, 1987. Decided:

February 25, 1988.

1. Except as otherwise required by statute, a bond given under the Civil Procedure Law shall be secured by one or more of the following: (a) cash bond to the value of the bond; or cash deposited in the bank to the value of the bond as evidenced by a bank certificate; (b) unencumbered real property on which taxes have been paid and which is held in fee by the person furnishing the bond; (c) valuables to the amount of the bond which are easily converted into cash; or (d) sureties who meet the requirements of section 63.2., Rev. Code I: 63.1.

2. For the purpose of an appeal bond, the number of houses secured by the bond is not material, but rather it is the assessed value of the house or houses that is important.

3. While it is true that the filing of a defective bond is ground for the dismissal of an appeal, the defectiveness must be clearly shown and not assumed.

4. The primary justification for filing an appeal bond in civil cases is that it will indemnify the appellee from all costs and injury arising from the appeal, if unsuccessful, and that the appellant will comply with the judgment of the appellate court or any other court to which the case is removed. Rev. Code I: 51.8.

5. One of the grounds upon which the Court relies for the dismissal of an appellant's appeal bond is that the revenue certificate issued in favor of the appellant by the Real Estate Tax Division, Ministry of Finance, shows that no taxes have been paid on the property.

6. The inadvertent issuance of a certificate for use of tax exempt property as security to an appeal bond does not render the appeal bond defective, absent any wrong doing by the appellant.

7. Mere technicalities which do not affect the merits of the case are not favored by the Court in the dispensing of justice.

8. Property against which there is a lien can also be offered as security to secure a bond as long as the value of such property is enough to cover the total amount of the liens, unpaid taxes and other encumbrances against the property, and as long as the owner has not parted with title to such property.

9. The Civil Procedure Law provides that an appeal bond should be accompanied by an affidavit of sureties containing the following specified information: (a) a statement that one of them (the sureties) is the owner or that both combined are the owners of the real property offered as security; (b) a description of the property sufficiently identified to establish the lien on the bond; and (c) a statement of then total amount of the liens, unpaid taxes, and other encumbrances against each property offered.

10. The property offered as security to an appeal bond is for the purpose of protecting the appellee against losses as a result of costs or injury sustained by reason of the appeal.

11. The aim and purpose of the Civil Procedure Law is justice and not technicalities. Thus, courts of justice loathe the dismissal of appeals on any technical grounds which tend to bar the determination of the merits of a case.

12. The mere absence from the affidavit of sureties of the words "all taxes have been paid", and the statement instead of the words" there is no other lien, unpaid taxes and other encumbrances against the property offered herein" do not render the appeal dismissible.

The petitioner/appellant, Dasia Massaquoi, filed a petition in the Monthly and Probate Court for Montserrado County against Esther E. Massaquoi, executrix of the testate estate of the late Arthur Momolu Massaquoi, seeking revocation of the letters testamentary held by Esther E. Massaquoi. Following the trial of the case, judgment was rendered in favor of the respondent/ appellee. From this judgment, an appeal was taken to the Supreme Court.

While the matter was pending on appeal, the appellee filed a motion to dismiss the appeal. The motion was resisted and withdrawn and an amended motion was filed in its stead. The movant gave as the basis for the motion that the appeal bond was defective and of no legal validity, in that (a) the affidavit of sureties contained the clause "there is no lien, unpaid taxes and other encumbrances against the property offered herein" rather than "all taxes have been paid"; (b) the certificate attached to the bond showed the assessed value of only one building rather than three buildings as the principal surety had alleged in his letter to the Minister of Finance; and (c) the property offered as security to the bond was not taxed and that taxes had not been paid thereon since the said property was exempt from taxation. The appellee contended that as the property was tax exempt, it was not transferrable and could not be seized or sold at a public auction to satisfy the judgment in case the appellant did not prevail in the Supreme Court. The appellee also contended that as the property was tax exempt and had not been valued for tax purposes, the government had a lien thereon. Appellee quoted in support of her contention a letter from the Minister of Finance wherein he stated that the exemption granted by the government was not transferrable and that it was an oversight by his Ministry to permit such exempt property being used as bonds.

The Court rejected all of the contentions raised by the appellee, holding that while the filing of a defective bond is a legal ground for the dismissal of an appeal, the defectiveness must be clearly

shown and not assumed. The Court opined that the primary justification for the filing of an appeal bond was that the appellant would indemnify the appellee from all costs and injury arising out of the appeal and that the appellant will comply with the judgment of the Court. The Court noted that the motion had failed to show that the justification for the appeal bond would not be satisfied by the appellant.

On the issue of the defectiveness of the appeal bond because the affidavit of sureties stated that "there is no other liens, unpaid taxes and other encumbrances against the property offered" rather than that "all taxes have been paid", the Court said that it perceived of no material difference between the former clause and the latter clause, especially as the appellee had not attacked the sufficiency of the bond to indemnify her. The Court noted that the aim of the appeal statute was justice, not technicalities, and that under its reading of the mentioned statute, the clause questioned by the appellee had met the statutory standard.

In addressing the second contention of the appellee to the effect that the bond was defective since the property valuation certificate showed only one building and not three buildings as the principal surety had alleged in his letter to the Minister of Finance, the Court opined that the number of houses was not of importance to it; rather, it was the assessed value of the house(s) that was of importance to the Court. In the instant case, the Court observed that the assessed value of the one building was more than was required for the bond, and that therefore the bond was adequately covered.

Regarding the contention that the revenue certificate of the Ministry of Finance was defective in that it showed that no taxes had been paid on the property since the property was tax exempt, the Court noted that the certificate did state the value of the property, and the exemption from the payment of taxation did not render the certificate invalid or defective. The Court observed that the contention raised a mere technicality which would not be entertained; rather, it said, the Court preferred to hear cases on the merits. In any event, the Court opined, the appellee did not have standing to question or complain about the government's waiver or exemption of the owner of real property from payment of taxes thereon. That matter, the Court said, was one purely for the government. Accordingly, it denied the motion to dismiss.

Joseph P. Findley appeared for appellant. *S. Raymond Horace, Sr., Sarah J Gibson* and *M Fahnbulleh Jones* appeared for appellee.

MR. JUSTICE KPOMAKPOR delivered the opinion of the Court:

The petitioner/appellant, Dasia Massaquoi, hereinafter referred to as the appellant, on the 3rd day of March, 1984, filed a petition for the revocation of letters testamentary, growing out of the testate estate of the late Arthur Momolu Massaquoi, Monrovia, Montserrado County, against Esther E. Massaquoi, respondent/appellee and executrix of the late Arthur Momolu Massaquoi, also of the City of Monrovia, Liberia. The cause was regularly tried and judgment was rendered on March 27, 1985, in favour of the respondent/appellee, hereinafter referred to as the appellee. To this judgment, the appellant's counsel excepted and announced an appeal to this Court.

On the 23rd day of November, 1985, appellee filed a motion to dismiss the appeal now pending before this Court. After a resistance was filed on July 17, 1986, appellee withdrew the said motion and filed an amended motion on November 7, 1986.

The movant prayed that we dismiss the appeal and affirm the judgment of the trial court because, as she put it, the appeal bond was defective and of no legal validity. The appellee's motion contained eight counts which we summarize below:

1. That under the law, only real property upon which taxes are paid can be offered as security for any bond including appeal bonds; that the real property offered in the instant case as security is not taxed and taxes have not been paid thereon; and that said property cannot therefore be offered as security to the appeal. The bond, he says, is therefore bad, defective and insufficient.

2.That when appellee, Esther E. Massaquoi, wrote to Finance Minister G. Alvin Jones, objecting to the use of property exempted from taxes as security for an appeal bond, he replied that "the exemption from real estate and realty lease tax resides with the original owner and is not transferable. Hence this goes to say that it has been an oversight by allowing exempted properties to be used as bonds." That as Appleton's property was exempted from taxes, it was not transferable and could not be seized and sold at a public auction to satisfy the judgment; and further, that the government has a lien on tax exempted property because it has not been valued for tax purposes.

3. That the affidavit of sureties shows the lien that the government has on the property.

4. That the Act of the Legislature out of which grew the Administrative Regulation does not state on its face that properties exempted from taxes may be used as security to a bond and that if this was intended, it would have been so stated in the Act to corroborate section 63.1(b), under security for bond which provides that property offered for bond must be unencumbered and on which taxes have been paid.

5. That the bond is bad, defective and insufficient because the sureties' affidavit is false, misleading and untrue, in that the said affidavit states that there are no liens and unpaid taxes when in fact no taxes are paid on said property, as per the certificate from the Bureau of Revenues, Ministry of Finance.

In response to the motion, the appellant filed a fourteen-count resistance, the essence of which we also summarize herein:

1. That section 63.1 (b) of the statute relied upon by appellee/movant shows that the owner of the property offered as security should not be delinquent in the payment of his taxes or owe taxes on the property offered; that in the instant case, taxes are not due; and that the exemption from paying taxes, granted to persons furnishing bonds certainly makes the bond sufficient.

2. That the bond is valid because no lien or liens have been created against the property offered as security to the bond executed in favour of appellant.

3. That with respect to the Administrative Act, the penalty prescribed is loss of right to any tax exemption and al 0% fine on the assessed value of the property; and that the tax exemption does not divest the owner of his title to the property offered or diminish the value of the property offered as security.

4. That the averments contained in the certificate are true, since there are no other liens or unpaid taxes on the property as the property offered for the bond is exempt from taxes.

An inspection of the records certified to this Court reveals that the parties have raised three issues:

1. Whether or not the sureties' affidavit attached to the appeal bond is fatally defective as the appellee strenuously contends because the said affidavit contains the clause "That there is no other liens, unpaid taxes and other encumbrances against the property offered herein", and not the clause "all taxes have been paid"?

2. Whether or not the contention of the appellee that the appeal bond is defective because the certificate from the Bureau of Revenues, Ministry of Finance, attached thereto, shows that no taxes have been paid and that the assessed value of only one house or building and not three is supported by statute?

3. Whether or not the statement: ". . . It has been an oversight by allowing exempted properties to be used as bonds", as contained in the letter of March 31, 1986, over the signature of Honourable G. Alvin Jones, then Minister of Finance, rendered the appeal bond defective, as contended by the appellee?

We shall resolve the issues raised by the parties in the reverse order.

In answer to the third question, we quote hereunder the letter of Minister Jones, referred to hereinabove:

"MF/2-5/BIR/CIRJANS/60/ '86 March 31 , 1986
Mrs, Esther E. Massaquoi
P. 0. Box 1435
Monrovia, Liberia

Dear Mrs. Massaquoi:

In reply to your letter dated March 21, 1986, on tax free property, the sole purpose of government granting five-year tax exemption is to encourage its citizens to develop the real

estate section of the economy. In this regard, it is not intended as an instrument to retard GOL's effort in collecting legitimate taxes that are due.

However, we would like to directly quote the applicable Administrative Regulation that 'The exemption from real estate and realty lease tax resides with the original owner and is not transferrable.' Hence, this goes to say that it has been an oversight by allowing exempted properties to be used as bond. Properties that are usually qualified for exemption should have balance of zero in their tax arrears, i.e. full settlement of current real estate tax must be evident by official GOL Flag receipts.

Thanks in advance as we appreciate your interest which assisted us to correct our over-sightedness.
Kind regards,
Sincerely yours,
/s/ G. Alvin Jones
/t/ G. Alvin Jones
MINISTER OF FINANCE"

In the amended motion to dismiss, argued before this Bench, the appellee contended that in reply to a letter dated the 21st day of March, 1986, which the appellee wrote to the Finance Minister challenging the use of property under tax exemption as bond in court cases, the Minister of Finance admitted that the issuance of the certificate was a mistake. This letter of Minister Jones did not however attribute any wrong doing to the appellant herein; rather, it admitted that the granting or issuance of the certificate in favour of the appellant to support his bond was an oversight. In essence, the Minister said that allowing exempt property to be used as bond, as was done in the instant case, was not a regular practice but was an oversight which he regretted.

This Court says that by admitting that the issuance of the certificate was an oversight or an inadvertence, the Minister in fact accepted responsibility for whatever impropriety, if any, was committed. This is true because nowhere in the letter did the Minister allege or attribute any wrong doing to the appellant in obtaining this certificate, the only ground, if it had occurred, which would have been a legal reason to render said certificate and the appeal bond null and void.

The Court says that even if the Minister of Finance had requested the trial court to cancel the bond on the ground that it had issued the certificate for the purpose of being attached to the bond

inadvertently, the trial court could not have honoured such a request, because to do so would have been to penalize the innocent appellant for a mistake committed by the Ministry of Finance, an agency of government which was supposed to be satisfied before issuing the said certificate. Consequently, the contention of the appellee that the bond is defective because the Finance Minister had said in a letter that it was issued in favour of the appellant inadvertently, and also because the property mentioned therein was tax exempt, is not sustained.

Our Revised Civil Procedure Law provides, with respect to security for bonds:

"Except as otherwise provided by statute, any bond given under this title shall be secured by one or more of the following:

"(a) Cash to the value of the bond; or cash deposited in the bank to the value of the bond as evidenced by a bank certificate;

(b) Unencumbered real property on which taxes have been paid and which is held in fee by the person furnishing the bond;

(c) Valuables to the amount of the bond which are easily converted into cash; or

(d) Sureties who meet the requirements of section 63.2." Civil Procedure Law, Rev. Code 1: 63.1.

Coming to the second issue, i.e. whether or not the bond is defective because the certificate attached thereto shows the assessed value of only one building and not three as the principal surety, William N. Appleton, Jr., had alleged in his letter to the Finance Minister, dated February 21, 1987, the Court is of the opinion that for the purpose of an appeal bond, the number of houses is not material but rather the assessed value of the house or houses. The certificate showing the assessed value of the building is quoted herein below:

TOWN, MON.

"REAL ESTATE TAX DIVISION MAY 21, 1985
TO WHOM IT MAY CONCERN
STATEMENT OF PROPERTY VALUATION

"LOT NO. LOCATION VALUATION ACREAGE PROPERTY OWNER
N/N OLDEST CONGO $200, 600.00 N/N WILLIAM APPLETON, JR.
TOWN, MON

TWO HUNDRED THOUSAND SIX HUNDRED DOLLARS
THIS IS TO CERTIFY THAT THE REAL ESTATE OF THE AFOREMENTIONED PERSON IS REGISTERED AND VALUED AS SHOWN ABOVE: TAXES THEREFOR ARE EXEMPTED FOR FIVE (5) YEARS.

APPEAL BOND IN FAVOUR OF DASIA MASSAQUOI. CERTIFIED BY: /s/ (illegible)
ACCOUNTS SUPERVISOR
"SIGNED: (illegible)
DEPUTY COMMISSIONER, RETD
"APPROVED: (illegible)
ASSISTANT MINISTER FOR REVENUES, R.L."

While it is true that filing a defective bond is ground for dismissing an appeal, we hold that the defectiveness must be clearly shown and not assumed. See *West Africa Trading Corp. v. Alrine (Liberia) Ltd*, 24 LLR 24 (1975). The primary justification for filing an appeal bond in civil cases, states our Civil Procedure Code, is that it will indemnify the appellee from all costs or injury arising from the appeal, if unsuccessful, and that the appellant will comply with the judgment of the appellate court or of any other court to which the case is removed. Civil Procedure Law, Rev. Code 1 :51.8.

One of the grounds urged upon this Court for the dismissal of an appellant's appeal bond is that the Revenue Certificate issued in favour of appellant by the Real Estate Tax Division, Ministry of Finance, is defective, in that it shows that no taxes have been paid on the property. The certificate herein involved, dated May 21, 1985, signed by the Deputy Commissioner, Real Estate Tax Division, and approved by the Assistant Minister for Revenues, Republic of Liberia, shows William Appleton, Jr. to be the owner of said property; shows its assessed value to be

$200,600.00, and that taxes thereon are exempt for five years. The question that presents itself at this stage is whether the certificate just described fully meets the requirement of the statute. The relevant provision of the statute provides:

"Except as otherwise provided by statute, any bond given under this title shall be secured by one or more of the following:

"(a) Cash to the value of the bond; or cash deposited in the bank to the value of the bond as evidenced by a bank certificate;

(b) Unencumbered real property on which taxes have been paid and which is held in fee by the person furnishing the bond;

(c) Valuables to the amount of the bond which are easily converted into cash; or

(d) Sureties who meet the requirement of section 63.2". Rev. Code I :63.1.

This Court has held in several of its opinions that mere technicalities which do not affect the merits of the case are not favored in dispensing of justice. *Deadly v. Republic,* [1944] LRSC 12; 8 LLR 256 (1944) and *Michael v. Fawaz,* [1964] LRSC 8; 15 LLR 541 (1964).

The appellee has contended in her motion to dismiss that the property offered as security is not taxed and that taxes thereon have not been paid. Therefore, she says, the bond is bad and defective.

In the case *American Life Insurance Company v. Emmanuel Sandy,* [1984] LRSC 34; 32 LLR 242 (1984), the appellee therein moved this Court to dismiss the appeal bond on several grounds, one of which was a clause in the bank certificate which read: "This bond is valued until December 9, 1985, after which time it will be considered null and void." The appellee in that case argued that the clause in the bank certificate imposed a limitation on its validity which was

contrary to the statute since in the event that the case was not heard and determined by December 9, 1985, the appellant would be without any appeal bond and appellee would not be secured. In rejecting the argument of the appellee, this Court held that that was not a sufficient ground for the dismissal of the appeal, "especially so when December 9, 1985, is far more than and beyond a year." The Court continued: "This issue is prematurely raised at this time and therefore cannot be conceded . . . it is possible that this case may finally terminate prior to December 9, 1985." We have cited the *Sandy* case to show and emphasize the fact that this Court prefers hearing cases on the merits and because we believe that the petition of the appellant in the instant case is indeed stronger than that of the appellant in the earlier case.

Another case in point which we cite for the benefit of this opinion is *Tay v. Wennah,* 31 LLR (1983), decided at the March Term, A. D. 1983. In that case, one of the grounds assigned by the appellee for the dismissal of the appeal was that the property offered as security had been leased to the Government of Liberia, which lease had not expired. The contention of the appellee in the *Tay* case was that since the property offered as security for the bond had been and was still under lease to the government, it was not unencumbered, and therefore it should not have been used as security for the bond since the lease in favour of the government operated as a lien. In denying the motion, this Court held, among other things, that it was difficult to understand by what points of reasoning one could conclude that a lessee has a lien on a property leased to him, by reason of which his lessor has no right to offer said property as security to an appeal bond. The Court concluded; "It is our opinion that a property against which there is a lien, as the property offered as security in this case, can also be offered as security to secure a bond as long as the value of such property is enough to cover the total amount of the liens, unpaid taxes and other encumbrances against the property; and as long as the owner has not parted with title to such property.

Coming to the final issue, that is, whether or not the appeal bond is defective because the sureties' affidavit simply says, there is no other liens, unpaid taxes and other encumbrances against the property offered, and does not contain or carry on its face the clause, "all taxes have been paid", the Court says that it does not perceive any material differences between the two clauses, in that the former clause says that there are no unpaid taxes, liens or other encumbrances, while the latter clause says that "all taxes have been paid".

An inspection of the bond shows that there is an affidavit of sureties, sworn to on the 24th day of may, A. D. 1985, and filed with it. For the purpose of this opinion, we herewith quote from it:

"SURETIES' AFFIDAVIT

"Personally appeared before me, a duly qualified justice of the peace for Montserrado County, at my office in the City of Monrovia, County and Republic aforesaid, William N. Appleton, Jr. and Roland Bedell, SURETIES, of the City of Monrovia, Montserrado County and Republic of Liberia aforesaid, and made oath according to law, to wit:

1. That they are owners of or one of them, William N. Appleton, Jr./Roland Bedell is the owner of the real property described herein. Also hey are freeholders and householders within the Republic of Liberia.
2. The description of the property, subject of the lien of this bond is as follows;
3. That there is no other lien, unpaid taxes and other encumbrances against the property offered herein.
4. The assessed value of the property is $200,600.00.
5. That all information and allegations contained herein are true and correct in fact and in substance to the best of their knowledge and belief and as to those matters of information they verily believe them to be true and correct."

The appellee strenuously argued before this Bench that the appeal be dismissed because the affidavit of sureties attached to the bond is not in accord with the statutory requirements.

The provision of the Civil Procedure Law which is relevant to this argument states that an appeal bond should be accompanied by an affidavit of sureties containing the following specified information:

"(a) A statement that one of them (sureties) is the owner or that both combined are the owners of the real property offered as security;

(b) A description of the property, sufficiently identified to establish the lien of the bond;

(c) A statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered. Civil Procedure Law, Rev. Code 1 :63.2.

A careful perusal of the motion to dismiss indicates that the appellee has not contended, and is not contending, that she is not sufficiently indemnified by the appellant's appeal bond; nor is she

doubting the availability of the $200,600.00 laid in the bond to indemnify her in the event the judgment in the trial court is confirmed. Civil Procedure Law, Rev. Code I :51.8. Indeed, she has attacked the bond on the mere ground that the sureties' affidavit simply states on its face, there is no other lien, unpaid taxes and other encumbrances against the property offered herein", rather than the clause "all taxes have been paid." Our interpretation of section 63.2(b) of the Civil Procedure Law is that the property offered as security is for the purpose of protecting the appellee against losses as a result of costs or injury sustained by reason of the appeal. The appellee argued vigorously before us that the mere absence of the words "all taxes have been paid" from the face of the sureties' affidavit, rendered it fatally defective. We disagree with this interpretation of section 63.2 of the Civil Procedure Law. The aim and purpose of our Civil Procedure Law is "justice" and not technicalities" in construing it. Thus, in section 1.4 of the said law, it is provided: "The provisions of this title shall be construed to promote the jusIspeedy, and inexpensive determination of every action." (Emphasis supplied)

During the argument before this Bench, the counsel for appellee was asked "whether there were any taxes due?" He answered "no", but explained that the affidavit of sureties should always state that "all taxes have been paid", and that the absence of this clause simply means that the bond failed to comply with the provision of the law. This failure, he says, renders the appeal bond defective.

We cannot over-emphasize the fact that as a general principle of law, courts of justice loathe the dismissal of appeals on any technical grounds, the grounds urged upon us to dismiss the case at bar being no exception, which tend to bar the determination of the merits of a cause.

For example, in the fairly recent case of *Liberia Electricity Corporation (LEC) v. Lewis and Greenfield,* [1986] LRSC 14; 34 LLR 112 (1986), the appellees filed a motion to dismiss the appeal on the solid ground that the appeal bond was not approved by the trial judge, as required by the statute. The appellant retorted that it duly took all necessary steps to perfect the appeal. but that the clerk of the lower court had neglected to keep his sincere promise to see to it that the bond was approved by the trial judge. The appellant charged the clerk of that court with "conniving" with the appellees to have the bond forwarded to this Court without the approval of the trial judge. In short, the appellant contended that the act of the clerk could not be ground to dismiss its appeal; it being an act of court. The Revised Civil Procedure Law contains the applicable provision: "Every appellant shall give an appeal bond in an amount to be fixed by the court . . . to the effect that he will indemnify the appellee from all costs or injury arising from the appeal, if unsuccessful, and that he will comply with the judgment of the appellate court or any other court to which the case is removed. The appellant shall secure the approval of the bond by the trial judge and shall file it with the clerk of the court . . . ." Civil Procedure Law, Rev. Code 1 :51.8. (Emphasis supplied). In the *Liberia Electricity Corporation* case, the Court saw the issue

as being whether or not appellant's appeal should be dismissed for failure to file an approved appeal bond due to the failure of the clerk of the lower court to have same so signed

In denying the motion to dismiss the appeal, the Court held:

"Having scanned through the records in this appeal and compared the pleadings on both sides, our sympathy has been compelled to favour the appellant in this case who had exerted every effort and diligence in perfecting his appeal, but due to the iniquitous tendencies exhibited by the clerk below, his appeal bond, otherwise valid, could not be signed and approved by the trial judge as is required by statute and by our several opinions. The said clerk had merely forwarded the documents to this Court without the sincerity he had promised a diligent appellant, apparently for his own personal benefits." *Liberia Electricity Corporation v. Lewis and Greenfield,* [1986] LRSC 14; 34 LLR 112 (1986).

Again, we have cited the *Liberia Electricity Corporation* case and the others in order to show the abhorrence of this Court towards motions to dismiss and to indicate that the position of the appellant in the case at bar is even more deserving of our consideration. Consequently, it is our opinion that the contention that the mere absence of the words "all taxes have been paid" from the sureties' affidavit renders the bond dismissible is not only baseless but it encourages the dismissal of appeals which all courts frown upon.

The argument that the property exempted from the payment of taxes from July 23, 1984, to June 4, 1989, cannot be used as security to an appeal bond is not legally sound, not in keeping with the statutory requirement, and not convincing to this Court. The said argument is therefore overruled. The word "exempt", has been defined as, to release, discharge, wake or relieve from liability. BLACK'S LAW DICTIONARY (4th ed). Therefore, if the government decides to waive taxes to which it is entitled for a period of years on certain classes of property, does the appellee have any standing to complain, not in her capacity as a tax payer, but as an appellee? We think not.

Having traversed the relevant grounds on which the motion to dismiss is based, and in keeping with the authorities cited herein, it is our opinion and holding that the motion to dismiss appellant's appeal be, and the same is hereby denied, with costs against the appellee. And it is so ordered.

Motion to dismiss denied

Freeman et al v Lewis et al [2000] LRSC 11; 40 LLR 103 (2000) (21 July 2000)

SAMUEL A. W. FREEMAN and MUNAH WESSEH, Appellants, v. JOSEPH N. LEWIS, DEBORAH B. TECQUAH, and PATRICK C. LEWIS, Appellees.

MOTION TO DISMISS APPEAL FROM THE MONTHLY AND PROBATE COURT, MONTSERRADO COUNTY.

Heard: April 5, 2000. Decided: July 21, 2000.

1. Every appellant is required to give an appeal bond in an amount fixed by the trial court, with two or more legally qualified sureties, to the effect that he will indemnify the appellee from all costs or injury arising from the appeal, if unsuccessful, and that he will comply with the judgment of the appellate court or any other court to which the case is removed.

2. A failure to file a sufficient appeal bond within the specified time allowed by statute shall be ground for the dismissal of the appeal.

3. Unless the court orders otherwise, the sureties to a bond shall be two persons who fulfill the requirements of section 63.2(1) or an insurance company authorized by law to execute surety bonds within Liberia.

4. A bond upon which natural persons are sureties shall be secured by one or more pieces of property located in the Republic, which shall have an assessed value equal to the total amount specified in the bond, exclusive of all encumbrances.

5. A bond creates a lien on the real property given as security when the party in whose favor the bond is given records it in the docket for surety bond liens in the office of the clerk of the circuit court in the county where the property is located.

6. A surety bond must be accompanied by an affidavit of surety which shall contain the following: (a) a statement that one of the sureties or both combined are the owners of the real property offered as security; (b) a description of the property, sufficiently identified to establish a lien on the property; (c) a statement of the total amount of the liens, unpaid taxes, and other encum-brances against each property offered; and (d) a statement of the assessed value of the property offered.

7. A surety bond must also be accompanied by a certificate of a duly authorized official of the Ministry of Finance certifying that the property is owned by the surety or sureties claiming title to it in the affidavit and that it is of the assessed value stated therein.

8. Where the language of a statute is clear and unambiguous there shall be no need for construction.

9. Every statute must be construed with reference to the object intended to be accomplished by it.

10. In order to ascertain the object of a statute, it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one.

11. A statute should be given the construction which is best calculated to advance its object by suppressing the mischief and securing the benefits intended.

12. The posting of cash as security to an appeal bond does not meet the requirements of an appeal bond, and therefore renders the appeal bond defective and insufficient.

13. The language of an appeal bond statute prescribing a penalty for insufficiency or defectiveness of the bond after the lower court loses jurisdiction is mandatory and not left to the discretion of the appellant.

Appellants, whose appointment as administrators of an estate was terminated and their letters of administration revoked by the Monthly and Probate Court for Montserrado County, on petition filed by the appellees, appealed the trial court's ruling to the Supreme Court for review. A motion to dismiss the appeal was filed by the appellees, asserting as the reason therefor that the cash bond posted by the appellants had failed to meet the statutory requirements for an appeal bond, which mandates that the bond be secured by one or more sure-ties who shall be natural persons holding title to real property in Liberia, or by an insurance company duly authorized by law to execute surety bonds in Liberia.

The Supreme Court upheld the contention of the appellees and dismissed the appeal, holding that the appeal bond posted by the appellants which was secured by cash was in violation of the appeal statute whose requirements were mandatory and not intended to be complied with at the discretion of the appellants. The Court noted that the statute governing appeal bonds clearly required that natural persons be sureties to the bond and that such persons hold real property in the Republic, which property had to be used as security to the bond, and be accompanied by an affidavit of sureties and a statement from the Ministry of Finance that the sureties were the owners of the property or properties. The statute did not provide for the posting of a cash bond in fulfillment of one of the requirements for completion of an appeal to the Supreme Court. The

Court observed that a failure by the appellants to strictly comply with the statute was ground for the dismissal of the appeal. Accordingly, the motion to dismiss was granted and the appeal was ordered dismissed.

Roger K. Martin, Sr. appeared for movants/appellees. Frederick D. Cherue appeared for respondents/appellants.

MADAM CHIEF JUSTICE SCOTT delivered the opinion of the Court.

This cause of action commenced in the Monthly and Probate Court for Montserrado County, wherein appellees, movants in the court below, filed a petition for the revocation of letters of administration against the appellants and prayed the said Monthly and Probate Court that appellees be appointed instead as administrators of the estate. The petition for revocation of letters of administration was granted on March 24, 1999. To this ruling, the appellants excepted and announced an appeal therefrom to the Supreme Court. The bill of exceptions were duly filed and approved. Subsequently, on May 24, A. D. 1999, appellants secured an appeal bond in cash, in the sum of L$1,500.00. Appellants completed the appeal process within statutory time.

In September 1999, appellees filed a motion to dismiss appellants' appeal, counts 2, 3, and 4 of which the Court herewith quotes.

"(2) Movants further say that in respondents attempt to secure their appeal bond, they posted cash in the sum of one thousand, five hundred Liberian dollars (L$1,500.00) and based on said cash, they filed their appeal bond on the 24th day of May, A. D. 1999..."

(3) Movants respectfully submit that the law on securing appeal bond is clear and unambiguous as found under section 51.8, pages 250 and 251 of 1 LCLR. Movants contend that in keeping with the above quoted statutory provision controlling the manner in which an appeal bond shall be secured, coupled with several opinions of this Honourable Court on this issue, the respondents appeal bond is glaringly and incurably defective, and as such the appeal is unsecured according to law and should be dismissed as a matter of law.

(4) Movants further contend that securing an appeal bond is distinguished and distinct from securing an appearance bond or any other bond under chapter 63, section 63.1, and 63.2 of 1 LCLR, at pages 266 and 267, which do not apply to securing an appeal bond."

Respondents filed resistance to the motion, counts 7,11,12, and 17 of which we deem germane to this controversy, and which we hereunder quote:

(7) . . . Respondents say and maintain that the securing of the cash bond, referred to in the said count of the motion, is a legal requirement by law and the fulfilling of same cannot be an issue or a ground for the dismissal of an appeal.

(11) As to count (4) of the motion, respondents say that the averment therein portrays movants' misapplica-tion and misunderstanding of the law, as chapter 63, sections, 63.1 and 63.2 (paragraphs 1 & 2) talk about bonds in general and clearly define the sureties referred to in section 51.8. Respondents say that this Honourable Court and all other subordinate courts in this jurisdiction have constantly read and interpreted section 51.8 and section 63.1 and 63.2 conjunctively in passing upon issues relative to bonds

(12) Further to count (11) herein above, respondents say that section 51.8 talks about the securing of a bond to be fixed by the court. It also talks about security of a bond. Also, section 63.1 speaks about the security for a bond. Section 63.2 talks about legally qualified sureties and says, unless the court orders otherwise, what the security on a bond should be. Respondents say that in defining bonds, whether it be appeal bond or otherwise, these three sections must be interpreted together in order to determine a genuine bond. Therefore, to say that sections 63.1 and 63.2 are not applicable to appeal bonds, is misleading and legally unfounded.

(17) And respondents say and submit that their appeal should be maintained because the bond, as filed, is permitted by law, that is, as far as the issue of indemnity is concerned. A party will make a deposit of money in lieu of giving bail. Respondents having given a bond, duly approved by the judge, the statutory requirement for an appeal bond has been met as interpreted by the Supreme Court. The motion to dismiss must therefore crumble."

From the foregoing, the issue which is determinative of this action is whether or not money or cash can be given as security for an appeal bond. We shall answer the question as stipulated by statute.

The Civil Procedure Law, as contained in volume I of the Liberian Code of Laws Revised, provides in section 51.8, under Appeal Bond, as follows:

"Every appellant shall give an appeal bond in an amount to be fixed by the court, with two or more legally qualified sureties, to the effect that he will indemnify the Appellee from all costs or injury arising from the appeal, if unsuccessful, and that he will comply with the judg-ment of the appellate court or of any other court to which the case is removed. The appellant shall secure the approval of the bond by the trial judge and shall file it with the clerk of the court within 60 days after rendition of judgement. Notice of the filing shall be served on opposing counsel. A failure to file a sufficient appeal bond within the specified time shall be a ground for the dismissal of the appeal; provided, however, that an in-sufficient bond may be made sufficient at any time during the period before the trial court loses jurisdiction of the action."

The foregoing provision of the statute clearly states that an appellant shall give an appeal bond. . .with two or more legally qualified sureties. . ." The statute, at section 63.2 goes on to define legally qualified sureties in the following terms.

l. Who may be sureties. Unless the court orders other-wise a surety on a bond shall be two persons who fulfill the requirements of this section or any insurance company authorized to execute surety bonds within the Republic."

The requirements regarding which natural persons may become sureties to secure an appeal bond, referred to in section 63.2 (1) quoted supra, are set out in section 63.2(2) and quoted hereunder:

"2. Lien on real property as security. A bond upon which natural persons are sureties shall be secured by one or more pieces of real property located in the Republic, which shall have an assessed value equal to the total amount specified in the bond, exclusive of all encumbrances. Such a bond shall create a lien on the real property when the party in whose favor the bond is given has had it recorded in the docket for surety bond liens in the office of the clerk of the circuit court in the county where the property is located. Each one shall be recorded therein by an entry showing the following:

(a) The names of the sureties in alphabetical order;

(b) The amount of the bond;

(c) A description of the real property offered as security thereunder, sufficiently identified to clearly establish the lien of the bond;

(d) The date of such recording;

(e) The title of the action, proceeding, or estate.

3. Affidavit of sureties. The bond shall be accompanied by an affidavit of the sureties containing tire following:

(a) A statement that one of them is the owner or that both combined are the owners of the real property offered as security;

(b) A description of the property, sufficiently identified to establish the lien of the bond;

(c) A statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered; and

(d) A statement of the assessed value of each property offered;

A duplicate original of the affidavit required by this section shall be filed in the office where the bond is recorded.

4. Certificate of Treasury Department official. The bond shall also be accompanied by a certificate of a duly authorized official of the Department of the Treasury that the property is owned by the surety or sureties claiming title to it in the affidavit and that it is of the assessed value therein stated, but such a certificate shall not be a pre-requisite to approval by the judge."

From the foregoing provisions of the Civil Procedure Law, that is, sections 51.8 and 63.2, the intent of the lawmakers is clear, unambiguous, and straight forward. The language of the stated provisions requires that there be two legally qualified sureties who are at least two natural persons who shall present unencumbered real properties or an insurance company authorized to execute surety bonds in Liberia. The law is also equivocally clear as to what the sureties should give as security to appeal bonds. The views of this Court were previously expressed by this Court in the cases The Intestate Estate of the late Willie J. M. Bowier and Samuel Bowier v. Williams et al.[2000] LRSC 9; , 40 LLR 84 (2000), delivered on April 5, 2000 during the delivery of advance opinions at the March, A. D. 2000 Term of this Honourable Court, and the Cavalla Rubber Corporation v. The Liberian Trading and Development Bank (TRADEVCO), [1995] LRSC 42; 38 LLR 153 (1995), decided at the March Term, A. D. 1995.

We noted in those opinions that to remove any confusion, the lawmakers distinguished bonds and bail bonds generally from appeal bonds. Bonds and bail bonds are provided for in section 63.1 and chapter 7, sections 7.16, 7.17 and 7.48, while appeal bonds are provided for, and the requirements set forth, distinguished, and defined in sections 51.8 and 63.2. In these latter sections, the legislative language is clear. This Court has held that when the language of statutes are clear and unambiguous there shall be no need for construction.

The general rule of statutory construction states: "Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object, it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended." 3 CYC l l l0.

In view of the foregoing it is the considered opinion of this Court that the cash bond of L$1,500.00, filed in the monthly and probate court as security to the appeal bond does not meet the requirement for an appeal bond as stipulated and provided for in chapter 51, sections 51.8 and chapter 63, section 63.2, of the Civil Procedure Law. Hence, the said appeal bond filed by the appellant is hereby declared to be defective and conse-quently insufficient.

The question now is what are the consequences of a defective or insufficient appeal bond? Chapter 51, section 51.8 of the Civil Procedure Law states that the object of an appeal bond is to

ensure that the appellant's sureties will indemnify the appellee from all costs or injury arising from the appeal, if unsuccessful, and that appellant will comply with or satisfy the judgment of the appellate court. The provision goes on to state a penalty for a defective or insufficient appeal bond after the lower court loses jurisdiction. The penalty is dismissal of the appeal. The language of the sentence which contains the penalty for an insufficient or defective appeal bond after the lower court loses jurisdiction clearly shows that the provision is mandatory and that compliance is not left to the discretion of the appellant. A failure to file a sufficient appeal bond within the specified time shall be a ground for dismissal of the appeal, provided however, that an insufficient bond may be made sufficient at any time during the period before the trial court loses jurisdiction of the action.

This Court is therefore under a legal duty to declare that due to the defectiveness of the appellants' appeal bond, appellee's motion to dismiss the appellants' appeal is hereby granted and the appellants appeal is ordered dismissed. The Clerk of this Court is ordered to send a mandate to the court below ordering the judge presiding therein to resume jurisdiction over the case and enforce its judgment, thereby giving effect to this Court's decision. And it is hereby so ordered. Costs are assessed against the appellants.

Motion granted; appeal dismissed.

Willie-Jorcie et al v Azzam et al [1983] LRSC 135; 31 LLR 606 (1983) (22 December 1983)

BEN T. WILLIE-JORCIE, JAYBOY JORCIE, KARNGA JORCIE, Administrators and Administratrix of the Intestate Estate of the Late **FLEHN JORCIE, et al.**, Respondents/Appellants, v. **HAYEL AZZAM**, by and thur his Attorney-In-Fact, **TOUFFIC AZZAM**, Movant/Appellee.

MOTION TO DISMISS APPEAL FROM THE MONTHLY AND PROBATE FOR MONTSERRADO COUNTY.

Heard: November 23, 1983. Decided: December 22, 1983.

1. The Court has every right to take judicial notice of any records certified to it, and to decide its own jurisdiction.

2. An affidavit is not a pleading to which a statement or another instrument could be adopted by reference.

3. A description of the real property pledged as security in an appeal bond should be set forth in the affidavit of sureties, as mandatorily required by statute; otherwise, the appeal is dismissible on the ground of defectiveness.

4. The law does not direct that deeds of the property pledged be attached to the affidavit of sureties.

5. A motion to refuse jurisdiction over an appeal because the bond is imperfect without proferting a copy of the defective bond with the motion neither deprives the appellant of notice nor precludes the court from taking judicial notice of the already certified records before it, and therefore, inspecting such files does not amount to opening the records for the purpose of deciding the case on the merits.

This case, which involved an objection to the probate and registration of a lease agreement for lot no. 38D of Block 25, which was a part of the intestate estate of the late Flehn Jorcie, originated from the Second Judicial Circuit Court, Grand Bassa County.

The facts certified to the Supreme Court indicated that on June 27, 1963, the late Flehn Jorcie entered into a lease agreement with one H. I. Farhat for lot no. 38D, Block No. 25, located in Lower Buchanan, Grand Bassa County, for twenty (20) years, with the right to sublet. Later the said property was sublet to one Mr. Arif H. Rasamny for a period of sixteen (16) years, also with a right to sublease. As a result of this, Rasamny subsequently entered into a lease agreement with Mr. Hayel **Azzam** for a period of sixteen (16) years and six (6) months.

After the death of the late Flehn Jorcie, the original lessor, and with less than a year to the expiration of the first twenty-year lease, Mr. H. I. Farhat sought and obtained a renewal of the lease agreement on the property for twenty (20) additional years from the administrators of the estate. However, when the lease agreement was offered for probation, Mr. Hayel **Azzam**, by and through his attorney-in-fact, Mr. Touffic **Azzam**, interposed a caveat and filed an objection because, according to him, he had a leasehold interest in the property which was the subject of probation and registration. After hearing arguments on the objection, the trial judge denied the probation of the lease agreement and revoked the letters of administration. The lessee, Mr. Farhat, and the administrators took exception to the ruling and appealed to the Supreme Court for a final review of the cause, filing a four-count bill of exceptions. However, prior to the hearing of the case, the appellee filed a motion to dismiss the appeal based on the defectiveness of the appeal bond.

The Supreme Court granted the motion and dismissed the appeal, noting that the appeal bond filed by the appellant was indeed defective. The Court held that the affidavit of sureties filed by the appellants had failed to sufficiently describe the property put up as security to the bond as mandatorily required by the appeal statute, and in the face of such defect in the affidavit of sureties, the entire bond will be regarded as defective. That defect, the Court concluded, was a sufficient basis for the dismissal of the appeal.

Joseph P. H. Findleyappeared for the respondents/appellants. M Fahnbulleh Jones appeared for the movant/appellee.

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

This case originates from the Second Judicial Circuit, Grand Bassa County, and it involves the intestate estate of the late Flehn Jorcie of Grand Bassa County. The facts as gathered from the records certified to this Court reveal that on June 27, 1963, the late Flehn Jorcie entered into a Lease Agreement with one H. I. Farhat for lot no. 38D Block no. 25 located in lower Buchanan, Grand Bassa County for a period of twenty (20) years certain with the power to sublet. Accordingly, Farhat sublet the property to one Mr. Arif H. Rasamny for a period of sixteen (16) years with also the right to sublease. Subsequently, Rasamny entered into another sublease agreement with Mr. Hayel **Azzam** for a period of sixteen (16) years and six months. After the death of the original lessor, the late Jorcie and while the first twenty (20) years lease was barely a year to its expiration, Mr. H. I. Farhat sought and obtained a renewal of the lease agreement on the property for a further period of twenty (20) years from the administrators. However, when the said lease agreement was offered for probation, Mr. Hayel **Azzam** by and through his attorney-in-fact, Mr. Touffic **Azzam**, interposed a caveat and filed an objection because according to him he had a leasehold interest in the property which was the subject of probation and registration. The trial judge heard the objection and denied the probation of the lease agreement and also revoked the Letters of Administration. The lessee, Mr. Farhat and the administrators thereupon took exceptions to the ruling and appealed to this Court for a final review of the cause upon a four-count bill of exceptions, hence this appeal.

Upon the call of this case, appellee/movant informed the Court that he has filed a one-count motion to dismiss the appeal because the appeal bond was defective in that the sureties' affidavit attached to said bond failed to carry within its body and on its face the description of the real property pledged as security by the sureties as required by both statute and case laws and called on the Court to take judicial notice of the sureties's affidavit which forms part of the records before the Court. He submitted that said description ought to be in the body of the affidavit and not merely attached to it.

In resisting, the appellants/respondents maintained that the motion lacked the required notice since it failed to show on its face the defective bond with its sureties' affidavit so as to put appellants on notice and afford the Court the opportunity to consider the allegation in said motion without recourse to the records in the case. Appellants, therefore, prayed that the motion be denied because the allegations as contained therein regarding the defectiveness of the appeal bond were incorrect, for the sureties' affidavit referred to by appellee carries on its face a description of the property pledged by means of the deeds which were attached to the sureties' affidavit as exhibits "A" and "B".

From a careful perusal of the motion and the resistance thereto, the following issues present themselves for this Court's consideration and determination:

1. whether or not a motion to refuse jurisdiction over an appeal because the bond is imperfect without proferting copy of the defective bond with the motion deprives the appellants of notice and precludes the Court from taking judicial notice of the certified records before it and consequently cognizance of such fault amounts to opening the records in the case?

2. Whether or not an affidavit is a pleading to which another instrument could be attached?

The issues will be resolved in the order of presentation. Appellants' counsel argued that the failure of appellee to attach a copy of the alleged defective bond to his motion for easy reference did not only deprive the appellants of that required notice, but also precluded this Court from opening the records to substantiate the factual allegations stated in the motion, because where the jurisdiction of the Court over an appeal has been challenged, it has no authority to open the records. Appellee cited the Civil Procedure Law, Rev. Code 1: 10.4(3) and 63.2(3), and Magbine v. Soko, [1981] LRSC 28; 29 LLR 292 (1981).

Counsel for appellee on the other hand argued that a court must first of all, be assured of its own jurisdiction over the parties and cause before proceeding to hear the case and therefore, the records should be inspected to decide the jurisdictional issues but not issues relating to or connected with the merits and demerits of the case, and cited Mim Liberia Corporation v. Toweh, [1983] LRSC 19; 30 LLR 611 (1982).

For the benefit of this opinion, let us see what a judicial notice is. Black's Law Dictionary 761 (5th ed.) states the following:

"JUDICIAL NOTICE: The act by which a court, in conducting a trial or framing its decision, will, of its own motion, and without the production of evidence, recognize the existence and truth of certain facts, having bearing on the controversy at bar, which, from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety, e.g. the laws of the state, international law, historical events, the constitution and course of nature, main geographical features, etc. The cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them."

As can be gathered from the above definition, the Court has every right to take judicial notice of any records certified to it and to decide its own jurisdiction. 4 C.J.S., Appeal and Error, § 2373, at 562. In the instant case, the certified records are before us which the appellee has requested us to take judicial notice of and by operation of law, we are indeed bound to do so as a court. 14 AM. JUR., Courts, § 168 and the Civil Procedure Law, Rev. Code 1: 25.1. This Court may examine the transcribed records before it to ascertain if the jurisdictional steps have been taken so as to confer jurisdiction over the parties and the case.

The appellants have also relied upon section 10.4 subsection 3 of the Civil Procedure Law, Rev. Code 1, which reads thus:

"3. Furnishing papers to the court. The moving party shall furnish at the hearing all papers not previously filed and necessary to the consideration of the question involved. Where such papers are in the possession of an adverse party, they shall be produced at the hearing by the latter on notice in accordance with the provision of this section, shall be read in support of, or in opposition to the motion, unless the court for good cause shall otherwise direct."

This provision of the statute does not prevent the court from taking judicial notice of its own records in a case before it because this subsection clearly stipulates "furnishing papers to the court..." meaning papers not already before the court.

Therefore, the statutes relied upon by appellants are not applicable to the instant case as the "sureties' affidavit" referred to is already an integral part of the records submitted to us in this case for our consideration. The case Magbine v. Soko, [1981] LRSC 28; 29 LLR 292 (1981), cited by appellants to support their contention, having been recalled by this Court in the case Mim Liberia Corporation v. Toweh, [1983] LRSC 19; 30 LLR 611 (1982), can no longer serve as a reliance to support any legal contention. The contention therefore of the appellants in count one (1) of the resistance is not sustained.

Regarding the second issue, that is, whether or not an affidavit is a pleading to which another instrument could be attached, counsel for appellants has further argued that copies of the deeds of the property pledged as security, having been attached to the sureties's affidavit, appellants had thereby complied with the statutory requirement since indeed the best description of a realty should be found in the deed itself. Hence, appellants argued that the approved appeal bond tendered by them was not defective as contended by appellee, citing in support of said contention the Civil Procedure Law, Rev. Code 1: 9.3(4), at 106 and 107. For his part, appellee's counsel maintained that the law mandatorily requires that a description of the real property pledged in an appeal bond shall be set forth in the affidavit of sureties. He also cited the Civil Procedure Law, Rev. Code 1: 63.2(3), as well as West African Trading Corporation v. Alrine (Liberia) Ltd., [1976] LRSC 23; 25 LLR 3 (1976) and Lamco J. V. Operating Company (LAMCO) v. Verdier, [1977] LRSC 34; 26 LLR 180 (1977) to support his contention.

At this juncture, it is also necessary to define affidavit for the purpose of this opinion. Black's Law Dictionary 58 (5t h ed.) defines affidavit as follows:

"AFFIDAVIT: A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation."

Our statute on affidavit of sureties' states:

"The bond shall be accompanied by an affidavit of the sureties containing the following:

a. A statement that one of them is the owner or that both combined are the owners of the real property offered as surety;

b. A description of the property sufficiently identified to established the lien of the bond;

c. A statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered, and

d. A statement of the assessed value of each property of-fered. Civil Procedure Law, Revised Code 1: 63. (3).

An inspection of the bond tendered by appellants showed that there was an affidavit sworn to on June 21, 1983, filed with it, and for the purpose of this opinion we shall quote from it:

"PERSONALLY APPEARED BEFORE ME, a duly qualified Justice of the Peace for Grand Bassa County, at my office in Lower Buchanan, County of Grand Bassa, and Republic of Liberia, Levi R. Johnson and Solomon N. Greaves, sureties of the City of Buchanan, County of Grand Bassa and Republic aforesaid and made oath according to law, to wit:

"1. That they are owners of or one of them (Levi R. Johnson, Solomon Greaves) is the owner of the real property in the Republic of Liberia.

2. The description of the property subject of the lien of this bond is as follows (see exhibits "A" and "B attached.) (These latter underlined are in his hand writing).

3. That there is no other lien, unpaid taxes and other encumbrances against the property offered herein.

4. The assessed value of the property is $27,700.00.

5. That all information and allegations contained herein are true and correct in fact and in substance to the best of their knowledge and belief and as to those matters of information they verily believe them to be true and correct."

Does this affidavit contain a description of the sureties' property sufficiently to establish a lien on the bond as the statute requires? Lest we forget, this statute does not say that the bond shall be accompanied by an affidavit of sureties with the deeds of the property pledged as security attached, to be referred to in the affidavit and incorporated by adoption, reference or exhibits as has been done here in this case. This Court has interpreted subsection of the statute quoted above to mean that the description of the real property pledged in an appeal bond must be set forth in the affidavit of the sureties as a strict mandatory requirement of the statute.

Mr. Justice Azango, speaking for the Court in the case West African Trading Corporation v. Alrine (Liberia) Ltd., [1976] LRSC 23; 25 LLR 3 (1976), stated the following:

"Sitting forth a description of real property pledged in a document accompanying the appeal bond, such as the certificate from the Bureau of Revenues, does not cure the defect caused by the failure to describe the property in the affidavit of the sureties."

The statute on adoption by reference as found in the Civil Procedure Law, Rev. Code 1: 9.3(45), says "any statement in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in a motion." As quoted above, an affidavit is not a pleading to which a statement or another instrument could be adopted by reference as have been done by appellants in this case. See also 41 AM. JUR., Pleading, § 2. The law requires that a description of the real property pledged as security in an appeal bond should be set forth in the affidavit of sureties; otherwise, the appeal is dismissible on the ground of defectiveness, while the deed may appear to offer a better description of the property offered as security; yet, the law does not direct that deeds of the property pledged be attached to the affidavit of sureties, and this requirement of the law not having been met by filing a valid appeal bond in which the description of the

property is set forth in the body of the sureties' affidavit, the entire resistance must crumble under the legal contention raised in the motion.

As we have pointed out in this opinion, failure to file an appeal bond in which the sureties' affidavit does carry in its body the description of the property offered as surety as required by statute, and several opinions of this Court, is indeed a ground for which a motion to refuse jurisdiction over an appeal can be granted. Civil Procedure Law, Rev. Code 1: 51.16. Furthermore, a motion to refuse jurisdiction over an appeal, because the bond is imperfect without proferting copy of the defective bond to the motion neither deprives the appellant of notice nor precludes the court from taking judicial notice of the already certified records before it and therefore inspecting such a file does not amount to opening the records to decide the case on its merits as contended by the appellants. This Court also says that an affidavit is not a pleading to which another instrument can be attached. To this conclusion, our learned Colleague, in person of Mr. Justice M. Kron Yangbe, disagreed and filed a dissenting opinion.

Having thus declared the appellant's appeal bond defective and bad under the foregoing circumstances and the laws cited, this Court is of the considered opinion that the motion should be, and the same is hereby granted and the appeal is ordered dismissed, with costs against appellants. The Clerk of this Court is hereby instructed to send a mandate to the trial court commanding the probate judge presiding therein to give effect to this Court's judgment and opinion. And it is hereby so ordered.

Motion to dismiss granted.

MR. JUSTICE YANGBE dissents.

The one count motion to dismiss the appeal reads:

"Because appellee says that the appeal bond is defective and bad for reason that the sureties' affidavit does not carry in its body and on its face the description of the realties offered as security by the sureties as is mandatorily required by the statute and confirmed by numeral opinions of this Court. Objector/appellee/movant requests Court to take judicial notice of the sureties affidavit which formed part of the records in this case, especially count two thereof. For this violation of the statute controlling appeals, objector/ appellee/movant prays the dismissal of the appeal."

To this motion, a three-count resistance was filed and because of the majority holding of this Court in Mim (Lib.) Corporation v. Toweh, [1983] LRSC 19; 30 LLR 611 (1982), which recalled the opinion in Magbine v. Soko, [1981] LRSC 28; 29 LLR 292 (1981), I will focus my attention mainly on and discuss the last count of the three-count resistance and it reads, as follows:

"1. Because the motion lacks and is void of notice; in that, it does not show from its face the defective bond even the sureties' affidavit referred to by appellee to warrant this Honourable Court's attention and also to give appellants that notice required under the law to intelligently and legally rebut the allegation contained in said motion."

2. Appellants submit that it is elementary that this Honourable Court cannot refer to and/or open 'the records in this case', to determine the allegation contained in this motion for all motions to dismiss are determine without recourse to the records. In view of the lack of notice on the face of the motion, appellants respectfully pray Your Honours to deny the motion.

3. And also because appellants say further to the motion that the appeal bond is not defective for the sureties' affidavit does carry the description of the property as the law requires as it is stated in count two thereof with the deeds attached." See exhibit "A: filed herewith as part of this resistance."

It is legally important to observe that no mention whatsoever is made in the motion with reference to the attachment of the deed to the affidavit of sureties as being irregular, except the alleged lack of description of the property offered in the body of the affidavit, therefore, the deed should have been recognized, accepted for the purpose.

The first case in which the issue of omission of the description of the property offered as surety on the appeal bond was raised is West African Trading Corporation v. Alrine (Liberia) Ltd, [1976] LRSC 23; 25 LLR 3 (1976). In that case, there was no deed of the sureties attached at all as an exhibit, nor was any kind of document attached thereto with the description of the property pledged. Therefore, this Court sustained the motion for lack of description of the property offered as security on the affidavit of sureties. Unlike the case at bar, appellant attached to the affidavit of sureties photocopy of the deed of the sureties who signed the appeal bond and the affidavit. There is no precedent in the history of this Court where the deed of sureties was proferted to an appeal bond or affidavit. Hence, the case cited above is not applicable in this situation. The sole purpose of the requirement for the description of the property is to easily establish the lien on the property and to locate the same during the enforcement of the bond. I do not want to believe that the majority view, as expressed in its opinion just read, is that the mere metes and bonds that are usually quoted in an affidavit of sureties are more accurate and contain more data than the photocopy of the deed of the sureties for the purpose of locating the land for easy enforcement of the appeal bond.

The sole reason for the majority ignoring the description of the pledge property in the deed attached is because same is not inserted in the affidavit of sureties, although in the affidavit the deed is referred to as an exhibit and to form a part thereof. Civil Procedure Law, Rev. Code 1: 9.3.

In the majority opinion, it is recorded on page two that:

"Upon the call of this case, appellee informed the court that he has filed a one-count motion to dismiss the appeal because the appeal bond is defective in that the sureties; affidavit attached to said bond fails to carry within its body and on its face the description of the real property pledge as security by the sureties as required by both statute and case laws and called on the court to take judicial notice of the sureties' affidavit which forms part of the record before the court."

Predicated upon this request, the Full Bench while considering the issue of its jurisdiction over the appeal opened and searched the records in the case file for evidence to determine the question

of authority of the court over the appeal. The appellants also made a similar request in the resistance quoted above, praying the Court to take judicial notice of the photocopy of the deed of the sureties who signed the appeal bond and also the deponents on the affidavit, but the majority refused because, in its opinion, there is no law or practice which authorized profert of document to an affidavit. The law cited in the majority opinion and relied upon for the decision, certainly does not prohibit attachment to an affidavit, but only define what an affidavit is. In my view, since all the records, including the alleged defective affidavit of sureties as well as the deed of the sureties are before this Court and in the same case file of this Court, under the same parity of reasoning and procedure, and out of fairness to the appellants, the Court is bound to also take judicial notice of the deed attached to the affidavit.

Although in my dissent in MIM Liberia Corporation v. Toweh, [1983] LRSC 19; 30 LLR 611 (1982), supra, I pointed out that judicial notice does not include records in a case in which the authority of the Court over the appeal is attached, therefore, all the documents relied upon to establish lack of jurisdiction over the appeal, must be annexed to the motion to dismiss, as notice to the Court and opposing party. Civil Procedure Law, Rev. Code 1: 9.3. For, it is logical that the court is without any authority to inspect the records prior to its decision on the issue of jurisdiction. But the majority was of a different view, and has again applied the same procedure in this case by opening the case file and searching for evidence to decide the issue of jurisdiction over the appeal. Therefore, under the principle of stare decisis, in order to balance the equation, we should take judicial notice of the deed attached to the affidavit of sureties. Additionally, it is admitted in the opinion by the majority that:

"....the surety's affidavit referred to is already an integral part of the records submitted to us in this case for our consideration."

Assuming that our law and practice preclude proferts to affidavits of sureties of deeds and other documents, such technicalities are forbidden in A. H Basma & Son (Liberia) Incorporated v. Camer Liberia Corp., decided this very Term[1983] LRSC 136; , (31 LLR 618), wherein we cited Liberty v. Horridge, [1923] LRSC 3; 2 LLR 422 (1922), which stated that "courts of justice will avoid the refusal to hear litigants because of immaterial technicalities."

Consequently, I have refrained from signing the judgement in this case.

Standard Stationery Stores v Gompu et al [1982] LRSC 58; 30 LLR 271 (1982) (9 July 1982)

STANDARD STATIONERY STORES, Appellant, *v.* **JOHNSON GOMPU, et al.** and the BOARD OF GENERAL APPEALS, Appellees.

MOTION TO DISMISS AN APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: May 10, 1982. Decided: July 9, 1982.

1. For a real property offered as security to be sufficiently described within the meaning of the statute, the number of the plots and the metes and bounds of the particular lot must be shown in the affidavit.
2. Affidavits are not required in motions or allegations involving issues of law; but where issues of facts are involved, affidavits are required.
3. The certificate from the Ministry of Finance which accompanies an appeal bond is only to show the ownership and value of the property offered and is not part of the affidavit of sureties.

Appellant Standard Stationery Stores appealed from a final judgment of the Civil Law Court of the Sixth Judicial Circuit, Montserrado County, affirming the decision of the Board of General Appeals. Appellees moved to dismiss the appeal on grounds that the affidavit of sureties did not contain the metes and bounds of the property and that the notice of the completion of the appeal was not served on appellees within the statutory time. The appellees also argued that the affidavit accompanying appellant's resistance to the motion to dismiss was not verified.

The Supreme Court sustained appellees' contentions, *granted* the motion, and *dismissed* the appeal.

P. Amos George and J. K. Burphy appeared for appellants. *S. Edward Carlor* appeared for appellees.

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

This appeal was brought to us by the appellant, Messrs. Standard Stationery Stores of the City of Monrovia, in protest against a final judgment rendered against it on the 13th day of November, A. D. 1981 by the People's Civil Law Court for the Sixth Judicial Circuit, Montserrado County, to which court, the appellant had earlier filed a petition to set aside the decision of the Board of General Appeals of the Ministry of Labor.

A perusal of the judgment in question reveals that the appellant, together with a sister corporation, had earlier been sued by its employees at the Ministry of Labour for unfair labor practices in which the employees claimed overtime allowances amounting to $21,460.13.

The hearing officer, according to the records, ruled against the sister corporation, the Middle East Trading Corporation (METCO), finding it liable to the Standard Stationery Stores employees in the sum of $21,460.13. METCO excepted to this ruling and appealed to the Board of General Appeals on the ground that the Standard Stationery Stores, and not METCO, was liable to the employees. In its decision, the Board of General Appeals affirmed the ruling of the hearing officer. Again METCO took exceptions and appealed to the People's Civil Law Court, which court, though affirming the sum awarded by both the hearing officer and the Board of General Appeals, modified the decision of the Board and that of the hearing officer by exonerating METCO completely from liability and holding, instead, Standard Stationery Stores, the appellant herein, absolutely and severally liable to the workers for the sum claimed. This decision of the Civil Law Court, rendered on the 13th day of November, A. D. 1981, was excepted to by Standard Stationery Stores and an appeal announced to this Court for appellate review.

A look at the records also reveals that before the appeal was called for hearing, the appellees filed a motion to dismiss the said appeal. In their motion to dismiss the appeal, the appellees contended that: (a) the affidavit of sureties attached to the appellant's appeal bond did not contain any metes and bounds of the property allegedly offered by appellant's sureties as security as is mandatorily required by statute; (b) that the appellants in violation of the statute, practice and procedure neglected to serve copy of their bond on the appellees within the statutory time to enable appellees to inspect the same as a matter of notice; and (c) that the affidavit accompanying the appellants' resistance was not verified since indeed the said resistance contained mixed issues of both law and facts.

In its resistance, the appellant maintained that: (a) the description of the property by metes and bounds was not a mandatory requirement by statute as long as the property was sufficiently described and identified to establish a lien thereon; (b) the bond became effective when approved by the court after it had been filed with the clerk of court in which the action is pending, and notice of the filing of the bond served on the adversary party; (c) a resistance to a motion in the appellate court need not be verified; and finally (d) its appeal bond had met the legal requirement as the numbers of the lots were stated in the certificate from the Ministry of Finance and that same was a part and parcel of the affidavit of sureties.

With this factual background, it now becomes necessary to address ourselves to the issues we consider necessary in the disposition of this case. The issues that present themselves before us for consideration and determination are: (1) whether or not under the laws of Liberia, real property offered as security and mentioned in an affidavit of sureties accompanying an appeal bond must be described by metes and bounds so as to render the appeal bond enforceable? (2) whether or not a resistance to a motion in the appellate court requires affidavit? and finally (3) whether or not the certificate from the Ministry of Finance which accompanies an appeal bond is a part and parcel of the affidavit of sureties?

Dealing with the first issue, it is observed that the Civil Procedure Law, Rev. Code, 1: 63.1 and 63.2 appear silent on this issue. It only provides that an appeal bond must be accompanied by an affidavit of sureties with a description of the real property offered as security thereunder, sufficiently identified to clearly establish the lien of the bond. *Ibid.*, 1:63.2(3). Even though the laws of Liberia do not specifically spell out that real property mentioned in an affidavit of sureties accompanying an appeal bond has to be described by metes and bounds, *Ibid.* 1:63.1 and 63.2, yet a careful interpretation of the said sections point to one objective only, that is, that for real property to be sufficiently described so as to render the appeal bond enforceable, the description of the property will of necessity have to include the metes and bounds in order to make such property easily identifiable.

The next question then that immediately comes to our minds is when is a piece of real property offered as security said to be sufficiently described for identification within the meaning of Section 63.2 (3) quoted *supra.* The answer to this question lies in the opinion of this Court given in the case *Lamco J. V. Operating Company v. Verdier*, [1977] LRSC 34; 26 LLR 180 (1977). In that case, this Court held that:

"The statutory requirement that an affidavit of sureties accompanying an appeal bond contain a description of the property offered as security 'sufficiently identified to establish the lien of the bond' means that the number of the plot and the metes and bounds of the particular lot must be shown in the affidavit."

Upon inspection of the appeal bond filed in the case at bar, we observe that the properties offered by the sureties as security, fall far below the standard envisaged by the statute.
Instead, the affidavit of sureties in question reads:

"AFFIDAVIT OF SURETIES

PERSONALLY APPEARED BEFORE ME., Martha Kashouh and Sayuo Gargard sureties, to the attached bond, duly sworn and depose and say:

1.1. That they are freeholders and householders within the Republic of Liberia and own the properties offered as security to the attached bond;

1.2. That the said properties each consists of a dwelling house situated, and lying within the City of Monrovia, Montserrado County, Liberia;

1.3. That there are no claims, unpaid taxes and other encumbrances upon the said properties.

PROPERTIES LOCATION: Paynesward and Caldwell

PROPERTIES ARE DESCRIBED AS FOLLOWS:

1.4. That the assessed value of each of the properties is $30,000.00 and $1,500.00 respectively, all of this they say to be true and correct in substance as well as in fact to the best of their knowledge."

This description, in our opinion, leaves much to be desired, to say the least. A casual and slipshod description, such as the one found in the affidavit of sureties in this case, will not help the authorities or parties to locate the whereabouts of such property for the sake of placing a lien thereon and determining the value thereof. As a matter of fact, a glance at the affidavit of sureties in question, clearly shows in count thereof that each property is said to consist of a dwelling house situated in the City of Monrovia. Notwithstanding the above, the locations of said properties are again stated in count three of said affidavit of sureties to be in Paynesward and Caldwell, respectively, without providing a detailed description of the properties in question. Despite these inconsistent locations which constitute these obvious deficiencies, appellant contends that its appeal bond meets the legal requirements!

In *Richards v. Liberia Bank for Development,* 29 LLR 526 (1981), this Court held that:

"Every deed must contain the names of the grantor and the grantee, the lot number, the name of the place where the specific property is situated and an expert description of how it can properly be demarcated."

In our considered opinion, the said affidavit lacks the description of the property as required by the statute, which has been held to be essential to the completeness of an appeal bond. Where the property offered as security is not properly described, it is unlikely that it will be easily identified, and nor can such bond be enforced – Vide: *Zayzay v. Jallah et al*.[1976] LRSC 6; , 24 LLR 486 (1976).

After a thorough examination of the records now before us, we have been compelled to conclude that the description of the real property in this case cannot satisfy the statutory intentions and our interpretation thereof. We therefore declare the bond defective and, thus, of no legal consequence in this case. The contention of appellees in count one of their motion to dismiss the appeal is accordingly sustained, while the contention of the appellant in count two of its resistance is dismissed.

With regard to the second issue, that is, whether or not a resistance to a motion in the appellate court requires affidavit, this Court has generally held that a motion on a question of law does not require any affidavit. This holding is not only in line with the practice at common law where affidavits were generally not required in judicial pleadings unless to back up allegations of fact, but is also in conformity with the Liberian Civil Procedure Law, Rev. Code 1: 9.4(1). Indeed, the general rule of law is that affidavits are not required in motions where the allegations involve only issues of law; but that where issues of facts are involved, affidavits are a necessary component. *See Nagbe v. Republic,* [1966] LRSC 84; 17 LLR 656 (1966). Therefore, the contention of counsel for the appellees during argument of the case before this Bar that appellant's resistance to appellees' motion to dismiss the appeal was defective for lack of supporting affidavit, does not hold any water and thus of no legal significance. *Raymond Concrete Pile Company v. Buchanan,* [1971] LRSC 39; 20 LLR 330 (1971). Consequently, appellants' resistance to appellees' motion before this Court need not be verified as same contains only legal issues. Our conclusion on this second issue is not only an endorsement of our earlier decisions on similar issues but also in harmony with common law practice and our own Civil Procedure Law, quoted *supra*.

As to the third issue, the appellant contended that the numbers of the lots were stated in the certificate issued by the revenue department and that it was a part of the affidavit of sureties. According to the provisions of our statute, the affidavit of sureties is a separate and distinct requirement of the law when it comes to meeting the legal prerequisites for the filing of an appeal bond as same goes to the contents of the affidavit and the sufficiency of the description of the property, Civil Procedure Law, Rev. Code, 1: 63.2(3), while the revenue certificate from the Ministry of Finance which accompanies an appeal bond is only to show the ownership and value of the property so offered. *Ibid.*, 63.2.4. Unlike the affidavit of sureties, the revenue certificate does not contain the metes and bounds or the description of the property. Assuming, without admitting, that the lot numbers had been stated in the revenue certificate, they could not have been considered a part of the affidavit of sureties.

While it is always the intention of this Honourable Court not to dismiss cases on procedural grounds so as to enable the Court to pass on substantive considerations for the sake of legal justice, we highly regret our inability to pass upon the several issues brought up for review on appeal, in view of the serious failure of the appellant to meet a cardinal jurisdictional prerequisite, which has precluded us from hearing the case. Vide: *Taylor v. Pasi and Wonkor*, [1977] LRSC 9; 25 LLR 453 (1977); and *Doe v. Dent-Davies*, [1978] LRSC 56; 27 LLR 306 (1978).

Under the circumstances and the controlling principles of law, the motion to dismiss the appeal is hereby granted. The Clerk of this Court is instructed to send a mandate to the lower court ordering it to resume jurisdiction over this matter and proceed to enforce its judgement forthwith. And it is hereby so ordered.

Motion granted.

Walker-Calloway et al v Walker et al [1994] LRSC 4; 37 LLR 380 (1994) (18 February 1994)

JUANITA C. WALKER-CALLOWAY, otherwise known as WARMATTA CONBOR-FREEMAN, and FAMATTA WALKER-FREEMAN, legal heirs of the late ARTHUR

WALKER, SR, Appellants, v. **EDWIN DWALU WALKER** and **ARTHUR B. WALKER, JR.**, also heirs of the late ARTHUR B. WALKER, SR., Appellees

APPEAL FROM THE MONTHLY AND PROBATE COURT FOR MONTSERRADO COUNTY.

Heard: October 25, 1993. Decided: February 18, 1994

1. The probate court is the legal custodian of all decedent estates and is called upon to supervise the proper handling of these estates.

2. An administrator is a fiduciary clothed with the responsibility to manage the estate of the deceased.

3. Under our Decedent Estates Law, all children of deceased parents, whether natural born, legitimized or adopted are considered heirs of the deceased parents and are entitled to share in the intestate estate of said deceased parents in accordance with the provisions of the Decedents Estates statute.

4. An administrator is under an obligation to perform his duties with diligence, honesty and exercise proper management to the best interest of all persons interested in said estate. As such, he will be held liable when, in the performance of his duties, he caused loss or damage to any person interested in the intestate estate.

5. The probate court has the authority to open, vacate, modify, or set aside any decree or order of the court directing distribution of the property of an estate, which was made prior to the probate of and without knowledge of a will which affects such distribution, and in the same or a different proceeding, a notice to the persons or the fiduciaries of the persons to whom the property has been distributed, to make such further and different direction as to such distribution as justice may require and as incident thereto, order the refund of any property theretofore distributed erroneously."

Appellants filed a petition in the Monthly and Probate of Montserrado County for the equitable distribution of the intestate estate of their late father, Mr. Arthur B. Walker, Sr., so as to include them in the distribution after being left out by the administrator when he closed the estate in 1961. Appellees interposed the petition contending that the petitioners are barred by the statute

of limitations because when the estate was ordered reopened in 1966, upon a petition filed on their behalf, they failed the take advantage of their rights to appoint an administrator until after twenty-two years. The judge heard the petition and ruled for appellees on the grounds that the appellants were barred by the statute of limitations. The Supreme Court reversed the judgment, holding that there was no showing in the records that the appellants had attained the age of majority at the time the estate was ordered open in 1966, and that the court-appointed administrator of the estate had unjustly distributed the estate in 1961. The Court also held that the administrator was liable for his failure to properly administer the estate to include the appellants, especially so when he was aware that appellants were legitimate heirs of their late father.

Molly Gray for appellants and *Joseph P. Findley* for appellees.

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

This is a matter from the Monthly and Probate Court for Montserrado County for the equitable distribution of the intestate estate of the late Arthur B. Walker, Sr., so as to include his two legitimized daughters who were left out by the administrator when the intestate estate was first closed and the real and personal property divided between only two heirs who are sons of the deceased. The appellees set up defenses of adverse possession and statute of limitations.

Because the facts presented in the records before us are somewhat unusual or extraordinary, as well as involve what appears to be a novel question, we deem it advisable, at the outset, to make a full statement of the record.

The late Arthur D. Walker, Sr., a resident of Montserrado County, died intestate on the 26t h day of April 1956, leaving four children—Arthur Benedict Walker, Jr., Edwin Dwalu Walker, Juanita C. Walker, and Famatta Walker. Arthur Jr. and Edwin were born in wedlock. Juanita and Famatta were begotten by Arthur Walker Sr. from the body of one Liquah Somah, an illiterate woman of one of our indigenous tribes. About a year prior to Mr. Walker's death, that is to say, on the 10thday of April, A.D. 1955, a decree for legitimization was issued legitimizing the two girls, Juanita and Famatta. The girls were, at the time, minor children. There is no evidence before us as to how old these minor children were at the time they were legitimized in 1956.

The Honourable Richard S. S. Bright was appointed as administrator to administer the intestate estate of Arthur D**.** Walker, Sr., less than one month after decedent's death on the 26th day of April, A. D. 1956. It might be of interest to mention that the Honourable Richard S. S. Bright and Arthur B. Walker, Sr. had been co-workers at the Executive Mansion, in the administration of the late President Edwin J. Barclay, before the latter's death. Honourable Bright served as President Barclay' s executive secretary and the late Walker was the President's chief chauffeur. Four years after his appointment, Administrator Richard S. S. Bright filed his report with a petition for the closing of the intestate estate of the late Arthur B. Walker, Sr., on the 31' day of January A. D. 1961. The Monthly and Probate Court of Montserrado County, presided over by his Honour J. Gbaflan Davies, accepted the administrator's report, issued a decree declaring the intestate estate closed, and discharged Administrator Richard S. S. Bright from any further liability concerning the administration of said intestate estate.

Prior to being discharged of his duties as administrator, Richard S. S. Bright apportioned all of the real properties of which the late Arthur B. Walker, Sr., died seized to two of decedent's children, Arthur Benedict Walker, Jr., and Edwin Dwalu Walker, issuing to each of these two heirs administrator's deeds for the real property which their late father possessed at the time of his death.

Five years later, in 1966, following the closure of the intestate estate by Judge Davies, Madam Liquah Somah, on behalf of her two minor daughters, Famatta Walker and Juanita Walker, filed a petition for the reopening of the Walker's intestate estate on the grounds that these two legitimized children had been deprived of their share in the real property of the intestate estate of their late father, Arthur B. Walker, Sr. Further, that at the time when the intestate estate was ordered closed and its property apportioned, these two children were minor children and could not assert their rights. It is interesting to note that the same judge, His Honour J. Gbaflan Davies, who had presided over the closing of the intestate estate in 1961, also heard and decided the petition for the reopening of the estate five years later. Judge Davies granted the petition and ordered the intestate estate reopened. In addition to reopening the estate, Judge Davies requested the representatives of each of the two sets of minor children, the two born in wedlock and the two legitimized, to nominate someone to administer the intestate estate. This nomination was to be made within ten days after the date of the ruling and upon failure to do so, the court would order the Curator of Montserrado County to take charge of said intestate estate and administer same in keeping with law. As it turned out, neither did the representative of the appellants or the representative of the appellees appoint anyone to act as administrator for the intestate estate as the judge had directed in his ruling of 31 May 1966. Also, the court itself did not order the curator to take over the administration of the intestate estate when the heirs failed to carry out the court's directive. Twenty-three years thereafter, on the 8th day of June, 1989, when both Juanita C. Walker-Calloway and her sister, Famatta Freeman, had now reached their maturity and married, they filed a petition before the Probate Court for Montserrado County, presided over by His Honour Harper S. Bailey, praying said court to issue a writ of summons to be served on their brothers, Edwin Dwalu Walker and Arthur Benedict Walker, Jr., to show cause why the real

property of the intestate estate of their late father should not be distributed and the estate closed, and to account for the operation of the said intestate estate since it was reopened in 1966. Appellants also alleged that appellees had exercised exclusive control and management over the properties belonging to the estate.

His Honour Judge Harper S. Bailey of the Monthly and Probate Court of Montserrado County heard the petition and rendered his final ruling on 30th June, 1989. The judge denied the 1989 petition and dismissed it on the grounds that these legitimized heirs of Arthur B. Walker, Sr. had remained silent for twenty-two years before bringing said petition praying for the relief therein. Judge Bailey based his ruling upon the law relating to limitations of particular actions found in the Civil Procedure Law, Rev. Code 1: 2.12, and section 102.6 of the Decedents Estate Law, Rev. Code 8.

The single relevant issue which is presented from these facts and which was argued before us by counsels in this decedent estate matter is the following:

Under what circumstances may an heir lose rights to the descent of real property and the distribution of personal property under an intestate estate guaranteed to such heir under our Decedents Estate Law?

We believe that this question which the facts in this case present, appears to be one with which we are faced for the first time in this jurisdiction.

Under our Decedent Estates Law, all children of deceased parents, whether natural born, legitimized or adopted are considered heirs of the deceased parents and are entitled to share in the intestate estate of said deceased parents in accordance with the provisions of the Decedents Estate Statutes.

From the facts in this case, Administrator Richard S. S. Bright did not comply with the law referred to above. He did not manage the intestate estate to the advantage of all of the heirs. This administrator who knew of the existence of all of the heirs elected to deprive some of these heirs of enjoying the estate of their deceased father. On the other hand, the probate court judge, who presided over such poor administration, discharged the administrator when the estate was closed in 1961, without being assured that said administrator had properly administered said estate and

apportioned its property to all of the heirs who were entitled to share in the property of the intestate estate. More than this, when the intestate estate was reopened by the same judge who presided over the closing of the said intestate estate, he again committed gross error to the detriment of some of the heirs by failing to appoint the curator of intestate estates of Montserrado County to take charge of said estate when the parties failed to nominate one person each to administer the estate as he had directed in his 1966 ruling.

Judge Gbaflan Davies, in his ruling rendered on 31 May 1966, which reopened the intestate estate, observed from the administrator's report that Administrator Richard S. S. Bright, during his administration of the said intestate estate, contributed an amount of $2,767.85, out of funds for the estate, for the support of the two minor children, Famatta and Juanita. However, Administrator Bright apportioned the real property of the decedent to only two of the heirs namely, Edwin Dwalu Walker and Arthur Benedict Walker, Jr., and issued to them administrator's deeds.

The probate court is the legal custodian of all decedent estates and is called upon to supervise the proper handling of these estates. An administrator is a fiduciary who is clothed with the responsibility to manage the estate of the decedent to the advantage of all of the heirs.

When appellants first sought to exert their rights in the intestate estate of their late father, Arthur B. Walker, Sr., by their mother filing a petition on their behalf in 1966 before the Probate Court for Montserrado County, our Decedent Estates Laws were contained in four inadequate chapters consisting of six and a half pages, couched in Vol. 1 of the 1956 Code of Laws. However, implicit in the sections of these four chapters are clearly spelled out duties and liabilities of the administrator. In these sections, not only is the administrator to perform his duties with diligence, honesty and proper management to the best interest of all persons interested in said estate, but he is also liable when in the performance of his duties he caused loss or damage to any person interested in the intestate estate. The laws under the 1956 Code further provide for the administrator and executors to function under the supervision of the court. Decedents Estates Law, 1956 Code, sections 23-25, pages 419-421. The evidence in this case reveals that during the administration of the estate by Richard S. S. Bright, he had given to the natural mother of the appellants, during the three years plus of his administration, the amount of $2,767.85 for the support of the appellants who were at the time minor children. This act is a clear indication that Richard S. S. Bright was aware of the relationship between petitioners and the late Arthur B. Walker, Sr. His Honour Gbaflan Davies, however accepted the report of Administrator Bright, discharged him of his bond, and closed the estate. Even though Administrator Bright knew of the existence of other heirs of the late Arthur B. Walker, Sr., he left these heirs out when he divided the real property of the estate. The probate court was grossly negligent in accepting the administrator's report, discharging him and closing the estate. The negligence of the probate court was further demonstrated when the judge permitted the ruling, which he made in reopening

the estate in 1966, to be completely ignored by himself when he failed to appoint the curator to take charge of the estate after the parties had failed to nominate their choice to serve as administrators. We see no reason why these heirs should be deprived of their rights to the property of their late father due to the mismanagement of the estate by Administrator Bright and the negligence of the probate court.

In 1989 when petitioners filed their petition in the Probate Court for Montserrado County, before his Honour Harper S. Bailey, praying for the equitable distribution of the estate of their father, Arthur B. Walker, Sr., the Liberian Legislature had enacted the Decedents Estates Law as Title 8 of the Liberian Code of Laws Revised, approved and published May 26, 1972 and August 26, 1972, respectively.

The Liberian Decedents Estates Law has created the rights of heirs in this jurisdiction. In common law jurisdiction, such as this jurisdiction, where the rights of heirs are created by statutes there is the presumption that the protection of these rights must also be governed by statutes. A fortiori, any statute of limitations extinguishing the rights of heirs would be effective, save for some exceptions, e.g. disability or infancy. It cannot be considered irrational therefore if a court in this jurisdiction would consider statutes of limitations, which may operate to extinguish the rights of heirs under the Decedents Estates Law if such statutes are unequivocally applicable.

Judge Bailey in disposing of this matter on appeal before us, dismissed said petition relying on Section 2.12 of the Civil Procedure Law, Rev. Code 1, and Section 102.6 (d) of the Decedents Estates Law, Rev. Code 8. Section 2.12 of the Civil Procedure Law bars an action to recover real property if the defendant or his privy has held the property adversely for a period of not less than twenty years. Section 102.6 (d) of the Decedents Estates Law allows for the dismissal of any proceedings which petitioner had neglected to prosecute diligently.

Even though Judge Bailey referred in his ruling to Section 2.12 of the Civil Procedure Law, which is the adverse possession provision of that law, he merely recited the statute without elaborating on specific facts which persuaded him to believe that the petitioners' rights to realty of the estate was affected by the law of adverse possession. We have not discovered in the records any facts, which would suggest to us that Section 2.12 is applicable in this case.

However, the judge does appear to have relied more heavily upon Section 102.6 (d) of the Decedents Estates Law in reaching his conclusion in this case.

The judge in concluding his ruling of the matter, said the following: "Wherefore, and in view of the above legal authorities cited the court says because of either party's failure to recommend a person for appointment as successor to the former administrator as was required of them by this court, and also because of the appellants/petitioners' slumbrous attitude to have sat and remained dormant without prosecuting their petition within the past twenty-two (22) calendar years, it is therefore the ruling of this court that the petitioners have miserably failed to diligently prosecute their case and, as such, this court has no other legal alternative but to deny the petitioners' petition, and the same is hereby vacated and dismissed of any further consideration by this probate court either in law or in equity. The cost in these proceedings are disallowed by the court."

We however disagree with Judge Bailey that either the statute of limitations provision of the civil procedures law or section 102.6 (d) of the Decedents Estates Law upon which the judge has heavily relied is applicable to the determination of the case.

These two statutes do provide for the extinguishing of rights of heirs to intestate estates under certain conditions. We have already stated above why the law of adverse possession cannot apply in this case.

Let us examine Section 102.6 (d) of the Decedents Estates Law. This section permits for the dismissal of any proceedings, which the petitioners have neglected to prosecute diligently. Section 102.6 (d) presupposes that there has been no disability which petitioner suffered that could cause such neglect to prosecute her proceedings diligently. In the instant case, we have not come across evidence which shows that these petitioners were negligent in exerting their claim to share in the property of the estate of their late father. Therefore, no justifiable reason exists for Judge Bailey to reach the conclusion that petitioners were negligent in prosecuting their rights since the records before us are void of such evidence. All that we have been able to gather from the records in this case is that the estate of the late Arthur B. Walker, Sr., was first closed in 1961 and reopened in 1966 before the petitioners had reached their majority. There is no evidence before us to show how old these children were in 1961 or 1966. In point of fact, the petitioners were in their infancy in 1961 and in 1966, and their natural mother was an illiterate woman who could neither read nor write the English language. Neither did this illiterate mother know that her minor children were entitled by law to any of the property of this estate. Furthermore, from the facts in this case, we are placed in no position to say at what age or period in their lives these petitioners got to know they were legitimized daughters of the late Arthur B. Walker, Sr., and were entitled to share in the property he possessed during his life time.

In the absence of such material evidence, it is our opinion that the petitioners were unjustly deprived of their rights to the estate of their late father, Arthur B. Walker Sr., due to no fault of theirs.

Under section 102.6 (d) of Decedents Estates Law at page 43, the probate court is granted the power, and we quote:

"To open, vacate, modify, or set aside any decree or order of the Court directing distribution of the property of an estate, which was made prior to the probate of and without knowledge of a will which affects such distribution, and in the same or a different proceeding a notice to the persons or the fiduciaries of the persons to whom the property has been distributed, to make such further and different direction as to such distribution as justice may require and as incident thereto, order the refund of any property theretofore distributed erroneously."

The subject property according to the facts of this case was erroneously distributed and these petitioners were deprived of their portion of the property to which they are entitled. The law quoted above vests the probate court with the power to remedy such injustice. This we feel the court must do.

For the foregoing reasons, the judgment of the probate court is hereby reversed and the case is remanded to the probate court of Montserrado County, with instructions that it resumes jurisdiction over the subject intestate estate and order the curator for Montserrado County to take charge of all of the real property of the late Arthur B. Walker, Sr., which were erroneously distributed between Edwin Dwala Walker and Arthur Benedict Walker, Jr., and where administrator's deeds have been issued, the probate court shall order the curator to seek the cancellation of all such deeds before the proper court. Thereafter, the curator shall apportion said real property in the intestate estate in keeping with the Decedents Estates Law. Costs are ruled against appellees. And it is hereby so ordered.

Judgment reversed.

Wulah v Wright et al [1993] LRSC 20; 37 LLR 271 (1993) (23 July 1993)

CHARLES WULAH, Petitioner, v. **HIS HONOUR M. WILKINS WRIGHT**, Resident Circuit Judge, Sixth Judicial Circuit, Montserrado County, and **THE CHURCH OF THE LIVING GOD**, by and thru its Deacon, N. WHYNEY, Respondents.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE GRANTING THE PETITION FOR A WRIT OF PROHIBITION.

Heard: April 13, 1993. Decided: July 23, 1993.

1. Where title is not in issue, a special proceeding to recover possession of real property may be maintained in a circuit court or a court of the justice of the peace or magistrate. The Court of a justice of the peace or magistrate shall have jurisdiction only in cases in which the amount of the judgment demanded does not exceed three hundred dollars.

2. Summary Proceedings to recover possession of real property is not a special proceeding within the meaning of Revised Code 1: 16.

3. Any independent application to a court for relief shall be prosecuted in the form of an action, except where the prosecution in the form of a special proceeding is authorized.

4. If a court obtains jurisdiction over the parties, an application for relief shall not be dismissed because said application is not brought as an action or special proceeding or motion, whichever may be proper, but the court shall make whatever order is required for its proper prosecution.

5. Ten days is the required time allowed by statute for the filing of responsive pleadings, including those in special proceeding, except for a writ of habeas corpus

6. Summary means that the issue must be disposed of speedily, without delay; that the time usually allowed for pleadings does not apply; that the strict rules of evidence do not prevail; that the ordinary formal procedure prevailing in the trial of a case at law is dispensed with.

7. Prohibition will lie where the ruling of the trial judge constitutes an abuse of jurisdiction.

Appellant filed an action of ejectment in the Magisterial Court in New Kru Town. The judge dismissed the case for lack of jurisdiction over the subject matter since title to real property was at issue. Thereafter, appellant instituted summary proceedings to recover possession of real property in the civil law court. The writ of summons was issued on January 31, 1992 for hearing to be held on February 5, 1992. The precepts was served on February 3, 1992 and appellee did not file an answer until February 10,1992. In the meantime, the judge conducted the hearing on February 5, 1992 and entered a default judgment against the appellee. When appellee went to file his answer and discovered the default judgment, he filed a motion to rescind the judgment which was denied on the basis that the hearing was a special proceedings. Appellee then petitioned the Chambers Justice for a writ of prohibition and it was granted. Appellant thereupon appealed to the Full Bench where the Chambers Justice's ruling was affirmed on the ground that the hearing was not a special proceeding since title was at issue. The Court further observed that even if it were a special proceeding, the ten-day standard used for responsive pleading has been adopted by the Court for special proceeding as well. Accordingly, the petition for the writ of prohibition was *granted.*

The Dugbor Law Firm appeared for the petitioner. *Moses Kron Yangbe* appeared for the respondents.

MR. JUSTICE HNE delivered the opinion of the Court.

This case first commenced at the magisterial court in New Kru Town, Bushrod Island when the respondent, the Church of the Living God, sued the petitioner in an action of ejectment on January 8, 1992. That action was dismissed by the Magistrate because title was involved, placing the case beyond his jurisdiction.

Subsequently, on January 30, 1992, the said respondent sued the petitioner in the civil law court, this time in summary proceedings to recover possession of real property. The corespondent judge ordered a writ of summons issued against the petitioner on the 31' January 1992 with the appearance date fixed for February 5, 1992. The writ was served on the petitioner, then defendant, on 3rd February 1992. On 10th February, 1992, the petitioner filed an answer proferting his title deed for the property which is the subject of the suit. The judge, by that time, had rendered a default judgment against the appellee on the 5 th day of February, 1992, the day on which the writ of summons commanded him to appear. When his counsel went to file the answer and observed that the judge had already entered a default judgment, he wrote the judge giving him notice that he would file a motion to rescind the default judgment and requested the

judge to suspend enforcement of the judgment. We feel, however, that the counsel for appellee should have exercised diligence by ensuring his client's appearance on the day stated in the writ to make an appropriate application for relief. The counsel's failure in this respect exposes him to a reprimand by this Court.

That motion to rescind the default judgment was filed and, upon hearing thereof, it was denied by the judge. Before the enforcement of the judgment the appellee applied to the Chambers Justice for a writ of prohibition. An alternative writ was issued. After hearing the petition for prohibition the Chambers Justice, Mr. Justice Morris, granted the same on grounds that title was involved, and that after the judge came to know this by way of the motion to rescind, he should have granted that motion. The respondent has appealed to the full bench from the ruling of the Chambers Justice.

Our statute provides that:

"Where title is not in issue, a special proceeding to recover possession of real property may be maintained in a circuit court or justice of the peace or magisterial court. The court of a justice of the peace or magistrate shall have jurisdiction only of cases in which the amount of the judgment demanded does not exceed three hundred dollars." Civil Procedure Law, Rev. Code 1: 62.21.

This provision of our civil procedure code, to our mind, concerns itself with the right of possession and not title.

The appellant tells us that this case is a special proceeding and that the date of appearance and hearing is as specified in the citation issued by the clerk of court upon the orders of the Judge. He relied on the Civil Procedure Law, Rev. Code 1: 16.3 and 76.4(1) and (2). Under our statue, special proceedings consist of the following:

(a) Writs of certiorari, mandamus, prohibition and error

(b) Writ of quo warranto

(c) Habeas corpus

(d) Condemnation proceedings

(e) Special proceedings concerning mentally disabled and legally incompetent persons

We do not think that summary proceedings to recover possession of real property is a special proceeding within the meaning of special proceedings under chapter 16 of our civil code. Next, it is our consideration that even though the date of appearance in special proceedings is fixed in a citation upon orders of the judge, the standard of ten(10) days given for answer, returns and/or appearance has been adopted for special proceedings by this Court under chapter 16, except in cases of habeas corpus which is a constitutional writ and is usually attended by exigent circumstances.

The appellee advanced the position that the case being a special proceeding as claimed by the appellant, it should have been commenced with a petition instead of a complaint. We have already said that the case is not a special proceeding as contemplated by chapterl6 of our civil procedure law; and even if it were, it is not dismissible by reason of being commenced by a petition or complaint as this is a matter of mere form.

"Any independent application to a court for relief shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized. Except where otherwise required by statute or rule of court, procedure in special proceedings shall be the same as in actions.

If a court has obtained jurisdiction over the parties, an application for relief shall not be dismissed because not brought as an action or special proceeding or motion, whichever may be proper, but the court shall make whatever order is required for its proper prosecution". Civil Procedure Law, Rev. Code 1: 1.2. (1)(2), *Action and Special Proceedings.*

Commencement of the present case by a complaint is therefore permissible, a petition being the same as a complaint under our law.

Further, the appellee wishes us to make a determination that:

1. The judge having allowed him less than ten(10) days to appear, and rendered default judgment against him before ten(10) days is contrary to our statute.

2. The circumstances for which summary proceedings are required under section 62.21 of the Civil Procedure Law are those affecting tenants where no title is involved.

3. The judge's denial of the appellee's motion to rescind after seeing from such motion that title is involved in the case is against the law.

As to item # 1 above, we have already stated in this opinion that ten(10) days should be the required appearance date. In declaring this we are not unmindful of the definition of "summary" as enunciated in the *case Peakeh v. Nimrod,* [1913] LRSC 6; 2 LLR 102 (1913) and reaffirmed in *Doe v. Sinkor Bakery,* [1976] LRSC 65; 25 LLR 292 (1976). ° Summary" is stated to mean that " the issue must be disposed of speedily, without delay; that the time usually allowed for pleadings does not apply; that the strict rules of evidence do not prevail; and that the ordinary formal procedure prevailing in the trial of a case at law is dispensed with. *Peakeh v. Nimrod* was a habeas corpus proceeding. The factual setting was an exigent one which does not admit of the ten day standard for returns or appearance as stated earlier in this opinion. *Doe v. Sinkor Bakery* was a labour case. The ten days requirement for returns, answer or appearance already obtains in our practice as to labour cases.

We have therefore elected to adopt the standard of ten (10) days provided under our civil statute for answer and/or appearance to be better promotive of the rights and interests of party litigants in our courts, subject to the qualification stated above concerning habeas corpus proceedings.

We agree with the appellee's contention that summary proceedings as outlined in section 62.12 are premised upon circumstances where only possession is in issue, as in cases of landlord and

tenant when there is absent any indicia of title. Where the tenant has a valid lease agreement, that would raise a question of title in which event section 62.21 would not lend itself. An action of ejectment would then be the proper course to pursue. This responds to issue # 2 above.

Regarding point # 3 , we are in accord with the Chambers Justice when he held that the judge should have granted the motion to rescind when he saw from that motion that title is involved, which accordingly takes the case out of section
62.21.

The judge's denial of the motion compromises the property right of the appellee, which is a fundamental substantive right that cannot be curtailed by the mere procedural approach of the co-appellant's failure to appear on 5th February, 1992, a period of merely two(2) days after the writ of summons was served on him, even though the writ was issued on 31st January, 1992. His denial of the motion and his subsequent attempt to enforce his judgment against the appellee constitutes an abuse of jurisdiction for which prohibition should issue.

The ruling of Mr. Justice Morris granting the writ of prohibition is therefore hereby affirmed, with costs against the appellant. The Clerk of this Court is ordered to send a mandate to the lower court to resume jurisdiction over the case and give effect to this opinion. And it is hereby so ordered.

Petition granted.

Ashkar v Johnson et al [1985] LRSC 18; 33 LLR 74 (1985) (20 June 1985)

FOUAD ASHKAR, Informant/Appellant, *v.* **The Sheriff of Montserrado County, SAMUEL JOHNSON and all the BAILIFFS** of said County, Respondents/Appellees.

INFORMATION PROCEEDINGS.

Heard: March 21, 1985. Decided: June 20, 1985.

1. Under the statute law of Liberia, the sheriff has the authority only to execute and deliver to an execution purchaser proof of publication, service and posting of the notice of sale, and the deed which conveys the right, title and interest sold, which proof may be recorded in the office of the registrar of deeds of the county where the property is located. Rev. Code 1 :44.43.
2. Under our case law, every sheriff to whom a writ of execution or sale has been directed, shall have the authority and the duty to put the purchaser or purchasers of any property, movable or fixed, sold by virtue of such writ, in possession of such property only if the sheriff, the execution debtor, or the person against whom the writ was issued, is in possession of said property; otherwise the purchaser can obtain possession of the property only by other legal means available to him.
3. The sheriff has the authority and the duty to execute all instruments of writing or other evidence of title necessary and proper for the security of the purchaser.
4. The purchaser of real property at an execution sale cannot by means of a writ of possession be put in possession of the property which is in the possession of a third party.
5. Generally, the sale of real property under judicial proceedings will not ordinarily affect any right, title, or interest in the premises that may be held by any person who was not in some manner a party to the proceedings in which the sale was had.
6. Where a lessee acquires his interest after the attachment of the lien of a judgment, or after the lien or execution under which the property was sold, the interest of the execution purchaser becomes superior to that of the lessee.
7. A purchaser who acquires property after execution of a lease takes the property subject to the lease, although he had no actual knowledge of the leasehold.
8. A purchaser of property at a judicial sale takes over the rights of the former owner and becomes entitled to the rents and profits of the property that accrue subsequently, and the lessee thereby becomes the tenant of the purchaser as of the date the purchaser receives the Sheriff's Deed.
9. An execution purchaser may, if he can do so without a breach of the peace, enter upon the purchased property without the consent of the former owner free from liability as a trespasser.
10. An execution purchaser may enter an action to quiet title or an action of ejectment against the former owner or other persons in wrongful possession of the property.
11. Ejectment will however not lie to evict a lessee from possession of property held under a leasehold right subsequently sold or transferred to a lessee by the lessor.
12. The law cannot allow one to benefit by his own fraud or evil, but such benefit may not be withheld from a third party who did not participate in the fraud and had no knowledge of it.

Fouad Ashkar, the appellant, brought a bill of information in the Civil Law Court for the Sixth Judicial Circuit, Montser-rado County, in response to an attempt by the sheriff of Montserrado County to evict him from premises sold to a purchaser under an execution sale. The informant was lessee of a judgment/execution debtor under a lease executed subsequent to the judgment but prior to the sale of the property. The judgment debtor had concealed the property from execution after judgment was rendered against him. The property, dis-covered by the judgment plaintiff, was exposed to public auction and sold after the judgment debtor had failed to appear in response

to the service of a writ of execution. The informant was not cited to appear at the execution hearing. Following the sale, the sheriff sought to remove the informant from the premises, thus necessitating the filing of the information.
After a hearing, the trial court denied the information. From this denial, appellant appealed the case to the Supreme Court.
The Supreme Court reversed the judgment of the trial court, holding that under the statute the sheriff's authority and the duty extended only to executing and delivering to the purchaser proof of publication, to serving and posting notice of the sale, and to issuing a deed conveying the right, title and interest sold. The Court opined further that the sheriff had the authority to put the purchaser in possession of the sold property only where the sheriff himself or the execution debtor was in possession of the property, and not where the property was in the possession of a third party. Where the property was in the possession of such third party, the Court said, the purchaser must resort to other legal means to acquire possession.

The Court also held that where there exist a leasehold prior to the execution and sale, the execution and sale are subject to the leasehold. As such, the Court observed, the lessee becomes the tenant of the new owner, and the new owner acquires the right to the benefits, rents and profits accruing to the property. He cannot, however, eject the lessee by virtue of such new ownership. Moreover, the Court said, while it is true that one who commits a fraud or does an evil cannot be permitted to benefit such fraud or evil, the principle did not apply to an innocent third party who did not participate in or had knowledge of the fraud or evil. The Court therefore concluded that the lessee could only be ejected if he participated with the execution debtor in concealing the property from the trial court. The informant, it said was entitled therefore to the continued use and enjoyment of the property as provided for by the lease. The *judgment* of the trial court was therefore *reversed* and the information granted.

E. Winfred Smallwood and *David A. B. Jallah* appeared for the informant/appellant. *J. Laveli Supuwood* appeared for the respondents/appellees.

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

Fouad Ashkar brought this bill of information in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, contending that he is the lessee of a piece of real property which was the subject of a judicial sale, and that a writ of possession was subsequently issued to the highest bidder, one Mr. Nelson Diegbgha, who together with the Sheriff of Montserrado County, sought to oust or evict him from the sold premises.

According to the records certified to this Court, the genesis of this case is rooted in an action of ejectment brought in the Civil Law Court for the Sixth Judicial Circuit by M. M. Perry in 1956 against Igal Ammons, both of them being from Montserrado County. The action was decided in

1965 in favor of Mr. Perry and the judgment was partly satisfied as to the subject of the ejectment, but the money judgment for damages in the sum of $15,000.00 (Fifteen Thousand Dollars) remained unsettled. The reason alleged for the partial satisfaction of the judgment was that the defendant, Igal Ammons, was found to have no means to settle the payment of the amount. However, in 1983 Mr. M. M. Perry unraveled the existence of a piece of property belonging to said Igal Ammons, located on Randall Street and described as follows:

"Commencing at the Southwestern corner of the adjacent land owned by Mr. Aaron Cooper and running thence south 70 degree East 114 ft.; parallel with Randall Street then South 10 it; thence 70 degree West 121 ft.; and containing ½ acre of land".
On the basis of this discovery, Mr. Perry filed a bill of in-formation in the Civil Law Court, appraising the court of his discovery. A writ of summons was subsequently issued against Mr. Igal Ammons to appear in court and to verify the informa-tion filed by Mr. Perry. Said writ of summons and the returns are quoted below:

"REPUBLIC OF LIBERIA) IN THE PEOPLES CIVIL LAW COURT FOR

MONTSERRADO COUNTY) THE SIXTH JUDICIAL CIRCUIT, MONT-

SERRADO) COUNTY, SITTING IN ITS DECEMBER TERM, A. D. 1982.

BEFORE HIS HONOUR: J. HENRIC PEARSON, ASSIGNED JUDGE"

McDonald M. Perry, of the City of)

Monrovia, Liberia.....PLAINTIFF)

Versus) ACTION OF

Igal Ammons, also of the City of) EJECTMENT

Monrovia, Liberia.....DEFENDANT)

WRIT OF SUMMONS

REPUBLIC OF LIBERIA, TO P. EDWARD NELSON, II, Esquire,

Sheriff for Montserrado County, G R E E T I N G S:

YOU ARE HEREBY COMMANDED TO SUMMONS Igal Ammons, defendant in the above entitled cause to appear before the People's Civil Law Court for the Sixth Judicial Circuit Montserrado County, sitting in its December Term, A. D. 1982, on the 22nd day of February, A. D. 1983, at the hour of 2 o'clock in the afternoon to show cause why the properties just discovered by plaintiff should not be expose for public sale to satisfy the judgment.

YOU ARE further commanded to make your official Returns endorsed on the back of this writ of summons on or before the said 22nd day of February 1983, as to the manner of service of this writ of summons.
AND HAVE WITH YOU THERE THIS WRIT OF SUMMONS

Given from under my signature with the seal of this Honourable Court, this 15th day of February, A. D. 1983.

Signed:
Robert B. Anthony
"Clerk, People's Civil Law Court
Montserrado County

$4.00 Rev. Stamp on Original"

"SHERIFF'S RETURNS

On the 21st day off February, A. D. 1983, I, George Sherman a bailiff of the First Judicial Circuit Court "A" Montserrado County, Republic of Liberia, served the within said writ of summons on the within said named Igal Ammons. But he refused to received a copy of the within writ of summons, stating that the case is over. I now make this as my official returns to the office of the clerk, Peoples Civil Law Court, Montserrado County, Republic of Liberia.

Dated this 21st day of February A. D. 1983.

Signed: Sammy M. Johnson

Acting Sheriff, Montserrado County

Bailiff First Judicial Circuit Court "A"

Montserrado County, R. L.

21 /2183 GEORGE. S. SHERMAN"
The returns to the summons issued against Mr. Ammons reveal that he refused to attend because, he said, the matter between him and Perry had been concluded.

Thereafter, the court, being satisfied that the property in question was in fact that of Mr. Igal Ammons, as was reported by Mr. Perry, ordered that the writ of execution which was issued since 1980, be served on Mr. Ammons. The writ of execution is quoted here verbatim:
"REPUBLIC OF LIBERIA) IN THE CIVIL LAW COURT FOR THE

MONTSERRADO COUNTY) SIXTH JUDICIAL CIRCUIT, MONTSERRA-
DO COUNTY, SITTING IN ITS MARCH
TERM, A. D. 1980.
BEFORE HIS HONOUR: E. S. KOROMA,. ASSIGNED CIR. JUDGE

WRIT OF EXECUTION

REPUBLIC OF LIBERIA, TO P. EDWARD NELSON, II, Esquire

SHERIFF FOR MONTSERRADO COUNTY, G R E E T I N G S:

YOU ARE HEREBY COMMANDED TO seize and expose for sale the lands, goods, and chattels of Igal Ammons, the above named defendant and if the sum realized therefrom be not sufficient then his real property, until you shall have raised the sum of FIFTEEN THOUSAND DOLLARS ($15 000.00), with interest thereon at the rate of six (6) percent per annum, from the 25th day of August, A. D. 1964 until payment shall have been made; and in addition thereto, and if you cannot find any land, goods, and chattels of the said Defendant, you are hereby commanded to arrest his body and have him committed to the Central Prison where he was but absconded there-from, unless he will pay you the said sum of money, or show you property to seize and sell for the same.

AND UPON receiving from the said sale, or other-wise, said sum of money, you are further commanded to pay over to McDonald M. Perry, the above named plain-tiff, the sum necessary to satisfy the judgment therein; and reserve unto yourself the said cost and expenses, and you will make known to this court at the next Term thereof to be held on the third Monday in June, A. D. 1980, your doings and proceedings under this writ."
The aforesaid writ was executed and the property which was the subject of the information was offered and sold at a public auction to the highest bidder, Mr. Nelson Diegbgha for the sum of $20,000.00 (TWENTY THOUSAND DOLLARS). Having been informed by the sheriff of said sale and the issuance of a sheriff's deed to the buyer, the court ordered a writ of possession issued and placed in the hands of said sheriff for service on the occupier of the subject of the execution and sale.

The occupier of said premises happened to be Mr. Fouad Ashkar of the City of Monrovia who is the informant in the present bill of information. The informant, Fouad Ashkar, had gotten on the premises by virtue of a lease agreement with Mr. Igal Ammons, concluded in 1974, and extending to the year 2004. In consequence thereof, he had erected a concrete building thereon for business purpose. The informant was never cited as a party to the summons issued against Mr. Ammons; he was not informed of the execution sale; and he was not cited to appear during the course of the transaction. For those reasons, he refused to yield to the writ of possession which sought to eject him. He had therefore filed this bill of information contending that an action of ejectment was the proper remedy against him and not a writ of possession. More-over, informant contended that the sale of said property merely gave it a new owner and left his leasehold interest unaffected.
The respondents on the other hand, in resisting the information, maintained that Igal Ammons, having hidden the property from judicial execution earlier in 1965, his act amounted to a fraud, and he and his lessee should not thereby be allowed to benefit from their misdeeds.
Consequently, they said, an action of ejectment was unnecessary to oust or evict the lessee, and that a writ of possession should suffice to allow the sheriff to put the purchaser of the property in possession.
The information was heard and denied. It is from this denial that informant has appealed to this

Court of final resort.
From the facts and circumstances of this case, the main issues before us for adjudication are the following:

1. Whether or not the sheriff at an execution sale of real property has an obligation to put the buyer in physical possession of the property?
2. What are the rights of an execution purchaser as against the rights of a lessee in actual possession by virtue of a prior lease agreement concluded by the original owner, the then lessor, and how can said purchaser acquire possession from third party?
3. Whether or not fraud committed by a prior owner of a realty can affect the interest of a lessee who had entered the premises without notice of said fraud?

The first issue for our deliberation is whether or not the sheriff, at an execution sale of real property, has an obligation to put the buyer in physical possession of the property. Our statute does not indicate whether the sheriff at an execution sale has an obligation to put the buyer in actual physical possession of realty sold at such sale.
However, it does indicate that within ten days after the sale, the sheriff shall execute and deliver to the purchaser proof of publication., service and posting of the notice of sale, and a deed which shall convey the right, title, and interest sold. The statute also states that such proof, as enumerated, may be filed and recorded in the office of the registrar of deeds of the county where the property is located. Civil Procedure Law, Rev. Code 1 :44.43. Sale of Real Property, *(4) Conveyance; Proof of Notice*. From what the statute says, it appears that the sheriff is merely supposed to deliver the buyer's deed and other such documents that pass title in the property to the buyer.
Notwithstanding the statute, however, our case law autho-rity in this jurisdiction provides that every sheriff to whom a writ of execution or sale has been directed, shall have autho-rity, and it shall be his duty to put the purchaser or purchasers of any property, moveable or fixed, sold by virtue of such writ, in possession of such property, if the sheriff himself or the person against whom the writ was issued, is in possession of the same. It shall be his duty, and he shall have authority, to execute all instruments of writing or other evidence of title, which may be necessary or proper for the security of such purchaser or purchasers. See *Bracewell and Caranda v. Coleman et al.[1938] LRSC 3;* , 6 LLR 176, 183 (1938). The *Bracewell* case stresses that there is only an obligation to put purchaser in possession where the sheriff himself or the person against whom the writ was issued is in possession of the property. Otherwise, according to the statute, the sheriff is merely obligated to the buyer for his deed and other documents affirming the conveyance of title to the property.

At common law, it is ordinarily the duty of the execution officer to deliver goods bought at an execution sale to the purchaser.
In the case of a sale of a portion of a mass of personal property, the sale is not regarded as complete before there has been a separation and delivery of the portion sold. However, it is not necessary that the officer formally hand over the property to the purchaser.
An execution officer is ordinarily held not to be under obligation to deliver possession of realty purchased at the execution sale to the execution purchaser, who is left to acquire possession as he can. Under this rule, the execution officer may not turn the person in possession out of possession by force without judicial proceedings to secure possession. 30 AM JUR 2d.,

Execution, § 479.
From the foregoing, the sheriff at an execution sale is not obliged to put the purchaser of realty into possession, except where the sheriff himself, or the execution debtor is in posses-sion; otherwise, the execution purchaser with a sheriff's deed can obtain possession of premises purchased by resort to other legal means available to him. That means that the purchaser of realty at an execution sale cannot be put in possession of the property which is in the possession of a third party by means of a writ of possession as was sought to be achieved by the sheriff in this case.
Our statute is silent on the rights of the purchaser of realty at an execution sale *vis-a-vis* the lessee of the former owner in possession who had not been made a party; and in general, nothing is said as to how such a buyer can wrest possession of said property from a third party. Generally, however, it is firmly established that a sale of real estate under judicial proceedings ordinarily will not affect any right, title, or interest in the premises that may be held by any person who is not in some manner a party to the proceed-ings in which the sale is had. 47 AM JUR 2d., *Judgments*, § 267. Intestate of persons not joined as parties, p. 510.

In certain cases, the interest of an execution purchaser is superior to that of a lessee of the execution debtor. This is true where the lessee acquired his interest after the attachment of the lien of the judgment, or, after the levy of execution, under which the property was sold. In such case, the execution purchaser may disaffirm the lease by giving the tenant notice to quit; and upon notification, at least the lessee becomes a tenant at will of the execution purchaser. If the purchaser chooses to disaffirm the lease, he may not claim anything under the terms thereof. On the other hand, in the absence of circumstances calling for the application of a statutory provision to the contrary, the execution purchaser takes subject to a lease given by the judgment debtor before the judgment lien accrued, where such tenancy has not expired. In such case, the tenant becomes a tenant of the execution purchaser for the term and under the conditions of the lease. The execution purchaser is substituted for the lessor, and the tenant becomes his tenant, whose possession is his possession. Since an attornment is equivalent to a novation, an actual attornment by the tenant to the purchaser creates the relation of landlord and tenant between them, regardless of whether the lien of the judgment under which the execution sale was held was prior or subsequent to the lease. 30 AM JUR 2d, *Execution*, § 451, at 707-708. It has also been held in this jurisdiction that the purchaser takes subject to the lease, although he has no actual knowledge thereof. *Watson v. Oost Afrikaansche Compagnie*, 13 LLR 94 (1957). Furthermore, as a general rule, a purchaser of property at a judicial sale becomes entitled to the rents and profits of the property that accrue subsequently. 47 AM JUR 2d., *Judgments*, § 237, at 489.

From the foregoing, the appellant in this case became a tenant of the appellee as of the day the latter received a sheriff's deed for the premises bought. The judgment which was sought to be satisfied by the execution sales was rendered in 1965, and the lease by which appellant holds possession of the land in question was concluded in 1974, nine years after the mentioned judgment. That judgment did not impose a lien on any particu-lar property of Igal Ammons, but by the writ of execution, it sought to secure property belonging to Mr. Ammons as the subject of an execution sale to satisfy the monetary judgment of $15,000.00 (FIFTEEN THOUSAND DOLLARS) owing Mr. Perry. But from 1965 to 1983, about eighteen years, nothing is heard about property belonging to Mr. Ammons until in 1983 when the present property occupied by

appellant was identified by Mr. Perry as belonging to Mr. Ammons. Mr. Ammons was summoned to the proceedings to ascertain his title to the property but he never appeared. The appellant, lessee of Mr. Ammons, was not cited to appear, and could not be present to show his interest. The said property, however, had a judgment lien properly attaching to it only in 1983 when the sheriff was mandated to expose it to an execution sale which means that the lien is later than the lease of appellant which came in 1974. That means also that after purchasing said property, the execution purchaser took over the rights of the former owner, so that appellant now becomes his lessee as though he was Mr. Ammons who actually signed a lease agree-ment with appellant in 1974. Appellant then became the new tenant of the new landlord, and the former is as responsible to the latter for the rents under the lease as he used to be to Mr. Ammons.
Next, we will consider the means open to an execution purchaser to obtain possession of realty bought at an execution sale. Our statute merely provides that ten days from the sale, the sheriff shall execute and deliver to the purchaser proof of publication, service, and posting of the notice of sale, and a deed which shall convey the right, title, and interest sold. Civil Procedure Law, Rev. Code 1 :44.4 (4), *Conveyance: Proof of Notice.*
But, according to the case of *Bracewell v. Coleman, supra,* the sheriff at an execution sale can only put the buyer in actual physical possession of realty sold if he, the sheriff, or the exe-cution debtor, was in possession.

An execution purchaser of real estate may, if he can do so without a breach of the peace, enter upon the purchased realty without the consent of the former owner free from liability as a trespasser. 30 AM JUR 2d., *Execution,* § 480, Purchaser's to seize and enter into possession, at p. 723. He can also institute an action to quiet title or an action of ejectment against the former owner or other persons in wrongful possession of the property. 30 AM JUR 2d., *Execution,* § 481, at 723. However, according to the tradition in this jurisdiction, ejectment will not lie to evict a lessee from possession held under a leasehold right to property subsequently sold to the plaintiff by the lessor. *Watson v. Oost Afrikaansche Compagnie*, *supra*; *Ajavon v. Bull*, 14 LLR 178 (1960).
Appellees contend that Mr. Ammons had committed a fraud by secretly withholding this property from execution since the judgment in 1965, and that therefore he should not be allowed to benefit by his own misdeed. This contention of appellees shall form the basis of our next deliberation: Whether or not fraud committed by the previous owner of the subject matter of an execution sale can work against the interest of his lessee in possession who had entered the lease agreement with-out notice of the fraud? While it is true that the law cannot allow one to benefit by his own evil, yet, whatever fraud was committed by Mr. Ammons in hiding his property from the law has not been attributed to appellant in this case. There is no showing in the records that appellant in any way knew of the hiding of said property from execution when he entered into the lease agreement with Mr. Ammons, nor is there any show-ing that appellant in any way condoned, aided or abetted said fraud. Relying on the good representations made by Mr. Ammons, said appellant had entered into the lease agreement with him for a period of twenty years which is still in force until the year 2004.
The appellant therefore had gone ahead and erected a building on the premises, which he now uses for business purpose. In fact, to permit appellant to enjoy his leasehold interest does not in any way benefit Mr. Ammons since we held earlier that appellee now becomes the new lessee of the execution purchaser, paying rent to the latter and not to Mr. Ammons, his former landlord. Indeed the circumstances of the present case are such that it will be grossly inequitable to deny

appellant the benefit of said lease simply because Mr. Ammons had allegedly deceived the judicial authorities.

WHEREFORE, and in view of all that we have said herein, it is the holding of this Court that the judgment of the court below be reversed. The information is granted to the effect that the informant/appellant remains on and enjoys his leasehold rights as he continues to pay the rent to the execution purchaser as it falls due under the lease agreement up to and including the date of the expiration of said lease agreement. And it is so ordered.

Judgment reversed; information granted.

[Context] [Hide Context]

Good-Wesley v Porte et al [1968] LRSC 45; 19 LLR 70 (1968) (14 June 1968)

JESTINA GOOD-WESLEY, by and through her husband, REGINALD A. WESLEY, et al., Appellants, v. ALBERT PORTE and LILIAN PORTE-BEST, heirs of CONRAD C. PORTE, deceased, Appellees.
MOTION TO DISMISS APPEAL. (VENUE NOT INDICATED.)

Argued May 13, 1968. Decided June 14, 1968. 1. When the records of the Real Estate Tax Division of the Bureau of Internal Revenues fail to disclose registration of ownership, such person, by virtue thereof, is deemed not to be a real property owner and may not serve as a surety on an appeal bond.

During the course of an appeal, a motion to dismiss the appeal was brought, on the contention that the sureties on the bond were not owners of real property according to the records of the Real Estate Tax Division of the Bureau of Internal Revenues. The motion was granted and the appeal was dismissed.
Nete Sie Brownell for appellants. S. Raymond Horace and Tilman Dunbar for appellees.

MR. court.

JUSTICE

ROBERTS delivered the opinion of the

Before we could hear this appeal on its merits, appellees filed a motion to dismiss the appeal.
The motion embodies four counts. Count four reads : "And also because appellees say further to the defective bond of appellants in the above-entitled cause, that said appeal ought to be dismissed with costs against appellants, in that the rule of law commands

that sureties to bonds, whether appeal or otherwise, must be householders or freeholders within the Republic of Liberia. Appellees submit that from an inspection of the records certified to your Honors in

 the above-entitled cause, the names of Messrs James Dobor and Thomas J. G. Pahngon are laid in the body of the bond as sureties, though they did not sign said bond, and these sureties, it has been shown, do not possess the necessary real estate qualification as may be seen from a copy of a certificate 'from the Real Estate Tax Division, Bureau of Internal Revenues, Republic of Liberia, duly notorized, herewith made profert and marked exhibit 'A' to form part of this motion." Counts one through three alleged by appellees were later discovered to have been based on clerical errors and have been waived. We find it essential to here set forth the exhibit referred to by appellees : "Real Estate Tax Division, Bureau of Internal Revenues, Treasury Building, Monrovia. "Office of the Director "May 8, 1968 "To whom it may concern "This is to certify that Messrs. James Dobor and Thomas J. G. Fahngon, according to our records, have no property registered in the Real Estate Tax Division, Bureau of Internal Revenues, R.L. "Certified by: "[Sgd.] J. GBEDE WILLIAMS, Chief Accountant."

Appellants filed an answering affidavit consisting of four counts. Count four thereof is an answer to count four of the motion, contradicting the tenability of appellees' contention, and says : "And also because appellants say, that as to count four of the motion to dismiss the appeal, said count of the motion is also false and without any legal merit in that besides the fact that the sureties did sign said appeal bond, they are also freeholders in the Republic

of Liberia, for appellants would never have procured propertyless parties to sign an indemnity bond. Appellants submit that the mere nonregistration of real property in the Bureau of Revenues does not ipso facto prove that the surety is without any real property or a but on which he pays taxes." We find it very difficult to agree with the learned counsel's contention raised in this count, especially when our statute is very clear on this issue as set forth in the Civil Procedure Law, 1956 Code 6 :462 (C) . "By offer of unencumbered real property on which taxes have been paid and which is held in fee by the defendant." Counsel's contention that property need not be registered in the Bureau of Revenues to justify possession of real property is, therefore, not well taken. For how can one pay taxes on property that he has not registered? The registration of property shows the value which regulates the payment of taxes. This has a tendency to reveal that the Government has been deprived of taxes by these sureties. Because of this omission to perform a mandatory requirement, we have no alternative but to sustain the motion to dismiss the appeal, with costs against the appellants. And the clerk of this Court is hereby instructed to send a mandate

to the lower court informing said court of this judgment. And it is hereby so ordered.
Motion granted.

Williams v Wynn [1914] LRSC 4; 2 LLR 148 (1914) (9 January 1914)

LEAH A. WILLIAMS, formerly Leah A. Phelps, Appellant, v. **MANSON WYNN**, Administrator of the Estate of H. R. Phelps, late of Brewerville, Appellee.

ARGUED DECEMBER 15, 1913. DECIDED JANUARY 9, 1914.

Dossen, C. J., and Johnson, J.

1. If a husband buys property in the name of a third party who subsequently conveys it to the purchaser's wife, and if the transaction Were unattended by fraud and were allowed to pass unchallenged through probation and registration, the wife c.,uld have acquired an absolute right and title which could not be assailed by creditors of the husband; and if property so acquired runs uninterruptedly for twenty-one years, a perfect and complete title would vest in the wife by the doctrine of limitations to which the clause of the Constitution relied upon by the lower court would be inapplicable.

2. The bare allegation of title to real property unsupported by a valid deed or other instrument, or by any legal circumstances and condition, as for instance, undisturbed possession for the statutory limit requisite to bar an adverse title by which legal ownership is presumed, is devoid of legal efficacy and weight, and can not by any rule of law be construed into a defensible title.

3. In legal controversies where the *res gestce is title* to real, property founded upon deed or other valid instrument of writing, or an authentic copy thereof where the original has been proven lost is prima *facie* or best evidence to the claim; falling short of the production of which evidence at the trial, proof of title would be fatally insufficient unless where it was clearly established that the original document did really exist but had been lost, and that the public records in which same was recorded had been destroyed; or that the document is in the possession of the adverse party who has been duly subpoenaed to produce same at the trial.

4. A deed admitted to probate, is a valid document; and as such, is evidence against all parties thereto.

A court of probate should reluctantly permit articles which the husband purchases for the wife, and which he desires her to own in her own right, to be brought into the estate of a deceased husband if the widow can produce satisfactory proof of the fact, that they were bought for her own use or account by her husband.

Mr. Chief Justice Dossen delivered the opinion of the court :

In re a Petition to Strike from the Inventory of the Estate of the said H. R. Phelps Certain Real and Personal Property Claimed by Appellee—Appeal from Judgment. This case originated in the Court of Monthly Sessions and Probate, for Montserrado County at its March term, nineteen hundred and thirteen and was determined at its October term for the same year.

The records show that the said H. R. Phelps, late of the settlement of Brewerville, in the County of Montserrado, was the former husband of appellant and that he died intestate but that at his death he was seized and possessed of certain real and personal property, and that pursuant to statutory provisions the Probate Court appointed appraisers and administrators to discover and appraise his estate and to administer same agreeable with the statutes applying to intestate estates. That accordingly an inventory was returned to the Probate Court wherein was set forth and contained certain real and personal property claimed to be property owned and possessed by the intestate at the time of his death, as far as had come to the knowledge of the appraisers. The said inventory contained, *inter alia*, three pieces of real property situated in the settlement of Brewerville, the abuttals and description of which are set in the appellant's petition of claim and certain personal chattels which are also described in said petition and are hereinafter more specifically referred to, all of which property appellant claimed ownership to in her own right and independent of her right of dower out of the estate ; wherefore, the probation of the inventory containing said properties was objected to by appellant and application made to the court below to order same to be struck from the inventory as forming part of the assets of the deceased.

The properties comprised in the said application of the appellant are as follows : that is to say : (1) fifteen acres of land in the settlement of Brewerville with one dwelling house; (2) twentyfive acres of land located on the North Avenue in said settlement; (3) ten acres of land in the settlement of Brewerville bought from the estate of Charles Alexander; (4) thirty pieces of timber; (5) one cooking-stove, and utensils; (6) one dining table; (7) one bedstead; (8) four chairs; (9) one toy-stand with toys; (10) one table with waiter and toys; (11) three flower pots; (12) four picture frames; and (13) one folding table.

The trial court entered upon the hearing of the petition at the term to which it was presented, but owing, it would seem to the complexity of the facts surrounding the case and the determination of the trial judge to thoroughly and deliberately inquire into those facts, which in cases of this nature it is confidently expected that a probate judge will carefully do, did not conclude the hearing until nine months later when on October fifth it entered its final judgment in the premises wherein it denied the application in part; that is to say, the court refused to strike from the said inventory any portion of the lands and appurtenances claimed by appellant, but held that certain of the personal chattels which appellant had acquired "otherwise than through her husband" should be struck from said inventory as being the property of the appellant which could not be made liable for the payment of the debts of her deceased husband. See judgment.

Exceptions were taken to this final judgment of the trial court, as well as to several rulings made in the process of the trial and the case appealed to this judicature for review.

During the hearing of the cause before this court the learned counsel for the appellee raised in his arguments several points involving the legality of property acquired by a married woman from

her husband during coverture, and contended that all and any such property could be made liable for the payment of the debts of the husband. No exception to this general principle, which counsel insisted should be followed in the case at bar was made whether the property was real or personal; whether it was, or was not, procured from the independent resources of the wife, the husband only acting as agent ; 'whether the husband was or was not under legal disability at the time be made the conveyance; or whether, if real property, the transfer was void *ab initio* because it was a *direct* transfer from husband to wife ; or whether it was made through the medium of a trustee or third party.

It appears that the court below followed this principle without limitations or exceptions, in arriving at the conclusion that only the property acquired by appellant "otherwise than through her husband" should be eliminated from the inventory of the estate of the deceased husband, which meant in effect that any property which appellant may have acquired through her husband during coverture, whether the conveyance was through the medium of a trustee or third party or not and the title therein had become unassailable by virtue and operation of the statute of limitations; or whether fraud could be legally imputed as the motive for such transfer or not, in any case if the property had been acquired through the husband, the trial court held that it could be made liable for the debts of the deceased husband. Now while the question of the legality or illegality of a conveyance made by husband to wife through the medium of a trustee or third party with all the requisites of the law, is not properly before us, growing out of the fact that the deeds for the property alleged by appellant to have been procured by her late husband in her own right and title and by virtue of which she claims ownership to two parcels of the land in dispute, were not presented in evidence at the trial; nor was there any authentic copy of said deeds presented; nor was there any evidence of legal weight, of which this court could take notice, produced to prove either the loss of said documents or the destruction of the public records in which they had been recorded, still we feel that the principle which the trial court evidently followed in arriving at its conclusions with respect to the personal chattels, is so general in its application and so far-reaching in its effect upon the status of property belonging to married women, as to justify this court setting forth for future guidance what is the legal status of property acquired by a married woman during coverture through or by her husband, and how far such property may be held responsible for the debts of the husband.

The Constitution declares that, "The property of which a woman may be possessed at the time of her marriage and also that of which she may afterwards become possessed, otherwise than by her husband shall not be held responsible for his debts * * *." (Vide Const. Lib., art. V, sec. 10.) It was contended that the words "otherwise than through her husband" in the above cited section implied that property thus acquired by a married woman may be made liable for the debts of her husband. We are of the opinion that this provision of the Constitution is subject to certain limitations and qualifications. We hesitate to lay down the broad principle that the property of a *feme covert* acquired after coverture through her husband, is subject to the payment of hi's debts under any and every circumstance. Now it is well understood that husband and wife are one in the eye of the law, and therefore a contract made directly between them, in which property is the subject matter would be void *ab initio* for want of legally distinct parties thereto. But this barrier may be legally overcome by a husband buying or otherwise procuring property in the name of a third party, who becomes the medium through which the title may ultimately vest in the wife; and, it would seem that if such a transaction were unattended by fraud or the intent to defraud,

and if the husband was at the time under no legal disability to contract; and if the transaction were allowed to pass unchallenged through probation and registration the wife would have acquired an absolute right and title in the subject matter which could not subsequently be assailed by the creditors of the husband. Again, let us suppose that the fee of the wife in property acquired under such conditions had run uninterruptedly for twenty-one years : we hold that a perfect and complete title therein would have vested in her by the doctrine of limitations which would be unassailable and to which that clause of the Constitution relied upon by the lower court and urged before this court by counsel for appellee, would be inapplicable.

In the case *Bingham v. Oliver*, determined by this court in 1870, this court enunciated principles analogous with the foregoing premises with respect to the liability of the property of married women (I Lib. L. R. 47).

While we can not uphold the judgment of the trial court upon the legal premises assumed by it, nor can we support the contention that the language of the Constitution "otherwise than through her husband" taken inversely implies that property acquired by the wife through the husband may be held responsible for his debts no matter under what circumstances it may have been acquired and how long the title may have existed and so forth, still the case at bar, so far as the right of appellant in and to the twenty-five and fifteen acres of land and appurtenances in the settlement of Brewerville and claimed by appellant is concerned, must collapse and fall because appellant at the trial failed to support her claim by sufficient legal evidence. It is a legal maxim that "he who fails in his proof has failed utterly," so far as relates to the facts of a cause. We would here remark that the bare allegation of title to property, and particularly *real* property, unsupported by a valid deed or other instrument, or, by any of those legal circumstances and conditions—as for instance undisturbed possession for the statutory limit requisite to bar an adverse title—and by which legal ownership is presumed, is devoid of legal efficacy and weight and can not by any rule of the law be construed into a defensible title.

In legal controversies where *res gestce* is title to real property founded upon deed or other valid instrument of writing, the law will regard such deed or other instrument of writing or an authentic copy thereof where the original is proven lost as *prima facie* or best evidence of the claim; falling short of the production of which evidence at the trial, proof of title would be fatally insufficient and non-conclusive, unless where it was clearly established that the original document did really exist but had been lost and that the public records in which same was recorded had been destroyed; or, perhaps, that the document in the possession of the adverse party who has been duly subpoenaed to produce same at the trial.

The appellant failed to support her claim by proof of this quality ; it is true she did put in evidence two purported copies of the alleged original instruments, but neither of these was valid or authentic, because not having passed under the forms of the statute in such cases made and provided and it was manifest error in the trial judge in admitting them as evidence.

Having considered at some length the appellant's claim to the first and second pieces of the property in dispute ; namely, the *twenty-five* and *fifteen* acre blocks, we come now to consider her claim to the ten-acre plot situated in Brewerville, and bought from F. T. Clark in the capacity of administrator of the estate of Charles Alexander late of that settlement.

We find that a deed for the said *ten* acres was duly executed by the said F. T. Clark, who at the time of said act held letters testamentary over the estate and was further invested with an order of sale issued by the Court of Probate empowering him to sell. The power therefore in Clark to sell the said tract of land was legal and from the terms of the deed executed by him it doth appear that Clark sold the land in question to Leah A. Phelps alias Williams the appellant in this suit for a ,valid consideration. It further appears from the records that the deed so executed was admitted to probate without any objections being raised thereto and that the same was probated in accordance with the statute of Liberia passed 1862. This having been done the instrument became a valid document and as such is evidence against all parties thereto (vide Rev. Stat. Lib., p. 56, sec. 25). At the trial appellee sought to prove by Clark that the conveyance was made by him to appellant under a misapprehension of her relation to the estate of her late husband, but this statement is not borne out by the terms of the deed which specifically reads that the conveyance is made to Leah A. Phelps alias Williams and to her heirs and assigns. Now the law is unequivocal with respect to the extent to which oral testimony may be received to prove that the terms of an instrument is different from what is therein stated. There was no evidence supporting the testimony of Clark to the effect that he believed he was making the property over to the estate of H. R. Phelps, deceased, when he unqualifiedly transferred the land in question to appellant and her heirs and assigns forever. There was no evidence to prove that up to this time appellant had been appointed administratrix, or, that she had done any act in the premises of her late husband's estate, that could have influenced Clark to believe that the property was being sold to appellant for the benefit of the estate of her late husband. With regard to the receipt given by Clark to the husband of the appellant during his lifetime as part payment of the purchase money for the land in question, we find that applying the evidence of appellant to this fact, where she states that the amount paid by her late husband during his lifetime towards the purchase of the land came froth coffee taken from her father's estate and was therefore her own money paid by him in the capacity of her agent, which assertion is nowhere in the evidence controverted, we deliberately conclude that the hypothesis of fraud alleged to have been employed by appellant in the procurement of the deed in question seems to our minds not sufficiently established to warrant the judgment of the court below on this point.

But supposing the converse of the facts to have appeared at the trial even then the question which those facts would have naturally raised and the legal issue thereby involved, would have been one triable by a *jury* and not by a probate judge.

We find therefore the trial judge in error with respect to his ruling relating to the ten-acre plot bought by appellant from Clark and the same is hereby reversed.

We come now to consider the court's ruling with respect to the personal chattels on the said inventory and claimed by appellant. The Constitution of Liberia settles upon the wife *one-third* of her husband's personal estate which he possessed at the time of his death, which she becomes the absolute owner of no matter whether the estate be solvent or insolvent. The principle upon which this provision seems to be founded, is, that the wife from the share of responsibility she bears in the family and home as helpmate is equitably entitled to one-third of the personal chattels of her husband and that this shall go to her for her maintenance after his death. Apart from this constitutional provision, it seems to us highly justifiable for the husband to purchase for the wife articles, which he desires her to own in her own right, whether those articles be

articles for her personal adornment or otherwise, and a Court of Probate should reluctantly permit such articles to be brought into the estate, if the widow can produce satisfactory proof of the fact that they were bought for her own use and account by her husband. But we do not mean by this remark to give countenance to the practice which we fear is too often followed, where a widow appropriates the *whole* of the personal chattels of her deceased husband to her *own* use to the injury of creditors and heirs. These are matters we think which must be carefully considered by the probate judge and an equitable conclusion arrived at to suit the peculiar circumstances of each individual case.

From the facts and circumstances surrounding the case at bar, we are of the opinion that the court below was correct in refusing to grant the application to strike from the inventory of the estate chattels to which appellant had failed to establish her right, and which from their character a reasonable presumption in favor of appellant's claim thereto could hardly, under ordinary circumstances, be inferred. It seems to us more probable that the chattels in question formed a part of the personal property procured and owned by the deceased for the common use of the household and therefore is justly a part of the assets of the estate. While we are anxious to guard the rights of married women and will always when justified throw around them the strong arm of the law to protect their just and lawful interest against all persons whomsoever; and while we would hesitate "to lay down in this case any principle with respect to the property of a married woman that would not be in consonance with the meaning and spirit of the Constitution as commonly understood by the people of this Republic and uniformly held by this court for more than half a century; still we also feel it a stern duty not to uphold as law the practice which is becoming more and more pronounced in this country whereby on the death of a man, the widow comes forward and lays claim to the whole or most valuable part of the personal chattels of the family, including cash and other available assets, to the great detriment of creditors and heirs, and the ridicule and ignoring of the good *name, honor and honest reputation.* of the deceased husband.

The judgment of the trial court is hereby reversed so far as it relates to the ten-acre plot of land bought from Clark as administrator of the estate of Charles Alexander, late of the settlement of Brewerville, and for which a deed (the invalidity of which has not legally been established), was duly granted the appellant.

The judge of the lower court is hereby commanded to cause to be eliminated from the inventory of said estate the said tract of land and to cause the appellant to be reimbursed out of the estate in such sum as may have accrued unto the estate out of the said ten acres during the time the said land may have been under the control of its administrators.

In all other respects the said judgment is hereby affirmed. A mandate to this effect is hereby authorized to issue to the court below.

Costs disallowed both parties.

P. 0. Gray, for appellant. *Arthur Barclay,* for appellee.

Nassim v Zoe et al [1993] LRSC 4; 37 LLR 131 (1993) (26 February 1993)

NASSIM A. NASSIM, Petitioner, v. **HIS HONOUR C. ALEXANDER ZOE**, Assigned Circuit Judge, Sixth Judicial Circuit, Montserrado County, Sitting in its June 1992 Term, and **THE ABI JAOUDI & AZAR TRADING CORPORATION**, By and thru its President, ELIE J. ABI JAOUDI, Respondents.

APPEAL FROM THE RULING OF THE JUSTICE IN CHAMBERS DENYING THE PETITION FOR A WRIT OF PROHIBITION.

Heard: February 18, 1993. Decided: February 26, 1993.

1. Prohibition is a special proceedings to obtain a writ ordering the respondent to refrain from further pursuing a judicial action or proceeding as specified therein.

2. Prohibition is that process by which a superior court prevents inferior courts, tribunals, officers, or persons from usurping or exercising a jurisdiction which they have not been vested by law.

3. Prohibition is a writ directed to the judge and parties to a suit in any inferior court, commanding them to cease from prosecuting the suit on the suggestion that either the original action, or some collateral matter arising therein does not belong to that jurisdiction, but to the cognizance of some other court. It is also a writ issuing out of the Supreme Court for the purpose of keeping inferior courts or tribunals, corporations, officers and individuals, vested by law with judicial or quasi judicial authority from exceeding their jurisdiction.

4. Where title is not in issue, a special proceeding to recover possession of real property may be maintained in a circuit court or a court of the justice of the peace or a magistrate. The court of a justice of the peace or magistrate shall have jurisdiction only of cases in which the amount of the judgment demanded does not exceed three hundred dollars.

The gravamen of this petition is that the petitioner was employed by co-respondent under a written contract for a term of three years. Following the expiration of the contract, the petitioner filed a complaint of unfair labor practices at the Ministry of Labour. While the action was pending undetermined, the corespondent commenced an action of summary proceeding to recover possession of real property to evict the petitioner from its premises. Following a

judgment in co-respondent's favor, the petitioner filed a writ of prohibition before the Justice in Chambers to prevent the co-respondent judge from evicting him from the premises until the labor action shall have been determined.
The Supreme Court stated that prohibition is a process by which a superior court prevents inferior courts, tribunals, officers, or persons from usurping or exceeding its jurisdiction. The Court held that the petitioner failed to indicate that the corespondent judge had no jurisdiction to hear the summary proceedings, or give any legal ground to warrant granting of the writ of prohibition. Accordingly, the petition was *denied.*

Wynston 0. Henries appeared for petitioner. *H Varney G. Sherman* and *David D. Kpomakpor* appeared for respondents.

MR. JUSTICE MORRIS delivered the opinion of the Court

At the call of this case for final determination, the petitioner was represented by Counsellor Wynston O. Henries of the Henries Law Firm, while the respondents were represented by the Sherman & Sherman Law Firm in persons of Counsellors Varney Sherman and David D. Kpomakpor.

As concluded from the history of the case, the petitioner, Nassim A. Nassim, was an employee of the co-respondent, the Abi Jaoudi & Azar Trading Corporation. After the expiration of the three-year employment contract, the co-respondent wrote a letter to the petitioner requesting him to collect his redundancy pay. Instead of collecting his redundance pay, the petitioner filed a complaint with the Ministry of Labour for unfair labor practices. While this case was being pursued, the corespondent/appellee instituted an action of summary proceedings to recover possession of real property in the Sixth Judicial Circuit Court then presided over by His Honour M. Wilkins Wright. After the hearing of the case, which was determined in respondent's favor, petitioner took recourse to the office of prohibition to prevent the trial judge from evicting him from the premises which was assigned to him by his employer because, according to him, his complaint filed with the Ministry of Labor was still pending undetermined.

The main question is whether prohibition will lie? This question begs an answer to the further question as to what is prohibition? Prohibition is a special proceeding to obtain a writ ordering the respondent to refrain from further pursuing a judicial action or proceeding as specified therein. Civil Procedure Law, Rev. Code 1: 16.21(3). Prohibition or the writ of prohibition is that process by which a superior court prevents inferior courts, tribunals, officers, or persons from

usurping or exercising a jurisdiction with which they have not been vested by law. 73 C.J.S., *Prohibition, §* 1. Prohibition is further defined as a writ directed to the judge and parties to a suit in any inferior court, commanding them to cease from the prosecution thereof, on a suggestion that either the cause originally, or some collateral matter arising therein does not belong to that jurisdiction, but to the cognizance of some other court. It is a writ issuing out of the Supreme Court for the purpose of keeping inferior courts or tribunals, corporations, officers, and individuals, vested by law with judicial or quasi-judicial authority from going beyond their jurisdiction. 73 C.J.S., *Prohibition,* page 9, fn. 2&3.

The petitioner had not indicated that the co-respondent judge has no jurisdiction to hear summary proceedings to recover possession of real property nor has he given any legal ground to prompt this court to grant the writ of prohibition as prayed for. Under our statute covering summary proceedings, it is provided thus:

"Where title is not in issue, a special proceeding to recover possession of real property may be maintained in a Circuit Court or a court of a justice of the peace or a magistrate. The court of a justice of the peace or magistrate shall have jurisdiction only of cases in which the amount of the judgment demanded does not exceed three hundred dollars". Civil Procedure Law, Rev. Code 1:62.21, page 264, under the caption *Summary Proceeding to Recover Possession of Real Property.*

The action for which this prohibition is filed is summary proceedings to recover possession of real property which can either be filed in the magistrate or justice of the peace courts or in a circuit court.

Therefore, we are at a loss regarding the purpose of filing this prohibition proceeding; there being no legal reason to us. For reliance, see *Gaiguae v. Jallah,* [1971] LRSC 3; 20 LLR 163 (1971); *Alraine (Liberia) Ltd. v. Koroma,* [1973] LRSC 78; 22 LLR 308 (1973); *Nasser v. Smith,* [1977] LRSC 27; 26 LLR 115 (1977); *Lamco J. V. Operating Company v. Flomo and Wollie,* [1978] LRSC 24; 27 LLR 52 (1978).

In view of the foregoing, it is our opinion that the ruling of the Justice in Chambers be and is hereby confirmed and affirmed and the petition is denied with costs against the petitioner. And it is so ordered.

Petition denied

Tubman v Greenfield [1981] LRSC 18; 29 LLR 200 (1981) (29 July 1981)

WILLIAM ALFRED TUBMAN, Appellant, v. **MOSES A. GREENFIELD**, Appellee.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, MARYLAND COUNTY

Heard: April 29, 1981. Decided: July 29, 1981.

1. An appeal may be dismissed by the trial court, on motion, for failure of the appellant to file a bill of exceptions within the time allowed by statute; and by the appellate court, after filing of the bill of exceptions, for failure of the appellant to appear on the hearing of the appeal, to file an appeal bond, or to serve notice of the completion of the appeal as required by statute.

2. The provisions of the Civil Procedure Law controlling security for bonds, at section 63.1, are optional in nature and character, that is, the avenues demanded for security for an appeal bond are left with a party to an action to choose.

3. In the absence of an expressed statutory prohibition to the effect, that an appellant is legally precluded from being surety for himself, an appellant whose assets are over and above the bonded penalty and who by recognizance is required to be a freeholder possessing sufficient real property to cover the bonded penalty, may serve as surety on his own appeal bond.

4. A bond which is sufficiently descriptive in its construction to make its conditions clear and intelligible, and capable of enforcement, though lacking in other respects, is nevertheless legal.

5. The law governing security for bonds and that controlling appeal bonds are the same under the present statute.

Appellee instituted an action of damages for breach of contract against appellant. From a final judgment rendered in favor of appellee, appellant appealed to the Supreme Court. Upon perfection of the appeal, appellee filed a motion to dismiss on the grounds that the appeal was not supported by a valid appeal bond, in that there is no affidavit of sureties or a certificate from the Bureau of Internal Revenues attached to the bond as is required by statute. Appellee also contended that appellant violated the statute governing appeals bond when he had himself as the sole surety on the bond.

Appellant in resisting the motion to dismiss, contended that he had complied fully with the statute in that he had tendered unencumbered real properties on which taxes had been paid and which were held in fee simple by him. He further argued that the value of the properties posted was over one and one-half times the amount of the judgment.

The Supreme Court held that in the absence of an express statutory prohibition, an appellant may stand as surety to his own appeal bond where his assets are over and above the bonded penalty. The Court also held that it would be a miscarriage of justice to continue to insist that there are two sureties on the appeal bond no matter what amount is fixed in the bond. Accordingly, the Supreme Court *denied* the motion to dismiss and ordered the case re-docketed for hearing on its merits.

Wellington K Neufville appeared for appellant. *S. Edward Carlor* appeared for appellee.

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

On the 9' day of June, 1979, Moses A. Greenfield of Jacksonville, East Harper, Cape Palmas, instituted an action of damages for breach of contract against William Alfred Tubman of Harper City, Cape Palmas, Maryland County, in the Fourth Judicial Circuit Court for Maryland County.

Trial was had and final judgment rendered by the trial court against appellant on the 30t h day of September, 1980, adjudging appellant liable to the plaintiff in the amount of $110,000.00.

The appellant took exception to the judgment and announced an appeal to the Supreme Court. It is against this appeal that the appellee filed a motion to dismiss on the grounds that the said appeal is not supported by a valid appeal bond in that the sureties named in the bond, John Hilary Tubman and Isabella Gibson, did not own any land in fee simple, nor were they free holders within this Republic; consequently, they had attached no affidavit of sureties or certificate from the Bureau of Internal Revenues. He further contended that appellant violated the statute governing appeal bonds when he named himself as the sole surety to the bond, instead of being appellant/principal to the said bond. In support of this position, he relied upon and cited several cases of this Court, including *Cavalla River Co. v. Fazzah*, 7 LLR 13 (1939); *Koffah v. Republic*, 13 LLR 232 (1958); and *West African Trading Corporation v. Alraine (Liberia) Ltd.*, [1976] LRSC 23; 25 LLR 3 (1976).

The appellant, on the other hand, contended in his resistance that he did not violate the statute governing appeal bonds, for he had complied with one of the four enacted ways in which an appellee might be indemnified in matters on appeal. That is to say, he tendered unencumbered real property on which taxes had been paid and which is held in fee by the person furnishing the bond, meaning the appellant himself, accompanied by affidavit of sureties and a certificate from the Bureau of Internal Revenues. He stated in his brief and persistently argued before this Bench, that the names of John Hilary Tubman and Isabella Gibson mentioned in said bond as sureties, only served as surplusage because appellant's own properties so tendered covered the penal sum of the bond - $165,700.00 - and therefore his appeal is supported by a valid appeal bond, consistent with the provisions of the Civil Procedure Law, Rev. Code 1: 51.16.

The main issues presented by appellee's motion seem to be:

(1) Whether the appeal bond in question meets the requirements of the statute controlling appeal bonds? (2) Whether an appellant is legally precluded from being the sole surety regardless of his

assets being over and above the penal sum of the bond and his compliance with the statutory requirements? and (3) What is the object of an appeal bond?

The statute has prescribed the grounds upon which appeals from judgments of lower courts may be dismissed. The statute reads:

"An appeal may be dismissed by the trial court on motion, for failure of the appellant to file a bill of exceptions within the time allowed by statute; and by the appellate court, after filing of the bill of exceptions, for failure of the appellant to appear on the hearing of the appeal to file an appeal bond, or to serve notice of the completion of the appeal as required by statute." Civil Procedure Law, Rev. Code 1: 51.16.

Which of these grounds stated above has appellant violated in order for appellee's motion to hold? Lest we forget, the principles which control security for bonds, do also apply in the procurement of an appeal bond because the legal requirements are entirely the same. The relevant laws controlling security for bonds can be found in the Civil Procedure Law, Rev. Code 1:63.1, and it states: "Except as otherwise provided by statute, any bond given under the title, shall be secured by one or more of the following: (a) cash to the value of the bond or cash deposited in the bank to the value of the bond as evidenced by a bank certificate; (b) unencumbered real property on which taxes have been paid and which is held in fee by the person furnishing the bond; (c) valuable to the amount of the bond which are easily converted into cash; or (d) sureties who meet the requirements of section 63.2. The sheriff receiving cash, a bank certificate, stocks, or other negotiable securities, or valuables, shall deposit it or them in the government depository or a reliable bank, and secure a receipt therefor showing the amount deposited and the purpose of the deposit and containing a statement that the deposit will be released only upon written order of a judge of the court." This same law is expounded upon in the case *Stubblefield et al. v. Nasseh[1977] LRSC 7; ,* 25 LLR 443 (1977).

The appellee, relying on *Cavalla River Co., v. Fazzah*, 7 LLR 13 (1939), argued that the appellant, being the sole legally qualified security on the bond, renders said appeal bond defective since the appeal statute, as found in Civil Procedure Law, Rev. Code 1:51.8, requires two or more legally qualified sureties.

In this connection, the appellant argued that the *Cavalla River Co.* case, relied upon by appellee, was based on the previous statute in which there was no provision which would qualify an appellant to be surety for himself. The present statute makes such provision.

In giving effect to the statutory provisions applicable to bonds, we must say that the provisions are optional in nature and character, that is, the methods prescribed for security for an appeal bond are left with a party to an action to choose. In the instant case, the appellant elected to tender unencumbered real property on which the taxes were paid, and which is held in fee by the person furnishing the bond, appellant himself. This comes under sub paragraph (b) which refers to sureties who meet the requirements of section 63.2.

Finding, from a sober consideration of these statutes, that there has been no substantial violation, it is our holding that the appeal bond in the instant case was executed in conformity with the statute governing appeal bonds.

In the absence of an expressed statutory prohibition to the effect that an appellant is legally precluded from being surety for himself, as provided by sub-paragraph (b) of the Civil Procedure Law, Rev. Code, 1: 63.1, whose assets are over and above the bonded penalty, and who, by recognizance, is required to be a freeholder possessing sufficient real property to cover the bonded penalty, it would be erroneous to deny the appellant the right to be surety to his own appeal bond.

In all appeal bonds in civil cases, financial sufficiency is the prevailing feature because the sole objects of an appeal bond in such cases are the indemnification of the successful party and payment of costs. Therefore, it is our opinion that the attack on appellant's appeal bond is not sufficient to justify dismissal of the appeal. The appeal bond, in our opinion, is not defective. The Court, in *Smith v. Page*, [1950] LRSC 10; 10 LLR 361 (1950), held that a bond which is sufficiently descriptive in its construction to make its conditions clear and intelligible and capable of enforcement, though lacking in other respects, is nevertheless legal.

According to our bail statute, whenever the appellee in any case on appeal to the Supreme Court is sought to be indemnified by recognizance, the sureties, as in the instant case, must be possessed of sufficient unencumbered real property to cover the penalty of the bond. In *Liberia Mining company v. Bomi Workers Union[1976] LRSC 42;* , 25 LLR 198 (1976) . and *Stubblefield v. Nasseh*, [1977] LRSC 7; 25 LLR 443 (1977), this Court held that a bank manager's check or bank cashier's check was the equivalent of a bank certificate and is therefore valid as security for an appeal.

In the case cited and relied on by appellee as found in *Koffah v. Republic*, 13 LLR 232 (1958), the sureties were two aliens, American citizens, who were not freeholders or householders. In *Baky v. Nah*, 20 LLR38 (1970), there was no affidavit of sureties or certificate from the Bureau of Internal Revenue; in *Gabbidon v. Toe*, [1974] LRSC 24; 23 LLR 43 (1974), there was no description and or location of the property offered as security; whilst in the *Jarboe v. Jarboe*, [1975] LRSC 30; 24 LLR 352 (1975), the sureties named in the bond were not owners of the property they pledged; and finally in the *West African Trading Corporation v. Alraine (Liberia) Ltd.*, [1976] LRSC 23; 25 LLR 3 (1976), the description of the property was on a separate document instead of being in the affidavit. Accordingly, the holdings in those cases are not applicable in this instant case.

Recourse to the cases, with the exception of the *Cavalla River Co., v. Fazzah* on this point, this Court has been unique in its holdings, that since the sole purpose of an appeal bond is to indemnify the appellee if the appellant is unsuccessful and reasoning being the source of the law, it would be a miscarriage of justice to continue to insist that the number of sureties be two or more on an appeal bond no matter what amount is fixed in the bond. The law governing security for bonds and that controlling appeal bond are the same under the present statute. Civil Procedure Law, Rev. Code 1: 63.1.

In view of the circumstances mentioned above and the law cited herein, the motion to dismiss the appeal is hereby denied and the Clerk of this Court is ordered to have this case re-docketed for hearing on its merits. Costs to abide final determination. And it is so ordered.

Motion denied.

[Context] [Hide Context]

Wiles v Wiles [1904] LRSC 4; 1 LLR 423 (1904) (1 January 1904)

RICHARD J. WILES, Appellant, vs. **FLORENCE J. WILES**, Appellee.

[January Term, A. D. 1904.]

Appeal from the Court of Quarter Sessions and Common Pleas, Montserrado County.

Partition—Homestead.

A homestead set apart under and by virtue of the "Homestead and Household Exemption Act" answers to an estate in coparceny. The estate constituting such homestead cannot be devised while there are living heirs of the original householder.

This case was brought in the equity jurisdiction of the Court of Quarter Sessions and Common Pleas of Montserrado County, at its March term 1903, by Florence J. Wiles, appellee (petitioner in the court below) , upon a petition in equity, for the partition of certain real property; to wit, lots 96 and 97, situated in the city of Monrovia, of which James T. Wiles, the father of appellee, was once seized, and which, during his residence thereon, that is to say, in May, 1899, he had set apart from the rest of his estate as a homestead for himself and his family, agreeable with the Homestead Exemption Act of 1889.

The pleadings appear to have stopped here, but when the petition was called up for hearing, Richard J. Wiles, the appellant before this court, appeared by counsel and objected to the granting of said petition, upon the ground that the said property which constituted the subject-matter of the petition had been devised by the will of James T. Wiles unto Richard J. Wiles, the appellant, and W. S. Wiles, his brother. The court below overruled the objections of the appellant

and rejected the claim sought to be set upon said property by virtue of the will of James T. Wiles, and gave the following decree in the premises, to wit:

"That no one taking advantage of the said Homestead Exemption Act can afterwards dispose of said property by will or otherwise without having first applied to a court having competent jurisdiction and annulling his said act with regard to said homestead. Therefore this court decrees that the said homestead of J. T. Wiles, viz., lots 96 and 97, be held by the said Florence J. Wiles and Richard J. Wiles, heirs of the said J. T. Wiles, equally between them, as they are the only surviving heirs of J. T. Wiles."

To this decree appellant excepted and has brought the case before this tribunal for review.

It having been admitted in the arguments by the learned counsels, first, that the said J. T. Wiles did place the estate in question under the Homestead Exemption Act, and secondly, that the said J. T. Wiles did afterwards devise said estate unto his two sons, W. S. and Richard J. Wiles, there remains no question on the facts averred on both sides for this court to consider, and therefore we proceed to examine and construe the law bearing on the case. To enable us to consider systematically the several doctrines of law involved, we deem it convenient to arrange the case under the following heads:

1. What is the legal status of an estate upon which a homestead has been declared under the Homestead Exemption law of the country?

2. Who are the parties whom the statute contemplates shall enjoy an interest and derive a benefit out of a homestead estate?

3. What kind of an estate, as between the parties interested, does a homestead create?

4. Does an ancestor or "head of family" who may place property under the above cited act still retain an absolute fee therein?

5. If not, can he at his option alienate such an estate by will or otherwise?

Before going further we would remark that the law of homestead exemption is of comparatively recent origin. Anterior to the last century this species of real estate was unknown to the law. It is one of the two great doctrines which have been introduced into the law during the nineteenth century and which have marked the development of the legal science in the United States. This species of real property was first brought forward under the constitution and statutory enactments of Texas, when it existed as a separate and distinct Republic. A doctrine founded upon such a sound and judicious basis, instituted not for the purpose of encouraging and stimulating a tendency to fraud, but, on the contrary, with a view to protecting the honest and upright landholder against failures in the ordinary affairs of life,— failures which may at any moment dispossess the honest but unfortunate landholder and his family of a home,— could not fail to commend itself, and hence we find that in the United States of America the doctrine was readily taken up and state after state passed statutes adopting it, with such modifications as were deemed suitable to their respective conditions.

In 1889, the Legislature of Liberia passed an act entitled, "The Homestead and Household Exemption Act." Section 1 of said act reads as follows : "That from and after the passage of this act all householders and heads of families, owning real estate, shall have so much of that real estate exempt from the writs of their creditors, that is to say, one town lot or one acre of farm land upon which the house is situated, with all the appurtenances and out-dwellings of same, which exemption shall mean the homestead of the family, and this exemption shall last as long as any of the heirs of the family so occupying it shall live." (Act Leg. Lib. 1889.) This is practically the law controlling this case. The language of the above cited act conveys to the mind of the court the idea that property set aside by the head of a family as a homestead for himself and family creates an estate in which all parties connected with and forming a part of said family, within the meaning and purview of said act, acquire an interest and a share therein.

The object of the lawmakers in passing this statute, which enables a householder to take out of market a limited portion of his real and personal property, and to have the same secured against the claims of his creditors, appears to be not only for the purpose that the head of the family shall have secured unto him an unassailable estate, but also that the wife and children, forming a part of said family, shall likewise take an estate therein, which cannot be set aside or destroyed, either by their own acts or by the acts of him who first held an absolute fee therein, or by the claims of third parties against any of the tenants thereto. And this view is upheld by the terms of a subsequent statute, which makes it a misdemeanor for either the clerk of court to issue, or the sheriff to serve, any writ upon a homestead estate. (Act Leg. Lib. 1897.) Undoubtedly this statute was not passed to screen property held in fee by debtors against the writs of their creditors. But it is because the putting an estate under the Homestead and Household Exemption Act creates an estate in coparcenary among all the parties constituting and forming the family, within the

meaning of the original act, that this statute forbids all interference with it by the officers of the law. To hold to the contrary, we think, would be to declare this statute fraudulent and pernicious.

It was insisted upon by the learned counsel for the appellant, that James T. Wiles placed the property under review under the Homestead Act after Florence J. and Richard J. Wiles had attained their majority, and that therefore they could not be looked upon as constituting a part of the family at the time said property was homesteaded. The court would remark here, that there was no evidence submitted to support this statement, but supposing there had been, we could not have upheld the proposition. The unequivocal intention of the lawmakers, so far as we can draw from the language of the act, was, as we have said, to create an estate in perpetuity for the family. The last paragraph of the Act of 1889 reads : "This exemption shall last as long as any of the heirs of the family so occupying it shall live." Let us suppose that Florence J. and Richard J. Wiles were not living in the family at the time the property was homesteaded, yet would they not acquire a title therein by virtue of being heirs of the original head of the family and occupant? And if there survives any of the heirs of the original head of the family, would not the homestead remain in full force and virtue? The statute contemplates a lapse of a homestead estate only after the heirs of the original "head" and occupant have become extinct.

We are aware that the statutes of some of the American states enunciate a somewhat different principle, but in this case it is the lex scripta of the country and not the statutes of foreign states which is the controlling law.

We have already shown that a homestead under the laws of Liberia is an estate in which the wife and children constituting the family, hold an undivided interest therein. Such an estate could not be regarded as an estate in joint tenancy, as was suggested by one of the counsel, for an estate in joint tenancy is one acquired by purchase and is not subjected in all respects to the rule of descent. This species of tenancy is governed by the subtle principle of survivorship, which does not apply to homestead estates. Equally so, nor would the law regard it an estate in common, because the title thereto is not distinct and several; nor an estate in fee tail, because in homestead estates the wife acquires and holds an equal interest therein with the heirs of the original householder, whereas in fee tail the title is reserved to the "heirs of the body" only of him last seized. By analogy of the law of real property we find that a homestead under the laws of Liberia answers to an estate in coparcenary. The three units which the law demands to establish such estate, namely, time, title, and possession, are to be found in this species of property.

Let us now consider whether James T. Wiles, the original householder, had a legal right to devise the homestead created by himself or not,—and we may here observe that it is upon this point chiefly that appellant rested his case.

We have already endeavored to show what kind of an estate a homestead estate is, and who the parties are that acquire interest therein, by force of the law of the country. If our conclusions are supported by the law of real property and the Homestead and Household Exemption Act of Liberia, and we do not hesitate to say that we feel that they are, then it follows as a legal consequence, that the property in question cannot be disposed of by will. If James T. Wiles and his family held the property in question as a homestead, it could not afterwards be devised, as long as the heirs existed, without setting aside an inflexible rule of the law of real property. "A man cannot dispose of the rights of other parties." "He who would be generous must first be just."

Having traversed the grounds of the whole case, we conclude by saying that the will of James T. Wiles, devising lots 96 and 97, cannot take the property from under the exemption where it had been legally placed. Nor can the will destroy or in any wise annul the force of the homestead, or create a new and distinct estate while there are living heirs of James T. Wiles, the original householder and occupant.

The judgment of the court below is therefore affirmed and the clerk is hereby authorized to issue a mandate to the judge of the court below, informing him of this decision.

Cavalla Rubber Corp. v TRADEVCO [1996] LRSC 20; 38 LLR 316 (1996) (27 January 1996)

CAVALLA RUBBER CORPORATION, Petitioner/Appellee, v**. THE LIBERIAN TRADING AND DEVELOPMENT BANK (TRADEVCO)**, Respondent/Appellant.

PETITION FOR REARGUMENT

Heard: September 18, 1996. Decided: September 27, 1996.

1. The statutes governing appeal shall be strictly construed; and when a party fails or neglects to comply with any of the mandates of these statutes, the appeal shall be dismissed.

2. The statutes provide that security for an appeal bond shall be either real property to the value of the appeal bond or an insurance company authorized to issue surety bond in Liberia.

3. Cash, manager's check, certified checks and other such securities for bonds, in general, do not qualify as security for appeal bond. Therefore, an appeal bond, secured by a manager's check, is defective and the appeal shall be dismissed upon motion of the appellee.

4. When an appeal has been dismissed, the Supreme Court is prohibited from delving into the merits of the appeal or from discussing the facts and circumstances of the case, no matter how just and equitable it might seem to do so.

5. Where a case has been dismissed by the trial court and the appeal therefrom dismissed by the Supreme Court for any one or more jurisdictional defects, such as defective appeal bond, the judgment of the trial court remains as it was when the appeal was taken and the Supreme Court shall not issue an order for the trial court to hear the merits of the case or for the case to be recommenced.

Respondent instituted an action of debt against petitioner at the Debt Court for Montserrado County; but upon a motion of the petitioner to dismiss, the trial judge dismissed the case. Respondent appealed to the Supreme Court and filed an appeal bond, secured by a manager's check consistent with several opinions of the Supreme Court to the effect that cash, manager's check or certified check may secure an appeal bond. Petitioner filed a motion with the Supreme Court to dismiss the appeal for reason that the statutes allow only for real property or an insurance company so authorized to secure an appeal bond. In response, respondent contended that it had filed an appeal bond consistent with several prior decisions of the Supreme Court and so if the Supreme Court is recalling its own previous opinions that recall should not be retroactive as to affect the appeal before it.

The Supreme Court reiterated its previous opinions on the issue and granted the motion to dismiss but without prejudice to the parties to appear at the Debt Court for Montserrado County and hear the debt case on its merits to determine what currency (Liberian dollar or United States dollar) the debt should be paid in since there was no denial of the debt itself.

Petitioner filed a petition for reargument which was granted. Upon hearing, the Court dismissed the appeal but without prejudice to the petitioner to recommence its case.

Considering the second opinion to be different from the judgment, and therefore filed a second petition for reargument, which was again granted. Upon hearing, the Supreme Court dismissed the appeal without reserving to the respondent any right to have the debt case heard on its merits, holding that in accordance with the language of the law on appeal bonds the respondent's appeal bond was defective since it was not secured by real property but by a manager's check.

Charles W. Brumskine and Oswald N. Tweh appeared for petitioner. H Varney G. Sherman appeared for respondent.

MR. JUSTICE BADIO delivered the opinion of the Court.

This petition for reargument grows out of an action of debt filed by the respondent against the petitioner, which was dismissed by the debt court upon the motion of the petitioner. Respondent

then filed an appeal to the Supreme Court, and again petitioner moved to dismiss the appeal for reason of defect in the appeal bond. The motion to dismiss the appeal was heard during the March, A. D. 1995 Term of this Court and deter-mined on July 27, 1995; but on the following day, July 28, 1995, the petitioner petitioned the Court for reargument, alleging that the Court overlooked certain important points of law, which in effect inadvertently negated its own decision dismissing the appeal.

Even though the respondent's appeal was dismissed in essence, His Honour Mr. Justice Smith speaking for the Court ordered, as follows:

"...without prejudice to the parties appearing in the trial court to present evidence as to the actual amount of debt owed by the defendant company and in what currency the evidence shows said obligation should be discharged. The case is therefore remanded to the trial court commanding the judge therein presiding to resume jurisdiction and proceed to hear evidence specifically as to the amount due by the defendant company and in what currency the debt obligation is to be discharged."

Petitioner contended that this Court's decision dismissing the appeal without prejudice means that this Court had allowed for the institution of a new suit for the same action; and yet the Court inadvertently ordered the trial judge to resume jurisdiction over the cause of action that had been dismissed and proceed to hear evidence. Petitioner contended that the dismissal of an appeal prohibits the appellate court from reviewing the appeal or the issues outlined in the appealed case; and as such, this Court should not have ordered the trial court to resume jurisdiction and proceed to hear evidence in the same case.

Oral arguments of the July 27, 1995 petition for reargument were entertained during the October, A. D. 1995 Term of this Court and on December 7, 1995, this Court again decided in its opinion, as follows:

"Therefore, in view of the foregoing, the appeal from the judgement dismissing the action of debt on jurisdictional grounds is dismissed for defects appearing on the face of the appeal bond; but the matter not having been tried as to its merits, the plaintiff is permitted to recommence his action with the right to election of venue as well as remedy to be sought. The Clerk of this Court is ordered to send a mandate to the Judge of the Debt Court, Montserrado County, informing him of this judgement. And it is hereby so ordered."

The judgement, which was entered based on the opinion, ordered as follows:

"That the petitioner/appellee's petition for reargument is granted and the appeal dismissed without prejudice and plaintiff is permitted to proceed with the debt action in the court below."

For the second time, petitioner filed a petition for the re-argument of this case; and this time petitioner contended that it observes that the concluding clause of the opinion is different from the judgement. In other words, petitioner submitted that this Court has inadvertently permitted respondent, plaintiff at the trial court, to proceed with the debt action in the debt court.

Petitioner argued that the granting of its July 28, 1995 petition for re-argument and also the dismissal of the appeal for reason of defect in the appeal bond legally corrected the mistakes in the first opinion; therefore the second opinion requiring the plaintiff to proceed with the debt action is a mistake, which should be corrected, because, there was no debt action pending in that court, as the debt action had been dismissed by the Debt Court.

In its returns, respondent argued that it had filed an appeal bond, secured by a manager's check, consistent with several decisions of this Court that a manager's check can secure an appeal bond and that it is this case that has recalled those decisions and instead held that only natural persons with real property to the value of the appeal bond can secure an appeal bond. Respondent further contended that pursuant to well-established and generally accepted principles of appellate practice, the recall of the Supreme Court's earlier decisions on procedural law should not affect this case at bar and that it is for this reason that notwithstanding the recall of those decisions and the granting of the motion to dismiss, the Supreme Court has ordered that the case be proceeded with at the Debt Court on the merits.

Respondent also emphasized that because the amount claimed as debt is so large and also because the proceedings involves a foreign commercial bank, this Court's opinion dismissing the case on procedural grounds sends the wrong signal to the business community at this critical period in the history of our country, and therefore this Court should avoid the legal technicalities raised by petitioner and allow the Debt Court to proceed with the action, as ordered in the two previous decisions of this Court in this matter.

The text of Rule IX of the Supreme Court Rules provides a relatively simple rule and the vitality of that rule consists wholly in the fact that it received the Bar's acquiescence and it also rests upon legal conscience and legal justification. Based on this, the Supreme Court in the past several years and in many opinions has entertained rehearings which have led to the overruling of prior decisions and the denial of some petitions for re-arguments.

Section 51.8 of the Civil Procedure Law, Revised Code, provides that every appellant shall give an appeal bond in the amount to be fixed by the court with two or more legally qualified sureties, and that a failure to file a sufficient appeal bond within the specified time shall be a ground for dismissal of the appeal.

The dismissal of respondent's appeal is consistent and also in conformity with our holding in the case, Gabbidon .v. Toe[1974] LRSC 24; , 23 LLR 43, 47 (1974). In that opinion we held that "Our law does not give us the authority either to add to or take from what the Legislature has commanded unless the said command clearly breaches provisions of the Constitution."

Reverting specifically to the respondent's argument, we observe that the underlying implication is that we relax the rule and permit a hearing on the merits of the claim in the Debt Court rather than dismissing the case on appeal on the legal technicality that instead of a manager's check, only real property to the value of the appeal bond can secure an appeal bond. That argument reveals, in essence, that respondent's failure to file a proper bond, as provided by the statute, should be ignored by us and the case proceeded with because of the amount and the commercial bank involved.

This line of reasoning has been repeatedly rejected by the Supreme Court; for example, in the case West African Trading Corporation v. Alraine (Liberia) Ltd., [1976] LRSC 23; 25 LLR 3,10-11 (1976), this Court said: "... courts do not decide substantive issues upon immaterial technicalities. However, dismissal of an appeal on grounds of non-compliance with the statute is not a technicality." Based on this principle, this Court has consistently applied the relevant statutes mandating the dismissal of an appeal upon failure to file a proper appeal bond, irrespective of the merits of the pending case or the parties thereto.

Therefore, this Court's opinion of December 7, 1995, delivered by Mr. Justice Yancy, correctly held that a defective appeal bond is a mandatory statutory ground for dismissal of an appeal and it is a legal principle in this jurisdiction that has remained consistent and unalterable throughout the judicial history of the Republic of Liberia.

However, the same opinion permitted respondent to replead and to recommence his action with the right to election of venue as well as remedy to be sought. Furthermore, we observe that the judgment is different from the decision or holding of the opinion, in that the judgement orders:

"That the petitioner/appellee's petition for re-argument is granted and the appeal dismissed without prejudice and plaintiff is permitted to proceed with the debt action in the court below."

It is because of the variance between the decision of the opinion and the accompanying judgement that petitioner filed the second petition for re-argument, which was ordered by the justices to be docketed for this second rehearing.

We hereby reconfirm the law established and settled in this jurisdiction that an appeal must be dismissed when it is determined that appellant's appeal bond is defective.

While we agree that modern practice does not favor too many technicalities, but prefer to hear a case on its merits, the basic principles of appellate procedure cannot be disregarded as they apply to appeal bonds. We must at all times abide by that law.

We acknowledge that respondent's argument sounded quite reasonable and convincing and we certainly would have encouraged more extensive arguments to reveal the facts surrounding the debt case and how that case was disposed of and dismissed by the judge of the debt court, as repeatedly referred to in respondent's argument. However, we cannot legally and procedurally discuss, expound on, or decide issues not made a definite part of a proceeding, and squarely presented for our consideration. This proceeding dwells only on the issue of the defectiveness of the appeal bond and not on the merit of what transpired at the debt court to warrant the appeal. If that were not the case, we would have surely expanded greatly on the legal and equitable rights of the parties in that litigation; but regrettably, we are legally prohibited from doing so.

It must be made clear, however, that the Supreme Court has the responsibility of deciding a case presented pro et con by the counsellors representing the parties. Many times the Justices of the Supreme Court are criticized for deciding cases contrary to the expectation of the public. These criticisms, we freely accept and tolerate because the public's understanding of the law and trial procedure of our courts is limited. Regrettably, however, we cannot comprehend why

professional lawyers, especially counsellors, who are knowledgeable in the law and trial procedures, would express views contrary to what they know are definite provision of statutes, especially when, due to their own negligence, they allow their clients rights to float into the pool of despair.

Frankly, we prefer not to suggest that some lawyers intentionally avoid complying with the essential requirements of law and procedure because they, indeed, have a definite responsibility to maintain and defend the rights of their client. However, could any conscientious individual think otherwise when, considering the level of intelligence and professional ability of some lawyers, they resolve to acting completely different and contrary to the required provision of the law?

The Supreme Court is always ready and prepared to secure the rights of party litigants both in law and in equity; but we, the justices, would be straight-jacketed if those lawyers who are required to present issues in the interest of their clients, as in this case, intentionally decide to proceed contrary to the provision of law and at the conclusion of the hearing expect the justices to twist the law only to cover up their own unprofessional exercise. Lawyers, especially counsellors, are expected to be very diligent.

In view of the foregoing, petitioner's motion to dismiss respondent's appeal and the petition for reargument filed are hereby granted and the appeal dismissed. The Clerk of this Court is ordered to send a mandate to the judge of the Debt Court for Montserrado County informing him of this judgment. Costs are disallowed. And it is hereby so ordered.

Petition granted; appeal dismissed.

Ross v Roberts et al [1931] LRSC 8; 3 LLR 266 (1931) (1 January 1931)

WILLIAM ROSS (The Father), Plaintiff-in-Error, v. LEWIS BURKE ROBERTS (Grantee), and JOSEPH W. BROWN, Judge of the Monthly and Probate Court, Sinoe County, Defendants-in-Error.
WRIT OF ERROR TO THE MONTHLY AND PROBATE COURT OF SINGE COUNTY.

[Undated.] 1. Any person who meddles or interferes with the estate of an intestate without authorization of the Monthly and Probate Court thereby becomes liable for the payment of all debts owed by the deceased. 2. It is the duty of an administrator to make known to the court any property found in the estate of the intestate which belongs to other persons. 3. The administrator of an estate cannot purchase for himself property forming part of the estate, as it is he who must execute the deed of administration. 4. The rule allowing a person objecting to probate of a deed ten days to complete his objections was merely intended to fix a time limit and not to be construed as a bar

to objectors completing their objections forthwith. 5. It is error for a court to refuse to grant a motion for continuance based on the absence of material witnesses.

Plaintiff objected in the Monthly and Probate Court of Sinoe County to the probate of a deed from his daughter Ellen R. Ross to the defendant. The objections were overruled, and the case has been removed to this Court by writ of error. Counsel for both parties have filed stipulations that the case be remanded to the court below to ascertain the facts. Stipulations of counsel confirmed and case remanded.
E. Emmons Dixon for plaintiff-in-error. Brownell for defendant-in-error. N. H. Sie

MR. JUSTICE GRIGSBY delivered the opinion of the Court. This case comes from the Monthly and Probate Court, County of Sinoe, to this Judicature by a writ of error in

which William Ross, the father of Ellen R. Ross, plaintiff, claims ownership to Lot No. 405 situated in the City of Greenville, County and Republic of Liberia aforesaid. It appears from an inspection of the records that the lot under consideration was bought by Isaac Roberts, previous to his demise, from Mrs. Marshall on behalf of his late wife Mrs. W. E. Roberts. This property the decedent, Isaac Roberts, held during his lifetime and erected a dwelling house thereon in which he lived up to the time of his death, August 27, 1929. The deed for said premises was kept by Mr. Roberts and was not delivered to his wife W. E. Roberts nor her daughter Ellen R. Ross, but remained in his possession up to his death. William Ross, the father, objected to the probation of the transfer deed for lot number 405 in the City of Greenville and County of Sinoe from Ellen R. Ross to Lewis Burke Roberts for the following legal reasons : 1. Because he says that the deed offered for probation from his daughter Ellen R. Ross to Lewis Burke Roberts is fraudulently and fictitiously gotten in that the said Lewis Burke Roberts told Ellen R. Ross that he intended procuring a room in which to reside in the premises--lot number 405--and that he would - write up stipulations to bind both of them, but she had no knowledge that she was signing a warranty deed in favor of Lewis Burke Roberts. 2. He further objects on the grounds that from the granting of the letter of administration to Lewis Burke Roberts up to the signing and offering of the deed for probation it is not twenty days in keeping with the statutory laws of the Republic controlling sale of realty by administrators,,:and further that the administrator had not complied with other requisites in the handling of the estate; and that this disregard of the statute has a tendency to create corruption in the management of the estate. 3. The objector contends further that the said Lewis

Burke Roberts to whom the deed is being transferred is one of the administrators of the intestate estate of the late Isaac Roberts and as such cannot purchase this property, which is under direct control of the aforesaid Lewis Burke Roberts, who is thus attempting to do what the intestate failed to accomplish during his lifetime. 4. The probation was further objected to because the intestate Isaac Roberts had a collateral warranty claim over lot number 405 so that Lewis Burke Roberts, one of the administrators of the estate, cannot, prior to the rendition of their closing report, take possession of or purchase said premises from Ellen R. Ross. The objections being overruled by the judge of the Probate Court of Monthly Sessions, plaintiff-in-error applied for a removal of his cause before this Tribunal by a writ of error and strongly contends that : "(a) His Honour the Judge of the Probate Court, one of the defendants in error, in his ruling, opinion and decision rendered on the 9th day of October, A. D. 1929, erred in that no evidence written or oral was offered by the grantee to overrule the objections set up against the probation of the deed by the plaintiff-in-error. "(b) His Honour, one of the defendants in error, further denied plaintiff in error's written motion for continuance until the next term of court on account of material witnesses being absent and who could not be had within the two days--i.e. from the 7th October to the 9th day thereof-- given Plaintiff-in-error for the hearing of the objections ; but forced plaintiff-in-error to take the matter on the 3rd day of the session of the court; and notwithstanding plaintiff-in-error applied for a subpoena and the subpoena was returned with witnesses in part available; and notwithstanding the law offered in support of ob-

jections, the hearing of the evidence was denied and the court ruled against plaintiff-in-error. "(c) It is further contended that it was shown to the court below that grantee clandestinely, deceitfully and illegally obtained his purported transfer deed and presented same to the court for probation and registration without procuring written or oral testimony of the grantor to verify or prove the validity of the purported transfer deed showing that the objections were false and that the transfer as well as his acts were valid." The statutory laws of this country regulating the Monthly and Probate Court plainly declare that no person or persons shall meddle or interfere with the estate of any person dying intestate (except to take a true and correct inventory of all the real and personal estate) unless authorized so to do by the said court for the county wherein such intestate resided, and any person so doing shall thereby become liable for the payment of all the debts due by the deceased and for the respective shares of all the natural or legal heirs to such estate. After the demise of an intestate it is the duty of the Probate Court to appoint an administrator or administrators who shall give bond and security in double the estimated value of said intestate estate for the faithful performance of all the duties connected therewith as follows: "He shall make a correct statement of all and singular the

property and effects of the deceased; whatever there is that is perishable he may sell at auction after giving notice by advertisement in three of the public places in the county for the space of twenty days ; such sale may at the discretion of said administrator or administrators be made at a credit not to exceed six months on bond and sufficient securities for the payment thereof. He shall make returns to the next term of the court of his and all other matters and doings

connected with said estate. And should it be found that the said deceased was so indebted as to make it necessary that further sale of property should be had, then he shall be ordered by the court to sell any or all of said estate for the payment of such claims." Therefore these duties are solemn and specific and embodied in the letter of administration issued under the seal and signature of the clerk of said court by orders of the judge thereof ; and nothing therein can be so construed as to authorize the disturbance or interference with estates settled or unsettled in the hands of the administrator as a trustee without the intervention of the Probate Court; to do otherwise would be exceeding the administrator's authority and he should be discouraged by the said court whenever its attention is called thereto. It appears from the records that the deed for the lot in question being in the possession of the late Isaac Roberts up to his death, the same being the property of his late wife W. E. Roberts, it was incumbent upon the administrator or administrators in their inventory to make this fact known to the court for the benefit of the daughter of plaintiff-in-error, she being the sole heir to the property of her late mother and the immediate surviving heir by descent. Also to declare property belonging to other parties concerned. The court should have viewed the acts of defendant-inerror with strong disfavor: being one of the administrators_of the estate, he became the legal representative. at the real and personal effects of the said intestate estate which the decedent ac_auired dvring his lifetime. If, however, the personal effects prove inadequate to meet the liabilities causing the administrators to apply to the court for an order to dispose of real property, the right of purchase is a privilege offered to all citizens, the administrators excepted. An administrator can only purchase from a third party as it is he who must execute the deed of administration. It should be the duty of every judge

of the court to preserve the purity and impartiality of the court and to retain the respect and confidence of litigants appearing at the bar of justice with their matters for adjudication. Under the Constitution it is the right of every citizen to acquire and possess property and to defend and protect it when his safety and happiness require it and no man has the right to dispossess him

thereof without due course of law. This Court therefore is of opinion that it was manifest error on the part of the judge of the court below to have overruled the objections raised by plaintiff-in-error in the court below when they partook of matters of fact which could only be overruled for want of sufficient written or oral testimony. This Court is also of the opinion that whenever a deed is offered for probation, the object of the sheriff's publicly announcing it at the door is to enable those having objections to its probation to come into court and make it known; in which case the objector is allowed ten days to complete said objections and an additional ten days for respondent to make his defense. In the event the objections are not completed within the ten days granted, the same is tantamount to a waiver and the deed is ordered probated. This is merely intended to fix a time limit to parties having objections and not to be construed as a bar to objectors completing their objections forthwith if the requirements of the law make it possible. It was error for the judge to have refused plaintiff-inerror's motion for continuance because the law has cogently laid out the grounds for which a cause may be continued, viz.: i. Inability to obtain the evidence of a witness, 2. Filing amendments to pleadings which introduce new matter of substance, 3. Illness of counsel or surprise from unexpected testimony. It appears also that notwithstanding the original docu-

ments for the said parcel of land were deposited with the decedent for safekeeping for and on behalf of Ellen R. Ross, yet it seems that the said document was clandestinely removed by the defendant-in-error from the batch of other documents. It appears also that notwithstanding the court's attention was called to the act of the administrators, yet the records prove that the trial judge failed to employ the use of the machinery of the court to have matters rightly placed before it for adjudication to the best interest of those concerned. While it is an admitted fact that it is the power of the court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision, yet its decision must be based on some principle of law or fact. And a finding without evidence, as in this case, is arbitrary and useless and an exercise of arbitrary power and places the parties to this litigation at great disadvantage. In consequence of which, at the call of the case, R. Emmons Dixon, Esq., counsel for plaintiff-in-error, and N. H. Sie Brownell, Esq., for defendant-in-error, respectfully submitted that in view of the fact that fraud is alleged to have attended the execution of the deed, the basis of this suit, said counsels have filed stipulations that said case be remanded to the court below in order that the evidence touching said allegation of fraud attending the execution of the deed in question may be sifted and said evidence be sent to this honorable Court to enable said Court to more intelligently and legally adjudicate the same. Stipulations of counsel are hereby confirmed and case remanded. Cost to follow final decision. And it is hereby so ordered.
Remanded.

Nungbor v Fiske [1958] LRSC 22; 13 LRSC 304 (1958) (19 December 1958)

KAYMA NUNGBOR, Relator, v. His Honor, I. VAN FISKE, Commissioner of Probate, Montserrado County, Respondent.
APPLICATION FOR ORDER
TO THE COMMISSIONER OF PROBATE, MONTSERRADO COUNTY.

Argued October 30, 1958. Decided December 19, 1958. 1. The administration of a decedent estate must be completed within the statutory period of time. 2. Where letters testamentary have been issued for the administration of a decedent estate, the court may conduct an investigation into such administration. 3. A court has no authority to adopt procedures with respect to an action on the bond of an administrator of a decedent estate, except as provided by statute. 4. The Commissioner of Probate may not properly order real property of a decedent estate to be distributed in lieu of personal property.

The relator
obtained a writ of certiorari directed to

the respondent from the Chambers of Mr. Justice Pierre, ordering the respondent to perform
certain functions respecting the administration of a decedent estate. Subsequently the relator filed a submission with this court complaining that the respondent had failed to execute the mandate contained in the writ of certiorari, and praying that the respondent be ordered the direction previously issued. The order applied for was granted.
William A. Johns for relator. Fiske, respondent, pro
se. His Honor, I. Van

MR. JUSTICE MITCHELL delivered the opinion of the

Court. In the month of September, 1954, one Sarah ColeHayes, died at her home in Kingsville, Montserrado County, and her estate subsequently became a subject of administration in the Monthly and Probate Court, Montserrado County.

Messrs. R. Abdullai Johnson and Henrietta Walker were sworn and received letters testamentary from the said court as administrator and administratrix over the said estate according to law. According to the records, the administrator and administratrix filed inventory of the real property in the estate in the sum of $1,o6o on January 17, 1956, but made no reference whatever to any personal effects or assets in the estate. On May 28, 1957, they filed the following as their final report:

"ADMINISTRATORS' OFFICE, LATE SARAH COLE-HAYES ESTATE, MONROVIA, LIBERIA, MAY 28, 1957.

"Before His Honor,
I. Van Fiske, Commissioner of Probate, Mo. Co. R.L. "We your administrator and administratrix, appointed by Your Honor, April Term,
1955 for administration of the Estate of the late Sarah ColeHayes, who died on the 17th. day of September, 1954, now make our final
report and ask that the said estate be closed, and that the administrator and administratrix be relieved. "1. All debts and claims
presented to us up to May 28, 1957 have been paid up to date. "2. There being no personal property now available to disburse, no
disbursement. ( ) Seven sheets zinc (used for repairs). (2) Four chairs. (3) One old table. (4) One iron bed. "Real estate in keeping
with Supreme Court ruling has been transferred to Mrs. Henrietta Walker, the late Sarah Cole-Hayes's adopted daughter. "Respectfully
submitted this 28th day of May, 1957. [Sgd.] ABDULLAI JOHNSON,
ildministrator,

for :

HENRIETTA WALKER,
Administratrix, Attorney in fact."

[Sgd.] E. DOSSEN WALKER,

It does appear, however, that before this report was filed for the
closing of the estate, Kayma Nungbor filed objections in the court below in which Henrietta Walker was one of the respondents, and
accompanied therewith a list of personal effects, purporting the same to be the property of the decedent, Sarah Cole-Hayes, which
she alleged was left in the home of the said decedent up to the period of her demise. This list respondent Commissioner Fiske refused
to accept because the same did not form a part of the inventory originally filed by the administrator and administratrix. The records
do not go to show the premises of these objections or the ruling made thereon by the Probate Commissioner. Nevertheless, it is shown
that
the aforesaid objector, Kayma Nungbor, now relator in

these proceedings, applied to the Chambers of Mr. Justice Pierre during the October, 1956,
term of this Court, for a writ of certiorari, which application was heard by the Justice presiding in Chambers. From the ruling thereupon,
which was delivered on February 12, 1957, the following excerpt is taken: "In view of the certified records in this case, which show
no legal reason why this estate should not have been closed before this time, and of the law which we have cited and referred to
herein, it is our ruling that all of the documents, papers and deeds belonging to the estate will be immediately turned over to the
Commissioner of Probate. The said respondent Commissioner will require a report to be submitted by the administratrix and administrator

as to the present status of the estate; that is to say, whether or not the debts have all been paid, and the distribution of the legacies completely made. Since no real property can pass under a noncupative will, deeds of the de-

ceased for land owned by her at death should be turned over to the surviving heir. Any personal property which might have been left by the deceased, and which appears on the inventory, should be disposed of by the administratrix and administrator among relatives of the deceased. The Commissioner of Probate will then proceed to close the estate according to procedure in such cases provided, and will make his returns in our Chambers as to how he had executed our mandate. The clerk of this Court is ordered to send to the Probate Court a mandate commanding the Commissioner therein to execute these orders without further delay." The administrator and administratrix having tendered what they termed a final report in the estate, His Honor, the Commissioner, still hesitated to execute the mandate handed down from the Chambers of Mr. Justice Pierre, and in direct challenge thereto, gave the following ruling on July 4, 1957: "Since it has been discovered, and it is a matter of record, that Mrs. Henrietta Walker-Hayes, the adopted daughter of the deceased, and Miss Jenneh, lived in the home of the deceased for about a year prior to the taking of the inventory, they are responsible for the personal property; and since Mrs. Henrietta Walker-Hayes has received all of the real property, she is hereby ordered to issue a deed for a half-lot in fee simple in favor of Kayma Nungbor, sister of the decedent, and only surviving relative yet known to this court; and until this is done, the court will not and cannot close the estate, since the Supreme Court's ruling has not yet been complied with; for it would be contemptuous on the part of this court to permit the administrators to be in possession of the realty, and relatives go without; costs to abide the closing of the estate. And it is hereby so ordered." Relator, being dissatisfied with this nugatory and unjustifiable ruling of the respondent Commissioner, filed

the below submission before this Court on March 25, 1958: "Relator most respectfully showeth from your relator's Exhibits i,"2,"3' and herewith filed and forming a part of her submission, the respondent is shown deliberately to refuse carrying out or putting into absolute effect the mandate sent down to him from this Court in the estate proceeding. Wherefore, in virtue of the foregoing, your relator prays that this situation be promptly remedied to her relief. "Respectfully submitted, KAYMA NUNGBOR, relator, by counsel

[Sgd.] D. C. CARANDA,

Counselor at law."

It is upon the submission quoted, supra, that this matter has found its place before us. Our minds have been placed in a quandary to know why the respondent Commissioner has so glaringly refused to obey the mandate of this Court coming from the Chambers of Mr. Justice Pierre. This deliberate act not only renders the respondent Commissioner liable or answerable in contempt before this Court; it also portrays either a wilful disregard or ignorance of the law controlling; and in either of the two cases, he should not escape liability. The law controlling intestate estates makes it mandatory for all such estates to be closed within a limited period unless foreign claims are involved ; and even in that instance, no intestate estate should remain open for more than eighteen months. Moreover, where letters testamentary have been issued by a court, and persons interested in the estate feel that correct inventory has not been submitted and make formal submission to that effect, it would be right for the Judge, as guardian of intestate estates, to make investigation for the purpose of satisfying himself as to whether there was unlawful interference or not, so that the interest

of persons entitled to benefit therefrom would not suffer. The proper course to be pursued against persons failing to perform their duties as administrators of intestate estates is prescribed in the 1956 Code, tit. 9, § 24. There is no legal premise that would authorize the Judge of an inferior court to adopt procedures countering the same upon his initiative, and this is the case in the matter now before us. It cannot be conceded that the respondent Commissioner acted within the scope of law when he arbitrarily ordered the real property of Henrietta Walker-Hayes transferred in fee to relator in lieu of personal property. Answering before this Court on the question of the submission, the respondent Commissioner admitted his act in this respect, but endeavored to justify it under a theory that is without merit. It is obvious that, if there were any personal effects in the aforesaid intestate estate, according to the mandate of this Court the administrator and administratrix are responsible to produce the same; and, in view of the allegation made by them to the effect that there was none other except those listed in their final report, these items are to be distributed among the heirs in keeping with the mandate previously given by this Court. It not having been established to our satisfaction that there were other items of personal effects besides those which the respondent Probate Commissioner acknowledged according to the inventory and-final report, said respondent Probate Commissioner is hereby ordered to proceed according to law immediately in obeying the orders from this Court previously given through the mandate of His Honor, Mr. Justice Pierre in Chambers. Costs in these proceedings are to be borne by the estate; and it is hereby so ordered. Order granted.

Williams v Abraham [1971] LRSC 10; 20 LLR 220 (1971) (22 January 1971)

LEVI C. WILLIAMS, Appellant, v. ZAKI ABRAHAM, Appellee.
MOTION TO VACATE PROCEEDINGS AFTER APPEAL FROM THE DEBT COURT, MARYLAND COUNTY.

Argued November 11, 1970. Decided January 21, 1971. 1. The jurisdictional limits imposed by acts of the Legislature upon courts established by it, are mandatory and permit of no deviation for any cause. 2. The Debt Court is empowered to try cases in which the amount sought by way of judgment is at least $2,000.00, and if the action is one in debt by way of attachment of real property. The Debt Court is nonetheless required to establish its jurisdiction by reason only of the amount sought to be recovered.

An action of debt by attachment of real property was instituted in the Debt Court. The defendant moved against the jurisdiction of the Debt Court in the action, maintaining that it was only empowered by statute to try cases in which the amount sought was at least $2,000.00. The motion was denied and the merits of the case were then heard, resulting in a judgment for the plaintiff, from which the defendant appealed. Prior to argument of the appeal, a motion again attacking the jurisdiction asserted by the Debt Court was put before the Supreme Court. The motion was granted, the judgment was reversed and the entire proceeding below was vacated. J. Dossen Richards for appellant. Neuville for appellee. MR. Court.
JUSTICE MITCHELL

Wellington K.

delivered the opinion of the

On December 8, 1969, Zaki Abraham, of Harper City, Maryland County, sued on an action of debt by attachment, against Levi C. Williams of Harper, before Hon. Edwin Gahie Hodge, Judge of the Debt Court, Maryland County. The defendant appeared and answered.
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On December 19, 1969, the defendant filed a motion moving the lower court to dismiss the case because of the want of jurisdiction in the lower court, maintaining that the Debt Court can only entertain matters in which the sum sued for is $2,000 or more, the amount sued for in this case being much less. The plaintiff opposed the motion and the court thereafter handed down its decision denying

the relief sought, contending that since real property was involved, the amount sought by way of attachment could not defeat the Debt Court's jurisdiction. The judge thereupon tried the case and found for the plaintiff from which judgment the appeal has come.
A motion has now been brought before this Court challenging again the jurisdiction of the Debt Court, on the same ground. The Act of the Legislature creating the Debt Court, passed and approved April To, 1967, which confers jurisdiction upon the Dept Court in debt cases in excess of $2,000 has not been repealed. There is nothing that this Court, or any other court for that matter, is competent to do in abrogation of the plain wording of that law. A magistrate has the right to entertain debt matters up to the sum of $2,000, but not above that amount. No Debt Court, whether on attachment or otherwise, has the right to hear and determine a debt matter below the sum of $2,000 prescribed in the Act. Therefore, the Debt Court of Maryland County, from which this appeal comes, should have dismissed the action immediately after the jurisdictional question had been raised by the defendant. The motion therefore is granted and the entire proceedings vacated for want of jurisdiction and the judgment reversed, with costs against the appellee, and the Clerk of this Court is hereby ordered to send a mandate to the court below informing it of this judgment.
Proceedings vacated, judgment reversed.:

Sirleaf v Reeves [1971] LRSC 56; 20 LLR 433 (1971) (25 November 1971)

SAKUE SIRLEAF, Appellant v. EUPHEMIA REEVES, Appellee.
MOTION TO DISMISS APPEAL FROM THE DEBT COURT, MONTSERRADO COUNTY.

Argued
November 11, 1971. Decided November 25, 1971. · 1. When the appeal bond filed lacks an accompanying affidavit executed by the sureties and a certificate attesting the net valuation of property pledged, and its ownership, the bond will be deemed deficient, and a motion addressed to the Supreme Court for the dismissal of the appeal based thereon will be granted. 2. In general, modern practice does not favor technicalities, and the Supreme Court would much prefer dealing with the merits of the appeal itself. 3. The Supreme Court will not do for litigants the things which they could have done for themselves.

During the pendency of an appeal from the Debt Court, a motion was made to dismiss the appeal, on the grounds that the affidavit of the sureties and the certificate required from the Revenue Service were not appended to the appeal bond approved by the trial judge.
Motion granted, appeal dismissed. Raymond A. Hoggard Dennis for appellee.

for appellant.

Joseph F.

MR. JUSTICE AZANGO delivered the opinion of the Court. When this case was called
for hearing, appellee moved the court to dismiss the appeal taken by appellant on the grounds that the appeal bond was defective, the amount therein insufficient, and the trial court without jurisdiction to make the bond sufficient, the matter now being properly before this Court. The appellant has opposed the contentions raised in the motion to dismiss.
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Our
Civil Procedure Law governs the argument. "Every appellant shall give an appeal bond in an amount to be fixed by the court, with two or more legally qualified sureties, to the effect that he will indemnify the appellee from all costs or injury arising from the appeal, if unsuccessful, and that he will comply with the judgment of the appellate court or of any other court to which the case is removed. The appellant shall secure the approval of the bond by the trial judge and shall file it with the clerk of the court within sixty days after rendition of judgment. Notice of the filing shall be served on opposing counsel. A failure to file a sufficient appeal bond within the specified time shall be a ground for dismissal of the appeal ; provided, however, that an insufficient bond may be made sufficient at any time during the period before the trial court loses jurisdiction of the action." L. 1963-64, ch. III, § 5108. An appeal bond in the amount of $4,650.00 approved by the trial judge and the signatures of two sureties appears in the record.
Provisions for security in the bond are provided by statute. "Except as otherwise provided by statute any bond given under this Title shall be secured by one or more of the following: " (a) Cash to the value of the bond ; or cash deposited in the bank to the value of the bond as evidenced by a bank certificate ; "(b) Unencumbered real property on which taxes have been paid and which is held in fee by the person furnishing the bond ; " (c) Valuables to the amount of the bond which are easily converted into cash ; or "
(d) Sureties who meet the requirements of Section 6302." Civil Procedure Law, L. 1963-64, ch. IIT, § 6301.

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Section 6302 thereafter speaks of the qualification of sureties, and other requirements for a sufficient bond, as well as release
of lien. "I. Who may be sureties. Unless the court orders otherwise, a surety on a bond shall be either two natural persons who fulfill the requirements of this section or an insurance company authorized to execute surety bonds within the Republic. A bond "2. Lien
on Real Property as Security. upon which natural persons are sureties shall be secured by one or more pieces of real property located

in the Republic, which shall have an assessed value equal to the total amount specified in the bond, exclusive of all encumbrances.
Such a bond shall create a lien on the real property when the party in whose favor the bond is given has it recorded in the docket for surety bond liens in the office
of the clerk of the Circuit Court in the county where the property is located, or, if it is in the Hinterland, in the office of the
clerk of the Circuit Court in the nearest county. Each bond shall be recorded therein by an entry showing the following : " (a)
The names of the sureties in alpabetical order; " (b) The amount of the bond ; "(c) A description of the real property offered as
security thereunder, sufficiently identified to clearly · establish the lien of the bond ; "(d) The date of such recording; "(e)
The title of the action, proceeding, or estate. The bond shall be ac"3.
Affidavit of Sureties. companied by an affidavit of the sureties
containing the following : " (a) A statement that one of them is the owner or that both combined are the owners of the real property
offered as security;

"(b) A description of the property, sufficiently identified to establish the lien
of the bond ; "(c) A statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered
; and "(d) A statement of the assessed value of each property offered. . . .
"4. Certificate of revenue services. The bond shall
also be accompanied by a certificate of the Revenue Services that the property is owned by the surety or sureties claiming title
to it in the affidavit and that it is of the assessed value therein stated, but such a certificate shall not be a prerequisite to
approval by the judge. "5. Release of lien. When the condition of a bond has been fulfilled, a certificate to that effect shall be
issued by the clerk of the court where the bond is filed. Such certificate shall be filed in the office of the clerk of the Circuit
Court where the lien on the real property has been recorded to show that the lien has been released." After close inspection of the
record in this case, it is regrettable to say that the bond filed is deficient. The absence of an affidavit by the sureties and the
certificate from the revenue service is verified by the clerk of the Debt Court and the Supreme Court. While we are in agreement
that modern practice does not favor too many technicalities, but rather prefers to hear the merits in a controversy, especially where
such technicalities are not clearly supported by statute, when the basic principles of appeal statutes are violated, as in the instant
case, parties litigant should not expect the Court to do for them that which they could have done for themselves. It is therefore,
our view that the motion, being sound in law, be hereby granted and the case dismissed, with costs against appellant. The Clerk of
this Court is hereby

Walker et al v Occupants of MBC Compound [1995] LRSC 7; 37 LLR 780 (1995) (16 February 1995)

ROBERT WALKER et al., Appellants, v. **ALL TENANTS/OCCUPANTS OF MBC COMPOUND**, excluding MR. PRINCE MOORE AND BEATRICE GOFFREY, Appellees.

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

Heard: October 26, 1994. Decided: February 16, 1995.

1. A Court should not be too hasty in disposing of real property matters.

2. Courts cannot raise issues but are bound to decide them only when raised in the pleadings

3. A trial court cannot properly pass upon issues not raised in the pleadings.

4. Where fraud is alleged in the pleading, the case should be ruled to trial since fraud is a factual issue to be proven by evidence.

Petitioners/appellants are the attorneys-in-fact for the Brown Family. According to the records, the Brown family entered into a lease agreement in the year 1960 with the Monrovia Building Company (MBC) through its executive officer, Hans Haldman, for a period of 20 years certain, from 1960 up to April 1980. After the expiration of the twenty years, petitioners instituted an action of summary proceedings to recover possession of the property, then occupied by tenants of the Monrovia Breweries, Inc. The petitioners did not attach a copy of the 20 years lease agreement of 1960 to their petition but gave notice to have it produced at the trial. A motion for the sequestration of rents was also filed by the petitioners.

The respondents/appellees appeared and filed an answer in which it contended that the petitioners had no standing to sue by virtue of the fact that they had leased the premises to

Monrovia Building Company up to and including the year A. D. 2000, and on this basis moved the court to dismiss the action. They too did not attach the lease agreement referred to but gave notice that at the trial they would apply for a writ of *subpoena duces tecum* to be served on the authorities of the Monrovia Building Company to produce the lease agreement.

From the records filed with the pleadings, it appears that prior to the expiration of the twenty year lease with the Monrovia Building Company, the Monrovia Breweries, Inc. (MBI) entered into an agreement with Mr. Hans Haldman, wherein it purchased the leasehold right to the property subject of the action up to May 1, 2000. Petitioners however contended that besides the first 20 years lease agreement entered into between them and the Monrovia Building Company, which ended in 1980, there was no further lease agreement existing between them, and the lease agreement of 1960 was never renewed between the parties. Both petitioners and respondents in their petition and returns charged each other with committing fraud but failed to produce evidence in support thereof

The Court consolidated the petition and the motion for sequestration of rents and ruled thereon together, dismissing the petition and denying the motion for sequestration of rents. The court held that there existed a binding lease agreement between the parties, either because of the agreement between MBC and Mrs. Beti Brown extended to 2000 A. D., or because upon the expiration of the 1960 agreement, the parties continued to conduct themselves in the same manner as when the agreement was in force, and so, by legal implication, a new contract arose on the same terms as the old agreement. Petitioner's excepted to the ruling and announced an appeal to the Supreme Court.

The Supreme Court reversed and remanded the case for new trial, holding that this being a real property case, and each party having charged the other with fraud, and both parties having given notice in their pleadings to produce the 1960 lease agreement and the extension thereof, the judge should have ruled the case to trial and should not have been too hasty in disposing of it. The Court also noted that the judge failed to pass on the issue of customary marriage in which the woman has no authority to administer the intestate estate of the late husband as raised by the petitioner. Accordingly, the court *reversed* the judgment and remanded the case for new trial commencing with the pleadings.

Marcus R. Jones appeared for appellants; *Theophilus C. Gould* appeared for appellee.

MR. JUSTICE MORRIS delivered the opinion of the Court.

The history of this case reveals that the Brown Family entered into a lease agreement in the year 1960 with the Monrovia Building Company (MBC) thru its executive officer, Mr. Hams Haldmann, a German national for a period of 20 years certain. The records further reveal that four thousand (US$4,000.00) United States dollars was the rental amount agreed upon.

This lease was to expire on the 30th day of April 1980. The records further reveal that prior to the expiration of the 20 years lease, the Monrovia Breweries, Inc. (MBI) represented by its Chairman, Joshua Kwabena Siaw, a Ghanian national, met Mr. Hans Haldmann in London where Mr. Siaw convinced Mr. Haldmann to buy the latter's 500 shares in the Monrovia Building Company. The respondents further argued that they bought the leasehold right up to May 1, 2000 according to the purchase agreement attached to the returns.

The petitioners are contending that besides the first 20 years lease agreement entered into between them and the Monrovia Building Company, which ended in 1980, there was no further lease agreement existing between them nor was the lease agreement of 1960 ever renewed between the parties.

Unfortunately, the petitioners never attached copy of the 20 years lease agreement of 1960 to their petition but rather gave notice to have it produced at the trial.

The respondents are contending seriously in count one of their returns, that the entire petition should be dismissed in that the petitioners have no standing to file this petition because they have leased the premises to Monrovia Building Company up to and including the year A.D. 2000. They gave notice that at the trial they shall apply for a writ of *subpoena duces tecum* to be served on the authorities of the Monrovia Building Company to produce the said lease agreement.

A motion was also filed for the sequestration of rents which was first denied but later refiled by the petitioners. Both petitioners and respondents in their petition and returns charged each other for committing fraud. However, during the disposition of law issues, the judge consolidated the petition and the motion for sequestration of rents and ruled thereon together. He dismissed the petition and denied the motion for sequestration of rents on the following grounds:

"From this discussion, the court takes the view that there exists a binding lease agreement between the parties either"

(a) because the agreement between MBC and Mrs. Beti Brown extends to 2000 A.D. as stated in the purchase agreement wherein respondents became subrogated to the rights of MBC, or

(b) because the 1960 agreement did expire in 1980 and the parties continued to conduct themselves in the same manner as when the agreement was in force and so by legal implication, a new contract arose on the same terms of the old agreement. If it was due to sympathy by Mrs. Brown, then petitioner, must now live with the agreement that arose out of Mrs. Brown's sympathy."

The court is of the opinion that both parties having given notice in their pleadings to produce the 1960 lease agreement and the extension thereof which ends on May 1, A. D. 2000, coupled with the charge of fraud levied by each party on the other, the judge should have ruled the case to trial and let each party produce the lease agreement relied upon. This being a matter of real property, the court should not have been too hasty in disposing of it, especially so when the parties have given notice to produce their authorities at the trial.

The court observes that the May 1, A.D. 2000 agreement is only mentioned in the purchase lease agreement but there is no evidence of renewal of the lease agreement up to May 1, A.D. 2000 before court. Therefore, the respondents realizing this, gave notice that they will apply for a writ of *subpoena duces tecum* to be served on the authorities of Monrovia Building Company to produce a copy of the said renewed lease agreement between Monrovia Building Company and the Brown Family which allegedly extends to May 1, A.D. 2000. The court further observes that the respondents relied heavily on the renewal of the lease agreement which extended to May 1, A. D. 2000 and not because the term of the lease agreement expired and the parties continued to act and therefore a new lease agreement by legal implication arose as relied upon by the judge.

This court has held that "Courts cannot raise issues but are bound to decide them only when raised in the pleadings". *Gallina Blanco, S.A. et al., v. Nestle Products, Ltd.[1976] LRSC 33; ,* 25 LLR 116 (1976) "A trial court cannot properly pass upon issues not raised in the pleadings." *Tetteh v. Stubblefield,* [1962] LRSC 1; 15 LLR 3 (1962) "Courts will only decide upon issues joined between the parties specifically set forth in their pleadings". *Elliot v. Dent,* [1929] LRSC 8; 3 LLR 111 (1929).

Where fraud is alleged in the pleading, the case should be ruled to trial, since fraud is a factual issue in order to be proven by evidence. Besides, the judge failed to pass on the issue of customary marriage in which the woman has no authority to administer the intestate estate of the late husband as raised by the petitioner. With these and other irregularities, the court has no alternative but to remand the case for new trial commencing with the pleadings.

Wherefore and in view of all we have said, it is the ruling of this court that the judgment is reversed and the case remanded for new trial commencing from the pleadings. Costs to abide final determination. And it is hereby so ordered.

Judgment reversed, case remanded.

Curtis et al v Brown [1932] LRSC 6; 3 LLR 320 (1932) (17 February 1932)

CECELIA A. **CURTIS** and RUTH L. DENNIS, Appellants, v. GEORGE C. P. BROWN, Appellee.
APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Decided February 17, 1932. 1. An action of injunction does not lie to try an issue involving title to real property, such being a mixed question, which by statute is triable by a jury under the direction of the court. 2. In injunctions the court must consider the issues raised and submitted by the parties to the suit and judgments in either courts of law or equity must be confined to the questions raised between them and cannot extend beyond them. 3. A Liberian woman who holds property in Liberia does not lose her right to property because of her marriage to an alien.

Petitioner, now appellee, obtained an injunction restraining respondents, now appellants, from receiving rents from a certain property in Monrovia. On appeal to this Court, reversed.
Barclay & Barclay for appellants. R. Emmons Dixon for appellee.

MR. CHIEF JUSTICE JOHNSON delivered the opinion of the Court. This case originated in the Circuit Court of the First Judicial Circuit, Montserrado County, and was brought by George C. P. Brown, the appellee in this case, against appellants, respondents in the court below, to restrain and prohibit the said appellants from drawing any portion of the rent due on lot 321 M, in the city of Monrovia now occupied by West and Co., and requiring the said appellants to show cause

why the injunction should be dissolved. The history of the case is as follows : Henry Dewitt Brown, late of the City of Monrovia, died in 1904, leaving a widow, Cecelia A. Brown, and

three children, Ashmun Brown, George C. P. Brown, the appellee, and Ruth L. Brown, now Dennis. Subsequently the widow married a Mr. **Curtis**, an American citizen who took his wife and her three children to America. Several years ago, appellee returned to Liberia and took charge of the property in Monrovia. Mrs. **Curtis** also returned bringing a registered power of attorney from Ruth L. Brown, now Dennis. The income of the property, variably amounting to four hundred dollars and six hundred dollars, was divided among the widow and the two surviving children. It seems that appellee consented to this arrangement and was allotted his portion of his rents, which he has been regularly receiving. The absent parties authorized Arthur Barclay to look after their interest, giving him full authority to act for them. This arrangement lasted several years down to the beginning of this action. Appellee now seeks to dispossess the said Cecelia A. **Curtis** and Ruth L. Dennis of their share of the property, because he claims they having married American citizens, are denationalized and have become citizens of the United States of America, and cannot in consequence of such denationalization own property in Liberia. Appellee brought an action in the Monthly and Probate Court of Montserrado County and subsequently entered an action of injunction in the Circuit Court of the First Judicial Circuit for Montserrado County as above stated. The case of injunction alone claims our attention. The pleadings are voluminous, but the Judge who presided at the trial of the case, His Honor Aaron J. George, ignored the demurrers raised in the answer of appellants, and made the following decree, which is substantially as follows: "Where we do not violate any statute or rule of court or abrogate any well settled principle of the common law or general practice or abridge or preju.

dice the rights of any opposing party, the court will take the shortest out to the merits of the case or the controversies between the parties concerned. The case in the mind of the court has one important issue involved in it, whether or not Cecelia A. **Curtis** and Ruth L. Dennis, both of whom are married to American citizens in the United States of America, can hold property in Liberia, Vol. 1, page 136, Sec. 12. "It is adjudged that the petition of the petitioner is hereby granted and the injunction is perpetuated, and that Arthur Barclay representing Cecelia A. **Curtis** and Ruth L. Dennis, who are naturalized citizens of America by marriage, desist from drawing any portion of the rent of said premises lot 32o, Monrovia, now occupied by West and Co., and also from further interference with any of the properties of the estate of the late Henry Dewitt Brown, and that said property be turned over to the petitioner. Cost in favour

of petitioner." To this decree, respondents in the court below took exceptions and have brought the case up to this Court, on appeal, by bill of exceptions. The bill of exceptions contained two points which are stated as follows : " (1) Because at the hearing of the case, Your Honour failed to pass upon the demurrers raised in the answer and subsequent pleadings, which by the laws of Liberia, you were required to do; to which neglect respondents except. "(2) And also because Your Honour handed down a decree perpetuating the injunction on the grounds inter alia that respondents, though born in Liberia, and the property of decedent H. D. Brown had vested in them long before marriage, had by their marriage to American citizens become aliens, and had thereby lost their right to hold property in this Republic, to which respondents except."

As to the first point in the bill of exceptions, we are of the opinion that it was error on the part of the Judge to ignore the demurrers raised in the pleadings. In McAuley v. Jorgusin, i L.L.R. 289 (1896), this Court ruling on a similar point, observed as follows : "While it may be to some extent discretionary with a court to perpetuate or dissolve an injunction, yet all courts are bound to consider the issue raised and submitted by the parties to a suit, and judgments in either courts of law or equity must be confined to the question raised before them, and cannot extend beyond them. In this case it is clear that the issues were not considered by the court below, for which reason the decree is voidable." The court also erred in deciding the title to lot 320 and to other property of the late H. D. Brown. See Johnson v. Cassell, [1883] LRSC 1; 1 L.L.R. 161 (1883) where it was held that a suit of injunction does not lie in cases where the title to real estate is involved. The court held that courts of law and not equity have jurisdiction over cases involving title to real property. Id. at 162. See also Green v. Turner, [1895] LRSC 4; 1 L.L.R. 276 (1895), where it was held that such being a mixed question which by statute is triable by a jury under the direction of the court, the court in equity cannot decide issues involving the validity of title. We come now to the second point in the bill of exceptions, in which is embodied the main point, whether a Liberian woman who is married to a foreigner is thereby rendered incapable of holding property in Liberia. This point has been decided in Williams v. Young, L.L.R. 293 (1896), where it was held that under the Constitution of Liberia a woman does not lose her title to property which she may have acquired either before or after marriage. The Court in handing down the decision made the following observations:

"The next point to which this court's attention is

called is as follows: That M. A. Johns, the testatrix, marrying an alien, a citizen of Holland, lost her citizenship of

Liberia, under the law that the wife takes the nationality of her husband. To this the court says, this foreign law conflicts with the organic law of the Republic. The Constitution, which throws its powerful and protecting arm to uphold her, speaks in the following language : `The property of which a woman may be in possession before or after marriage otherwise than through her husband shall not be taken for the payment of his debts whether contracted before or after marriage. Nor shall the property thus intended to be secured to the woman be alienated otherwise than by her free and voluntary consent, and such alienation may be made by her either by sale, devise or otherwise.' " It seems then to be a well-settled principle that a Liberian woman who marries a foreigner does not lose her right to hold property in Liberia. It results from the above reasoning and from the decision of the Supreme Court and laws above cited, that the judgment of the court below should be reversed and the estate ruled to pay all costs and it is so ordered.
Reversed.

Smith v Page [1952] LRSC 7; 11 LLR 146 (1952) (7 March 1952)

AARON J. SMITH, Appellant, v. WILLIETTE E. PAGE, Appellee.
APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued November 16, 17, 1950. Decided March 7, 1952. 1. Title to real property may properly be determined by a Provisional Monthly and Probate Court when issues requiring such determination have been duly presented. 2. A party to a stipulation is estopped from denial of facts contained or implied therein. 3. Dilatory or diversionary tactics by counsel are disapproved as tending to negate and render ineffective the proceedings wherein such tactics are employed.

Appellant offered a will for probate in the Provisional Monthly and Probate Court of Marshall. Appellee filed objections, contending that the testator had devised property which he did not own. Appellant appealed to this Court from a decision and verdict of the Circuit Court of the Sixth Judicial Circuit in favor of appellee. This Court denied a motion by appellee to dismiss the appeal on the ground that the appeal bond was defective. **Smith v. Page**, io L.L.R. 361 (1956). On appeal, judgment affirmed.
R. A. Henries for appellant. appellee. Nete Sie Brownell for

MR. JUSTICE BARCLAY delivered the opinion of the Court. This case was filed in the probate division of the Provisional Monthly and Probate Court of the Territory of Marshall, the pleadings going as far as the surrejoinder stage. When Judge Wardsworth of the Provisional Court perused the pleadings he discovered that the case

at bar embraced issues both of law and of fact. He consequently ordered the clerk to forward said records to the civil law court for the Sixth Judicial Circuit, Montserrado County, for disposition in keeping with law. The case was heard before Judge Monroe Phelps at December term of the civil law court. Upon the verdict of the jury, he thereafter handed down the following judgment: "On January 5, 1949, this action was brought on for trial. Plaintiff and defendant entered on the record stipulations that the court and jury should only try the following issues : ci. Who is, or who was, the owner of the property in dispute? "2. Did the testator have the legal right to devise? "The trial of facts on these two points was placed before a jury, who, after hearing oral and written evidence, returned a verdict on January 19, 1949, declaring that the plaintiff is entitled to the property in dispute, namely, lot number 318 in the City of Marshall. This conclusion being in support of the evidence brought out at the trial, the verdict of the jury is affirmed. Therefore, this court adjudges that the testator, Lewis F. Tisdell, was not the owner of lot number 318 of the City of Marshall mentioned in his said last will and testament; in consequence he had no power to devise the same. Clause `I' of the said will and testament, and the bequest therein contained, is rejected and held void ; and this court orders that said clause be deleted from the said last will and testament. "It is further adjudged that, in all other respects, the said last will and testament, not having been rejected by the jury, is good, and clauses two and three thereof are sustained. And the Judge of the Monthly and Probate Court for the Territory of Marshall is hereby ordered to probate the said will, excluding
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therefrom clause one. The clerk of this court is hereby commanded to take a correct copy of said will ; to file it in the records of this case ; and to return the original to the said Probate Judge with a copy of this judgment, justifying his action as herein directed. The cost of this trial is adjudged against the respondent. And it is hereby so ordered." On August 3o, 1945, Lewis F. Tisdell of the City of Marshall died, leaving a will containing three clauses as follows: 1. To Aaron J. Smith, my nephew, I will and bequeath my dwelling house and lot number 318 and his heirs and assigns forever after my death. "2. When all my debts are settled, all deeds of Lewis F. Tisdell are to be turned over to Aaron J. Smith, my nephew, with all my personal property. "3. I, Lewis F. Tisdell do hereby nominate and appoint Aaron J. Smith, my nephew, as the sole executor of my estate, hereby revoking all former wills made by me." Upon presentation of this will for probate by Aaron J. Smith, legatee under said will, Williette E. Page, appellee herein, filed objections, contending that the said lot number 318 was not the property of Lewis F. Tisdell and hence he was without power to devise same. Along with said objections, appellee made profert of a warranty deed from Wesley Ford and Joanna F. Gibson to Joanna M. Tisdell dated September 8, 1911, which was never probated until November 3, 1948. Appellee also made profert of a certificate

dated September 23, 1947 from Maria E. Wells, a relative of the appellee, wherein she surrendered to him her rights in, and title to, said lot number 318 which had come to her from Joanna Tisdell, who was the eldest sister of the said Maria E. Wells. Appellee also made profert of a copy of tax receipt number 4542 for one dollar and twenty cents is,(

sued to Mrs. J. M. Tisdell on account of the real estate tax for the year ending September 3o, 1927. Appellant, on his part, made profert of a certificate from the collector of internal revenue for Marshall Territory dated February 5, 1946, to the effect that, according to the records of his office, lot number 318 was registered in the name of L. F. Tisdell. Appellant also filed a copy of a letter from Moses Tisdell to him which stated that the said Moses Tisdell had in his possession all the deeds of the late L. F. Tisdell and that he would turn same over to the appellant as soon as he could come to Marshall. From a close study of the records, however, it would appear that Wesley F. Gibson acquired from the testator and his wife, Joanna M. Tisdell, lot number 318 of Marshall City; and that Joanna M. Tisdell subsequently repurchased in her own right the said lot number 318 from Wesley F. Gibson and his wife and built thereon a dwelling house where she resided until her death. During the course of the trial appellant stated that he had found a forged deed among the effects of his late uncle. This document was produced for the court and marked Respondent's Exhibit "4". It is a warranty deed from Lewis F. and Joanna M. Tisdell Xo W. F. Gibson, registered and probated in the Territory of Marshall on April 17, 1911, and bearing the seal of the Monthly and Probate Court of said Territory. Appellant, however, was unable to produce the deed, stating that it was in the possession of his attorney, J. Dossen Richards. A subpoena duces tecum was served on Mr. Richards, who stated that he had mislaid the deed, and asked for time to look for it. He was given until that afternoon, when he reappeared in court, and said that he must have left it in the clothes which he had sent to the washerman; that the washerman had gone to Firestone; and that no one could say to what part of Firestone he had gone, or when .

he was expected to return.
We disapprove of such tactics on the part of counsel as tending to negate and render ineffective the proceedings of the court. It was also shown that the deed issued by W. F. Gibson and wife to Joanna M. Tisdell when she repurchased the said lot number 318 was tampered with while in the possession of Miles Tisdell, uncle of appellant. The names of the officers of court had been erased. Miles Tisdell had found said deed among the effects of one Annie Hines to whom the papers of Joanna M. Tisdell were entrusted after her death. During the trial appellant submitted an unsealed copy of a deed from one Thomas King to Lewis F. Tisdell for lot number 318,

which he claims was issued by the registrar for Marshall Territory. This, however, the lower court rightly refused to admit in evidence.
Appellant contended that the Monthly and Probate Court was not the proper forum to decide title. The records show that, as soon as the trial began in the lower court,
the parties filed stipulations leaving only two points to be decided : (I) The ownership of the property in question; and (2) whether
Lewis F. Tisdell could legally devise the property. Since appellant was a party to these stipulations, he is now estopped from declaring
his action illegal and by so doing taking advantage of his own wrong. The trial judge correctly instructed the jury as to the legal
requirements for the preparation of a copy of a deed when issued by a registrar, as well as other authenticating documents which
should accompany it if same is to be admitted as evidence. We have not been able to find any evidence, written or oral, which would
tend to show that Lewis F. Tisdell owned the property at the time of his death. Rather he produced respondent's Exhibit "4", which
he subsequently suppressed, showing that Lewis F. Tisdell and his wife had alienated the property to W. F. Gibson as far back as
1911. This subsequent suppression of the deed, Ex-

hibit "4", together with the erasures and scratchings
on the deed from W. F. Gibson and wife to Joanna M. Tisdell, must have indicated to the jury that Lewis F. Tisdell, with his wife,
had sold the property to Gibson ; and that the property had been repurchased by Joanna Tisdell in her own right. In view of the stipulations
made by the parties and the verdict of the jury, the judgment of the court below should be affirmed ; and the appellant should pay
all costs of this action ; and it is hereby so ordered. Affirmed.

Gooding (Deceased) v Intestate Estate of Toomey [1998] LRSC 5; 38 LLR 534 (1998) (22 January 1998)

NAOMI **GOODING** (Deceased), Manager, MIM'S PIG PARTS, substituted by EMMET A. **GOODING**, Appellant, *v.* THE INTESTATE ESTATE of the late THOMAS T. TOOMEY, Appellee.

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

Heard: December 4, 1997. Decided: January 22, 1998.

1. Consideration is the cause, motive, price, or impelling influence which induces a contracting party to enter into a contract; the reason or material cause of a contract; some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.
2. Consideration are of two kinds: executed and executory.
3. Equity will not relieve a party because of an unfortunate or improvident bargain where there has been no fraud or imposition.
4. The act of a court in setting aside contracts which are lawful would be deemed to invade personal rights and disturb and destroy the safety of business transactions if such act is based solely on improvidence of the contracts.
5. Inadequate consideration is not a ground for a bill in equity to cancel a contract on charges of fraud.
6. Equity denotes the spirit and habit of fairness, justness and right dealing which regulate the intercourse of men; it is a system of jurisprudence collateral to, and in some respects, independent of law.
7. A court of equity possesses the inherent power to grant relief, in the recission of a contract and as a usual and necessary coincident to that relief to grant the cancellation or reformation of the instrument as written.
8. The recission of a contract will usually be allowed where there has been some fraud entering into the inception of the agreement, or where there has been undue influence exerted, or where the mind of the stronger has overreached and controlled the powers of assent in the weaker. Equitable relief will not however be granted merely because it has been prayed for.
9. Generally, when a court of equity has assumed jurisdiction for one purpose, it may retain jurisdiction and determine all equities between the parties connected with the main subject of the suit raised in the pleadings.
10. In order for a court to retain jurisdiction to grant legal relief, (1) there must have existed an equitable cause of action growing out of the transaction prior to the commencement of the action which must be both alleged and proved; (2) the legal matters adjudicated must be germane to, or grow out of, the matter of equitable jurisdiction and not be distinct legal rights not affected by the adjudication of the equitable question involved; and (3) the court must have acquired jurisdiction of the parties or res necessary to the exercise of its actual jurisdiction to grant at least some of the relief proper under the allegations of the bill.
11. The rule which authorizes a court to retain jurisdiction does not extend to a case where an incidental matter is cognizable in equity and by this enable the court to draw in a main subject of controversy which has a separate, distinct and appropriate remedy at law.
12. The sole ground of equitable jurisdiction is that a remedy merely ancillary to the legal remedy may be afforded to hold the *status quo* until the main suit can be ended.
13. In a proper case, a court of equity, upon obtaining jurisdiction, can retain such jurisdiction to administer or afford full or complete relief, both legal and equitable, so far as it pertains to the same transaction or the same subject matter, including the matter of

dispute over which courts of law and courts of equity have concurrent jurisdiction; and it may decree delivery of the possession of real or personal property.

14. Where the right of occupancy, possession, or enjoyment is the only issue involved and the instrument (lease or addendum) conferring such right of occupancy, possession, or enjoyment is cancelled by a court of equity, said court may in the same decree order the redelivery of the demised premises to the landlord or true owner.

15. To perfect a right of possession, occupancy, and/or enjoyment of a demised premises under a lease agreement requires a special proceeding entitled summary proceeding to recover possession of real property.

16. A special proceeding is tried by a judge alone without a jury, just as the trial to cancel an agreement.

Appellant Naomi **Gooding**, for Mim's Pig Parts, assignee of the sub-lessee of a leased parcel of land, appealed from a judg-ment entered by the trial court cancelling the lease agreement and the addendum thereto in proceedings in equity brought by appellee, one of the administrators and an heir of the lessor, on the ground of fraud. The basis upon which the appellee commenced the proceedings in equity and alleged fraud were that the consideration paid by the lessee to the lessor, being an agreement by the lessee to assume responsibility for payment of the real estate tax, which was previously the res-ponsibility of the lessor, was inadequate, and that the appellee, assignee of the leased property, had refused to renegotiate the terms of the addendum to the lease agreement.

The trial court judge had ruled the appellant to a bare denial and, following a trial, had entered judgment in favor of the appellee, after denying appellants motion for judgment on the ground of insufficiency of evidence. In addition, although an appeal was announced from the judgment by the appellant, the trial court had ordered that the property, subject of the cancellation proceedings, be placed in the hands of the appellee.

On appeal, the Supreme Court reversed the judgment of the trial court, holding that no where in the evidence presented by the appellee had it been shown that fraud had been perpetrated by the lessee against the lessor in the execution of the adden-dum. The Court noted that due consideration had been given by the lessee for execution of the addendum by the lessor, said consideration being the agreement by the lessee to assume responsibility for payment of the real estate taxes to the government, a responsibility which was previously that of the lessor. The Court opined that under the circumstances, and in the absence of any evidence of perpetration of fraud by the les-see, the mere inadequacy of the consideration did not constitute a basis for cancellation of the lease agreement or the addendum thereto. The Court therefore ruled that the trial judge was in error in entering judgment in favour of the appellee.

As to whether the trial judge could, after cancelling the agreement, and in the same judgment, place the appellee in possession of the demised premises, the Court said that if the judge had properly, on the basis of adequate evidence, can-celled the lease agreement and the addendum thereto, he could in the same judgment order that the owner be placed in posses-sion of the demised premises. However, as there was not adequate evidence to cancel the agreement, the judge could not place the appellee in possession of the premises. The Court therefore adjudged that as the lease agreement and the adden-dum were duly executed, with proper consideration, the same remained in full force and effect, and that therefore the appellant was entitled to

possession of the premises for the duration of the said agreement. It accordingly *reversed* the judgment of the trial court.

Oswald N. Tweh of Brumskine & Associates Law Firm appeared for the appellants *Felicia Coleman* of Sherman and Sherman Law Firm appeared for the appellee

MADAM CHIEF JUSTICE SCOTT delivered the opinion of the Court.

The late Thomas T. Toomey entered into a lease agreement with Mounir Nahra, a Lebanese National, on the 26th day of March, A. D. 1968, for a twenty (20) year period, commencing from the 1st day of April, A. D. 1968, up to and including the 31st day of March, A. D. 1988, for an annual rental of $1,000.00 (One Thousand Dollars). This lease agreement was duly probated. On January 10, 1973, an addendum to the 1ease agreement was executed between the late Thomas T. Toomey, lessor, and Mounir Nahra, lessee, granting an additional period of fifteen (15) years, commencing immediately upon the expiration of the 20 years granted in the April 1, 1968 lease agreement.
The lessee, Mounir Nahra, exercising his right to sublease and/or assign the leased premises, on October 5, 1973, as-signed his rights under the said lease agreement and the addendum thereto, to Hage Brothers Supermarket. This assignment was confirmed by the lessor, Thomas T. Toomey. On January 31, 1977, the Hage Brothers Supermarket partner-ship was dissolved and all assets of the partnership, including the assignment of the lease agreement and its addendum, were turned over to Hage Brothers Supermarket, Inc.
The lessor, the late Thomas T. Toomey, and the assignee, Hage Brothers Supermarket, Inc., on February 2, 1977 executed a second addendum transferring the tax burden from the lessor to the lessee and granting an additional two years for the optional period, commencing 1988, the date stipulated in the addendum of January 1, 1973, meaning thereby that the 1ease would end in the year 2005, A. D. instead of 2003, A. D., and that the lessee would have the obligation to pay all government taxes on the demised premises.

Hage Brothers Supermarket, Inc., on December 8, 1983, assigned its leasehold rights in the demised premises to Mim's Pig Parts (subsequently Mim’s Supermarket). On March 3, 1984, a lease agreement was executed between Mim's Super-market, Inc., represented by its manager, Emmett **Gooding**, and A-Z Corporation, represented by its general manager, Kamal Merhi, for a period of 5(five) years. An addendum to this lease agreement was executed between Mim's Supermarket, repre-sented by its managing director, Naomi A. C. **Gooding**, and the A-Z Corporation, granting the A-Z Corporation an additional five (5) years optional period, thereby extending the optional period such that instead of ending in 1989, it would now expire in 1994. The original lessor, Thomas T. Toomey, died and appellee herein, one of the administrators appointed by the probate court, approached the managing director of Mim's Super-market, Inc. to renegotiate the addendum of 1973 and 1977. The negotiations broke down and appellee herein, in 1990, instituted in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, a bill in equity for the cancellation of the addendum to the lease agreement, stating fraud as the

ground therefor.
The law issues in the case was heard during the March, A. D. 1992 Term of the Civil Law Court, Sixth Judicial Circuit. The judge, His Honour M. Wilkins Wright, ruled respondents to a bare denial of the allegations contained in the complaint. Thereafter, the trial of the case was proceeded with. During the trial, appellee presented oral testimony and moved the court to admit into evidence, in addition to the oral testimony, the addendum to the lease agreement of February 2, 1977, signed between Thomas T. Toomey and the Hage Brothers Super-market, Inc., and the addendum to agreement of lease of May 10, 1989, signed by appellee but not signed by Appellant Naomi **Gooding**. Appellant did not object to the admission into evidence of the documents requested by appellee. In addition, appellant waived evidence and moved the court for dismissal of the petition for insufficiency of the evidence. The motion was denied and the judge proceeded to render judgment in favor of petitioner, granting the petition. From this judg-ment, appellant announced an appeal to this Court, which was granted.

Notwithstanding the granting of the appeal, the judgment was ordered enforced, with the judge instructing that appellee be placed in possession of the demised premises. Appellant and A-Z Supermarket thereupon filed before the Chambers Justice a petition for a writ of prohibition to stay the execution of the final judgment, as well as a bill of information. The Chambers Justice heard both the prohibition petition and the bill of information and ruled on both in favor of appellee. Appellant then took an appeal to this Court *en banc*, which reversed the decision of the Chambers Justice and ruled in favor of appellant during the October A. D. 1992 Term of this Court. In its judgment, the Court ordered that the premises be placed under the control of the court pending the determination of the appeal. See ***Gooding*** *and A-Z Supermarket v. Wright and The Intestate Estate of Thomas T. Toomey et al.*, 37 LLR 15 (1992).
The matter now before us for consideration is the appeal announced from the judgment in the bill in equity for the can-cellation of the addendum to lease agreement for fraud. In pursuance of her appeal, the appellant filed a two-count bill of exceptions, stating:

1) Because pleadings having rested, Your Honour, in disposing of the law issues, ruled respondent to a bare denial of the facts stated in petitioner's petition on the 3rd day of March, 1992, thereby overruling and dismissing respondent's answer; to which ruling of this Honourable Court, respondent excepted.

2) And also because respondent says that after hearing the facts in the case, respondent moved this Honourable Court to deny the relief sought by petitioner and dismiss the case, but Your Honour reserved final judgment and on the 12th day of March, A. D. 1992 aforesaid, gave your final judgment that the petition had been sufficiently established in law and fact and granted same, stating that the addendum of February 2, 1997 between Thomas T. Toomey and Hage Brothers be and the same is hereby cancelled, set aside and declared null and void to all intents and purposes. In consequence of the cancellation, the court ordered the respondent evicted and ousted from the subject premises and the petitioner repossessed of his property, and the clerk of court was thereupon ordered to issue a writ of possession and place same in the hands of the sheriff to be served on respondent, and placing peti-tioner in possession... To this final judgment respondent excepted and announced an appeal to the Honourable Supreme Court...
At the call of the appeal before this Court, Associate Justice M. Wilkins Wright, who was trial judge in the court below, and Associate Justice Jangaba, who was one of counsel for res-

pondents herein, recused themselves from final determination of the case.
Having reviewed the records and listened to the arguments, this Court has determined that the salient issues to be considered for resolution of case are:

2. Whether or not appellee substantiated and proved his case by a preponderance of the evidence?
3. Whether or not in an action for cancellation of a lease agreement, the successful plaintiff is entitled to pos-session of the property as a matter of course?

As noted earlier, the records revealed that the appellant was ruled by the trial court to a bare denial. Therefore, the appellee only had to substantiate his petition. Thus, in discussing the first issue, we shall revert to the petition to see if the appellee met the burden of proof imposed by law. Count 2 of the petition read as follows:

"Petitioner further petitioning says in court 2. . . that prior to the demise of his late father, an addendum to the lease agreement was executed by and between his said late father, Thomas T. Toomey, and the Hage Brothers Super-market, Inc., in which it was stated that immediately upon the expiration of the twenty (20) years term of the original lease agreement, lessee would be granted an additional period of fifteen (15) years; that is to say, after the 15th day of April, A. D. 1988; but the said clause is void of any consideration in the payment of rent to lessor.... Petitioner proferts copy of the addendum to the lease agreement, marked exhibit "B".
An inspection of exhibit "B" revealed that the parties thereto agreed substantially, as follows:

1. Lessor Thomas T. Toomey agreed and re-affirmed his desire to further lease and honor his signature under the addendum dated January 10, 1973.
2. 2) Effective April 15, 1988, lessee will be responsible for the payment of all government taxes on the demised premises. Further, an amount of two thousand ($2,000.) was paid to the lessor as a balance and final payment for rental up to and including April 14, 1988.
4. That with the exception of count five (5) of the original lease agreement which placed the tax burden on the lessor, all other terms and conditions contained in the original lease agreement, dated April 15, 1968, shall remain the same and the same is hereby incorporated into this addendum and covers the entire new terms as per addendum dated January 10, 1973". Paragraph five (5) of exhibit "B", of February 2, 1977.

It is our view that exhibit "B" is evidence that the lessor, now deceased, intended to continue to lease his property to Hage Brothers Supermarket, Inc. beyond the original lease period of twenty (20) years. Further, that it was mutually agreed between the parties to the addendum, exhibit "B" to the cancellation petition, that effective April 14, 1988, Lessee Hage Brothers Supermarket, Inc., instead of Lessor Thomas T. Toomey, would become liable for all government taxes, rather than as was previously stipulated in the lease agreement of April 15, 1968. In other words, the lessee assumed liability for payment of all government taxes, which liability was pre-

viously that of the lessor, as stipulated and agreed to in the lease agreement of April 14, 1968.

We further say that exhibit "B", at paragraph five (5) thereof, quoted above, clearly states that with the exception of the referenced clause five (5) of the original lease agreement, which placed the tax burden on the lessor, all of the other terms and conditions of the April 14, 1968 original lease agreement were to remain the same and become incorporated into the addendum, and that it covered the new terms granted in the said addendum dated January 10, 1973. By that clause, the terms and conditions of the original lease, with the exception of responsibility for the tax liability, became the terms and conditions of the addendum of February 2, 1977, for the optional period of seventeen (17) years.

Appellee argued that there was no consideration for the mentioned addendum. This prompts the question whether the lease agreement of March 26, 1968 contained a consideration? We inspected the lease agreement and found the following:

"To have and to hold the above granted described pre-mises unto the lessee together with all and singular the easements, outlets, privileges, hereditaments and appurte-nances thereto belonging, for and during the full and com-plete period of twenty (20) calendar years, commencing from the 1st day of April, up to and including the 31st day of March, A. D. 1988, yielding and paying therefor unto lessor a yearly rental of $1,000.00".

Black's Law Dictionary (6th ed.) defines consideration as: "The inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract. Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. Restatement Second, *Contracts*, section 17(1), 71; *Richman v. Brook Haves Services Corporation,* 80 Misc. 2d 563, 363 S.N.Y. 2d 732, 733.... Considerations are either executed or executory; expressed or implied, good or valuable".

After our examination and inspection of appellee's exhibit "B" and the lease agreement entered into between Thomas T. Toomey, lessor, and Mounir Nahra, lessee, on March 26, 1968, both of which were admitted into evidence by the trial court, we find that the addendum of February 2, 1977 executed bet-ween Thomas T. Toomey and Hage Brothers Supermarket, Inc. contains consideration. The consideration was the assumption of the tax burden by the lessee, which was previously the res-ponsibility and obligation of the lessor, and the rental of $1,000.00 per annum for the optional period of 17 (seventeen) years, commencing April 1988, up to and including April, 2005.

We shall now turn to count 4 of the cancellation petition. That count stated:

"That because of *inadequate consideration* meted out to petitioner over the years, in so far as the same relates to the payment of rents, the respondent hereinabove did agree to increase the annual rental of the aforesaid demised premises to the sum of $8,000.00 (EIGHT THOUSAND DOLLARS) for which an addendum to the lease agreement was prepared for execution between petitioner and respondent herein; but after same was signed by the petitioner and Co-administratrix Lucy Gibson-Toomey, the respondent herein failed, refused and neglected to sign the same. . . . Petitioner proferts a copy of said addendum to the lease agreement, marked exhibit "C".

The bold characters of the words "inadequate considera-tion" is contained in

the petition filed by appellee, petitioner in the trial court. Appellee, one of several administrators of the intestate estate of the late Thomas T. Toomey, and one of the heirs to benefit from the demised premises under the lease agreement, is of the opinion that the rental is inadequate. This was further buttressed by appellee when testifying in his own behalf. He said:

"... I met Mrs. **Gooding** in the year 1988 and I was in charge of the building which houses the A-Z Super-market. She told me that she was prepared to work along with me in making a new understanding to the addendum because I told her the rental or rent which was paid to my father could not still stand for the addendum because we were already in the second Republic and no more U.S. dollars but Liberian coin..." See sheet two of the sixth day's chambers session, Sixth Judicial Circuit Court, March Term, A. D. 1992, Wednesday, March 4, 1992.

From the above statement, the question posed is whether inadequate consideration constitutes a ground for cancellation of a contract? This Court has said that ". . . equity will not relieve against an unfortunate or improvident bargain where there has been no fraud or imposition . . . Should courts under-take, because of improvidence, to set aside contracts which are lawful, they would invade personal rights and disturb and destroy the safety of business transaction...." *Nasser and Saleby v. Elias Brothers,* 5 LLR 108 (1936), text at 114.

A close scrutiny of the petition and the entire records in this case has not revealed any allegation that the signature of Lessor Thomas T. Toomey was forged or that the said lessor was declared judicially incompetent. This Court finds that the addendum of February 2, 1977 was a legal and lawful contract, duly executed between the late Thomas T. Toomey and Hage Brothers Supermarket, Inc. The reality is that under the law, the administrators of the late Thomas T. Toomey are legally bound by the addendum of February 2, 1977. Administrators and executors are required by law to honor and uphold legal contracts entered into by the deceased person whose estate they are entrusted to administer.

In count five (5) of his petition for cancellation, the appellee averred "that instead of the respondent performing by signing the said addendum, she proceeded, even prior to that time, to erect an additional storey to the building on the demised premises (A-Z Supermarket Building), without the agreement, consent, or any understanding with petitioner, any considera-tion of the annual rents or otherwise, for the sole purpose of unjust enrichment, to the detriment, loss and disadvantage of petitioner . . ."

The question which arises then is: Did the appellant have any right or authority to construct another storey on the demised premises? If yes, was there a pre-requisite that appellee had to consent and agree to the said construction? To answer these questions, we take recourse to the April 1968 lease agreement, the terms and conditions of which were incorporated into the February 1977 addendum. Paragraph three (3) of the said addendum reads:

"It is hereby mutually understood and agreed upon that at all times during the life of this agreement, lessee shall have the right to make use of said demised premises for warehouse purposes and shall also have the exclusive right to construct and/or erect a building as he may desire containing as many stores of concrete and steel to suit his own business and at his own proper cost and expense and not to be deducted from the rental herein."

The foregoing paragraph clearly gives Mim's Supermarket, who has now become assignee under the said lease agreement, the right to construct a building on the demised premises at its own expense. The lease agreement of 1968 and all

of the ad-dendum thereto, including the addendum of February 2, 1977, do not provide that the lessor's approval and consent must be obtained prior to the construction by lessee or his assignee of a building on the demised premises. Appellee's count five (5) says that the construction com-menced prior to the time he approached the appellant to recon-sider the annual rental. We do not believe that the act of construction complained of in the said count can be considered as an act of fraud. Moreover, appellee was unable to substan-tiate any act of fraud, even in count one (1) of his petition, in which he averred: "Petitioner says he is the only surviving lineal heir of the late Thomas T. Toomey to whom letters of administration has been issued."
During the trial, the following question was put to the appellee on cross-examination:

> Q. Are you sure Mr. Thomas T. Toomey that you are in fact the only lineal heir of the late Thomas T. Toomey as alleged in count one (1) of your petition?
>
> A. Yes, because the others are minors.

It is an elementary principle of decedent estate law that off-springs of a deceased are lineal heirs, whether they are minors or not. All lineal heirs, irrespective of age, have equal rights to benefit under the deceased parent's intestate estate. Appellee's count one (1) was therefore false and misleading. Accordingly, this Court is of the opinion that from the foregoing discussion appellee did not present any evidence to prove the fraud which he alleged was committed by the appellant. Exhibit "B" of the appellee's petition contains therein authority of a valid addendum executed between the late Thomas T. Toomey and Hage Brothers Supermarket, Inc., which addendum was pro-perly and legally assigned to Mim's Pig Parts (now Mim's Supermarket). Inadequate consideration is not a ground for a bill in equity for cancellation of an addendum to a lease agree-ment on the ground of fraud.
We now turn to the second issue, viz: Can a successful plaintiff in a bill in equity for the cancellation of a lease agreement (or addendum to lease) for fraud be awarded possession as a matter of course? Equity is defined in the sixth edition of the Black's Law Dictionary, on page 540, as follows:

"Justice is administered according to fairness as con-trasted with the strictly formulated rules of common law ... The term 'equity' denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men. [It is] a system of juris-prudence collateral to, and in some respect independent of 'law'; the object of which is to render the administration of justice more complete, by affording relief where the courts of law are incompetent to give it or to give it with more effect..." BLACK'S LAW DICTIONARY 540 (6th ed.)
This Court has said that: "A court of equity possesses the inherent power to grant relief in the recission of a contract, and as a usual and necessary coincidence to this relief granting of the relief of cancellation or reformation of the instrument as written. The right of rescission will be allowed usually where there has been some fraud entering into the inception of the agreement; or where there has been an undue power of assent in the weaker..." *Nassre and Saleeby v. Elias Brothers*, 5 LLR 108 (1936), text at 113. It must be understood however that this equitable relief will not be granted merely because it has been prayed for.
Courts of equity seek to render complete justice. Indeed, it has been said that equity delights to do complete justice and not by halves. Generally, when a court of equity has assumed jurisdiction for one purpose, the court

may retain jurisdiction and determine all equities between the parties connected with the main subject of the suit raised in the pleadings. This general rule is not without limitations. The principles have been set forth by legal authorities as follows:

"In order to justify retention of jurisdiction to grant legal relief, (1) there must have existed an equitable cause of action, growing out of the transaction prior to the com-mencement of the action which must be both alleged and proved; (2) the legal matters adjudicated are germane to, or grow out of the matter of equitable jurisdiction and are not distinct legal rights not affected by the adjudication of the equitable question involved; (3) that the court has acquired jurisdiction of the parties or *res* necessary to the exercise of its actual jurisdiction to grant at least some of the equitable relief proper under the allegations of the bill.

The rule which authorizes a court of equity to retain jurisdiction does not extend to a case where an incidental matter is cognizable in equity and by this enable the court to draw in a main subject of controversy which has a separate, distinct and appropriate remedy at law.

...the sole ground of equity jurisdiction is that a remedy merely ancillary to the legal remedy may be afforded, for example, to hold matters in *status quo* until the lawsuit can be ended then a chancellor (judge) may with propriety give the aid of his court to that extent, and leave the parties otherwise untrammeled in their lawsuit, especially so where the court has jurisdiction both in law and equity, and also the ancillary relief may be obtained by a special proceeding.

In a proper case a court in equity can retain jurisdiction to afford complete relief and may decree delivery of the possession of real or personal property." See 30 C.J.S., *Equity*, §§ 68, 69, 70, pages 421-424.
This Court has confirmed the forgoing principles and held in the case *Benson v. Johnson*, [1974] LRSC 55; 23 LLR 290 (1974), that a court of equity, upon obtaining jurisdiction of an action, will retain it and can administer full relief both legal and equitable, so far as it pertains to the same transaction or the same subject matter, including the matter of dispute over which courts of law and courts of equity have concurrent jurisdiction. This Court has further said:

"...where the right of occupancy, possession or enjoyment is the only issue involved and the instrument (lease or addendum) conferring said right of occupancy, possession or enjoyment is canceled by a court of equity, said court of equity may in same decree order the re-delivering of the demised premises to the landlord.

... To perfect a right of possession, occupancy and/or enjoyment, a demised promises under a lease agreement would require a special proceeding entitled summary proceedings to recover possession of real property. This special proceeding is tried by a judge alone without a jury just as the trial of the cancellation of agreement which confers original right of possession, occupancy, and enjoyment only. Civil Procedure Law, Rev. Code 1: 62.23 and 62.24. Therefore, there is no rationale for requiring two separate and distinct action-- a suit in equity to cancel the lease agreement and a special proceeding in law to recover possession of the real property demised under the lease agreement which has been cancelled." *Id.*

In view of the foregoing, and because this Court has deci-ded this issue in previous opinions, we hold that as a matter of course, a judge may also deliver possession of real property to the true owner in a decree granting cancellation of a lease agreement or addendum to a lease agreement. Therefore, if the appellee's petition for cancellation of the addendum to the lease agreement on the ground of fraud had been proven and substantiated, the judge would have been correct in his decree granting possession of the real property.
Wherefore, and in view of the foregoing, the final judgment of the trial court is hereby ordered reversed, the addendum of February 2, 1977 remains in full force and effect, and appel-lant is hereby ordered to be placed in possession of the demised premises and to pay all rentals due appellee under the February 2, 1977 addendum. Costs of these proceedings are disallowed. And it is hereby so ordered.

Judgment reversed.

Jarboe v Jarboe [1975] LRSC 30; 24 LLR 352 (1975) (26 June 1975)

ESTHER JARBOE, Appellant, v. SOLOMON JARBOE, Appellee.
MOTION TO DISMISS APPEAL.

Argued May 13, 1975. Decided June 26, 1975. 1.
The sureties named in the appeal bond must be owners of the property pledged and their affidavit and the revenue certificate which
must accompany the bond shall bear evidence to that fact. 2. When the foregoing documents accompanying the appeal bond do not precisely
show that the sureties named are not the owners of the pledged property, the bond will be considered defective and the appeal subject
to dismissal. 3. The affidavit of the named sureties and the revenue certificate required, must be filed simultaneously with the
appeal bond. 4. The lower court loses jurisdiction over a matter with the service on appellee of the. notice of completion of the
appeal, after all the other requisites for completion of an appeal have been performed. 5. Exceptions to the sureties can be taken
by the appellee only so long as the trial court still has jurisdiction over the matter, and cannot be taken after
all the steps for
completion of the appeal have been taken.

Appellee moved to dismiss the appeal, alleging primarily that the sureties were not the
owners of the property pledged. Appellant mainly contended that appellee was guilty of laches in not having taken exceptions to the
sureties in the lower court or applying to the Justice in chambers for the relief desired. The Court sustained the contentions of
the appellee, in that it found from the record of the case that the sureties were not the owners of the property pledged, as the
law requires. It did not support the argument of laches on the part of appellee, since he did not know of the defects in the bond

until after the service of the notice of completion of the appeal, when the lower court lost its jurisdiction over the matter. The motion was granted and the appeal was dismissed.
Clarence 0. Tunning for appellant. Daniel Draper

for appellee.
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MR. JUSTICE HENRIES delivered the opinion of the

Court. When this case, which emanated from the Third Judicial Circuit, Sinoe County, was called for hearing, we observed that the appellee had filed a motion to dismiss this appeal on the ground that the appeal bond was defective for the following reasons : "1. that the sureties, David Wreh and Isaac Clarke, own no property; "2. that lot No. 888 referred to in the appellant's revenue certificate is the property of J. E. Davies and Frances Wreh, who are not signatories to appellant's appeal bond ; "3. that lot No. 1218, also mentioned in the revenue certificate, is the property of D. J. Clarke of the City of Greenville, Sinoe County, who died leaving several lineal and collateral heirs, among whom is Isaac Clarke, one of the sureties ; and "4. that the appellee could not have moved for verification of the bond because he was not aware of the filing of appellant's bond until the service of appellant's notice of completion of appeal, when the lower court had lost jurisdiction."
Having stated the positions of the contending parties, let us now turn to the Civil Procedure Law relating to sureties of bonds.
"I. Who may be sureties. Unless the court orders otherwise, a surety on a bond shall be either two natural persons who fulfill the requirements of this section or an insurance company authorized to execute surety bonds within the Republic. "2. Lien on real property as security. A bond upon which natural persons are sureties shall be secured by one or more pieces of real property located in the Republic, which shall have an assessed value equal to the total amount specified in the bond, exclu-

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sive of all encumbrances. Such a bond shall create a lien on the real property when the party in whose favor the bond is given has it recorded in the docket for surety bond liens in the office of the clerk of the Circuit Court in the county where the property is located. Each bond shall be recorded therein by an entry showing the following: "(a) The names of the sureties in alphabetical order; "(b) The amount of the bond; "(c) A description of the real property offered as security thereunder, sufficiently identified to clearly establish the lien of the bond; "(d) The date of such recording; "(e) The title of the action, proceeding, or estate. "3. Affidavit of sureties. The bond shall be accompanied by

an affidavit of the sureties containing the following: "(a) A statement that one of them is the owner or that both combined are the owners of the real property offered as security; "(b) A description of the property, sufficiently identified to establish the lien of the bond; "(c) A statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered; and "(d) A statement of the assessed value of each property offered. "A duplicate original of the affidavit required by this section shall be filed in the office where the bond is recorded. "1. Certificate of Treasury Department official. The bond shall also be accompanied by a certificate of a duly authorized official of the Department of the Treasury that the property is owned by the surety or sureties claiming title to it in the affidavit and that it is of the assessed value therein stated, but such a cer-

tificate shall not be a prerequisite to approval by the judge." Rev. Code :63.2. Upon inspecting the appeal bond filed by the appellant, we found that the sureties named in the bond are David Wreh and Isaac W. Clarke, yet the revenue certificate states that the property offered for security, lots No. 888 and 1218, are owned by J. E. Davies and Frances Wreh, and D. J. Clarke, respectively, who are not sureties to the bond. However, the affidavit of sureties declares the named sureties to be owners. It is obvious that these documents do not state with any degree of certainty who are the actual owners of the property. The statute quoted above requires that the sureties named in the bond must be owners of the property offered as security and described in the bond ; and all of the documents to be filed with the bond, the affidavit of sureties and a revenue certificate, must bear evidence to that fact and must be consistent. Where all of the documents that must accompany a bond do not show exactly that the sureties named in the bond are owners of the property offered for security, the bond will be considered as being defective, and the appeal will be dismissed on that ground. The appellant, in an effort to counter the argument with respect to nonownership of the properties by the sureties, filed another revenue certificate showing that David Wreh, one of the sureties, is the owner of lot No. 889 in Greenville, Sinoe. We cannot accept this certificate because there is no affidavit of sureties filed with it; and it cannot relate back to the previous affidavit of sureties because that affidavit states that David Wreh is owner of lot No. 888 and not lot No. 889. More important is the fact that this new revenue certificate is dated April 23, 1975, and the appeal bond was filed on September 11, 1973. The statute is clear that the bond must be accompanied by the revenue certificate, and we interpret this to mean that the affidavit of sureties and the revenue certificate must be filed simultaneously with the bond.

The appellant alleged that lot

No. 1218 is owned by Isaac W. Clarke because he is the only legal heir of D. J. Clarke, the recorded owner of the property. This allegation, unsupported by any evidence, does not quiet the doubt raised by the appellee. The revenue certificate carries the name of D. J. Clarke as owner of lot No. 1218. This Court accepts only what appears in the affidavit of the sureties and the revenue certificate as evidence that the sureties are owners of the property described therein, and each of these documents must be consistent with the other. The appellant contended that the appellee is guilty of laches because he did not take exception to the sureties in accordance with our Civil Procedure Law. "Exception to surety; allowance where no exception taken. "I. Exceptions. A party may except to the sufficiency of a surety by written notice of exceptions served upon the adverse party within three days after receipt of the notice of filing of the bond. Exceptions deemed by the court to have been taken unnecessarily, or for vexation or delay, may, upon notice, be set aside, with costs. Where "2. Allowance where no exception taken. no exception to sureties is taken within three days or where exceptions taken are set aside, the bond is allowed." Rev. Code :63.5. "Justification of surety. "I. Motion to justify. Within three days after service of notice of exception, the surety excepted to or the person on whose behalf the bond was given shall move to justify, upon notice to the adverse party. The surety shall be present upon the hearing of such motion to be examined under oath. If the court finds the surety sufficient, it shall make an appropriate endorsement on the bond. "2. Failure to justify. If a motion to justify is not

made within three days after the notice of exception is served, or if the judge finds a surety insufficient, he shall require another surety or sureties in place of any who have not justified. Any surety who has not justified shall remain liable until another surety signs the bond and the bond is allowed." Rev. Code i :63.6. We have reviewed the record certified to us and see that the appeal bond and the notice of completion of appeal were filed on the same day, and the notice was served on the appellee two days later. This Court has consistently held that it is the service of the notice of completion of appeal which alone gives the appellate court jurisdiction over the matter. Witherspoon v. Clarke, [1960] LRSC 60; 14 LLR 194 (1960). We take this to mean that after all the prescribed requisites for completion of an appeal have been performed, the lower court loses jurisdiction with the service on the appellee of the notice of completion of appeal. Since the appellee did not know of the defects in the bond until after service of the notice of completion of appeal, after the trial court had lost jurisdiction over the matter, we wonder how the lower court could have assumed jurisdiction to consider any exceptions taken to the sureties. It is our opinion that the law with respect to exceptions to a surety can be employed only so long as the trial court still has jurisdiction over the matter, and not after all of the steps for completion of an appeal have been taken. The appellant, relying on Jos. Hassen& Soehne, Ltd. v. Tuning, [1966] LRSC 23; 17 LLR 298 (1966), argued that if appellee felt that

the sureties were insufficient, he should have applied to the Justice presiding in chambers
for the necessary relief. We find this argument untenable because we cannot imagine what relief the Justice in chambers could have
given when the lower court had lost jurisdiction and the matter was pending on appeal before the bench en banc. The case cited by
appellant is not analogous because in that case the lower court had not lost jurisdiction

over the matter.
It was the trial judge who had lost jurisdiction over the circuit immediately after approving the appeal bond, and this Court has
held that since a circuit judge is not authorized to perform any judicial act within the circuit after the expiration of his term
time, a party who desires the performance of an act indispensable to an appeal must apply for relief to the Supreme Court or to the
Justice presiding in chambers, after which any judge may be ordered to perform the act. This holding presupposes that the final jurisdictional
step of service of the notice of completion of appeal has not been taken. The situation in the instant case is different in that
the lower court had lost jurisdiction over the matter. Therefore, we do not find appellee guilty of laches for failure to except
to the sureties or to apply to the Justice in chambers for relief. The appellant contended that the appellee was negligent in not
superintending his interest or cause but, to the contrary, we found that she was the one who failed to superintend her appeal. The
defects complained of could have been discovered easily had appellant taken time to read the documents she was filing. It is the
responsibility of the appellant to insure that the statutory prerequisites for completion of an appeal are properly Yengbe executed
within the prescribed period of time. v. Porte, is LLR 537 (1964) ; and where the sureties subscribing to an appeal bond are not
statutorily qualified, the bond is materially defective and the appeal will be dismissed. Sauid v. Gebara, [1964] LRSC 18; 15 LLR 598 (1964). In view of the foregoing, the motion to dismiss is granted with costs against the appellant; and the Clerk of this Court
is hereby ordered to send a mandate to the court below ordering it to proceed to resume jurisdiction and enforce its judgment. And
it is so ordered. Motion to dismiss appeal granted; appeal dismissed.

MIM Liberia Corp. v Toweh [1983] LRSC 19; 30 LLR 611 (1983) (3 February 1983)

MIM LIBERIA CORPORATION, by and thru its Managing Director, E. AEIG, and Chief Engineer, GHETELAT, Appellant, v. **DAVID N. TOWEH,** Appellee.

APPEAL FROM THE CIRCUIT FOR THE EIGHT JUDICIAL CIRCUIT, NIMBA COUNTY.

Heard: November 2, 1982. Decided: February 3, 1983.

1. Where the question of jurisdiction of the appellate court to hear a direct appeal is involved, it will be considered by the appellate court even though the question is not raised by the parties.

2. It is not sufficient for sureties on an appeal bond pledging real property as security to merely state in the affidavit of surety that they are owners of realty and that the net worth of each exceeds the amount of the bond; they must describe the properties so offered sufficiently to establish a lien on the bond.

3. It is one of the inherent rights of a court to take judicial notice of its own records especially in a case pending before it.

4. Failure to file a valid appeal bond is a ground for the dismissal of an appeal.

5. The Supreme Court cannot open the records to decide any issue touching the merits and demerits of a case when its jurisdiction is challenged, but it can examine the records to ascertain if the jurisdictional steps were taken so as to confer jurisdiction upon her over the parties and the cause.

6. Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided. Rev. Code 1: 9.8(3)

7. To render a judgment binding, a court must have jurisdiction over the parties and the subject matter.

8. An appellate court has power to dismiss an appeal either on motion of a party or on its own motion when there are sufficient grounds to warrant such dismissal.

9. Where the question of jurisdiction of the appellate court to hear a direct appeal is involved, it will be considered by the appellate court even though the question is not raised by the parties.

10. Want of jurisdiction in the appellate court, if it is patent, or can be readily ascertained by an examination of the records, warrants the dismissal, on motion of the appellee.

11. One of the main grounds for dismissal of an appeal is the lack of jurisdiction on the part of the court. Completion of the prerequisites for perfection of an appeal is necessary to give the Supreme Court jurisdiction over the subject matter and the parties in an appeal; and jurisdictional requirements cannot be waived even by the appellee in the absence of statutory authorization. This being so, a court must of necessity, and if need be upon its own motion, always consider the question of its jurisdiction primary over any issue brought before it, since it is bound to take notice of the limits of its authority.

12. The prerequisites for the perfection of an appeal to confer jurisdiction of the Supreme Court over the person and the subject matter according to our statute include (a) the announcement of an appeal in open court after the rendition of final judgment, (b) the filing of a bill of exceptions within ten days after final judgment is rendered, (c) the filing of an approved appeal bond within sixty days after final judgment, and (d) the filing and service of a notice of the completion of the appeal within sixty days. Failure to comply with any of the above mentioned prerequisites, or the performing of any of the prerequisites beyond the time allowed by statute, or the filing of a defective appeal bond, even though filed within statutory time, will render the appeal dismissible upon motion properly made. Civil Procedure Law, Rev. Code 1: 51.6, 51.7, 51.8, 51.9 and 51.16.

13. To render transparent justice, a court must first have jurisdiction over the parties and the subject matter. Therefore, when the jurisdiction of the court is contested, it must first decide upon its own jurisdiction before proceeding with the merits and demerits of the case.

14. A court has knowledge of the genuineness of its own records. Notice will uniformly be taken by a court of its own records and of all matters patent on the face of such records, including all

prior proceedings in the same case, though not of matters which may merely be inferred from facts appearing on the face of the records.

On a motion to dismiss an appeal, appellee contended that the appeal bond was defective in that the properties offered by the sureties were not sufficiently described as required by the appeal statute.

Appellant did not deny the allegations contained in the motion with respect to the bond, but contended, relying on Magbine v. Soko, [1981] LRSC 28; 29 LLR 292 (1981) and Washington v. Sackie, [1982] LRSC 77; 30 LLR 441 (1982), that the motion is void and violative of the principle of notice in that appellee did not attach a copy of the bond to the motion and, that, by reason of this defect, the Supreme Court cannot pass upon the motion as to do so would be tantamount to opening the records which it cannot do unless jurisdiction is conferred.

The Supreme Court overruled the contentions of appellant, stating that although it cannot open the records to decide issues touching on the merits and demerits of the case, it had the power to examine the records to ascertain if the jurisdictional steps were taken so as to confer jurisdiction upon it over the parties and the cause. The Court also opined that where its jurisdiction is questioned, it must decide upon its jurisdiction over the parties and the cause before proceeding to hear the case. In so holding, the Supreme Court overruled and recalled its opinions in Magbine v. Soko, [1982] LRSC 60; 30 LLR 292 (1982); and Washington v. Sackie, 29 LLR 441 (1981), and sustained the portions of the opinion in Talery v. Wesley, [1972] LRSC 14; 21 LLR 116 (1972) and Kamara v. Khalill Niam Brothers, [1973] LRSC 2; 21 LLR 402 (1973) as they relate to the power of the Supreme Court to examine the records on appeal to determine jurisdictional issues, which were recalled by the opinion in the case Magbine v. Soko. Accordingly, the Supreme Court granted the motion.

Raymond A. Hoggard appeared for appellant. Clarence Harmon appeared for appellee.

MR. JUSTICE MORRIS delivered the opinion of the Court.

Appellee instituted an action of damages against appellant, for damages done to personal property, in the Eighth Judicial Circuit Court for Nimba County, during the November 1979 Term. Pleadings progressed to the reply. Law issues were disposed of, and after regular trial, the

jury returned a verdict in favor of plaintiff/appellee awarding him Six Thousand ($6, 000,00) Dollars as general damages and Seven Thousand Five Hundred Sixty ($7,560.00) Dollars special damages for the value of the car, Peugeot 504 Sedan, 1977 model, which was bought from C.F.A.O. (Liberia) Limited for Eight Thousand Five Hundred Sixty ($8,560.00) Dollars in February 1977. Appellant excepted to the verdict and thereafter filed a motion for new trial which was argued, denied and final judgment rendered on July 2, 1981 affirming the said verdict. Appellant appealed from the final judgment and processed its appeal to this Court.

Upon the call of the case for hearing, the appellee informed us that he had filed a motion to dismiss the appeal. We quote counts one and three of the motion since count two is simply requesting this Court to penalize appellants' counsel for negligence:

"1.Because appellee says that the appeal bond is fatally defective in that the properties offered by both sureties are not sufficiently described in order to establish liens on the properties for a clear and unequivocal identification of the properties so offered, as the law requires. In this regard, appellee asks this Court to take judicial notice of its records and with particularity, the revenue certificates of clearance.

2. Finally, because appellee says that the purpose for requiring a sufficiently described property as lien is to ensure an appellee the actual property for foreclosure of the bond should appellant lose, and/or fail to perform or to comply with court's judgment; and that the said appellee is in the position to recover in the final analyses against the property so offered. Appellee fears that without these guarantees being well accounted for, he is unsecured, especially so when the appellant is a logging company."

The appellant's counsel filed the below two-count resistance:

"1.Because appellant submits that the purported motion to dismiss in its entirety is void, naked and that it violates the principle of notice to appellants as to what movant intends to prove and should therefore be denied; in that the purported motion has vaguely and loosely alleged that the appeal bond is fatally defective in that "the property offered by both of the sureties is not sufficiently described in order to establish the property lien on the Bond for a clear and unequivocal identification of the properties so offered." Appellant submits that the fundamental principle of pleadings is that of giving notice, and since appellee has requested that the appeal be dismissed without referring to records in the case, the alleged defective appeal bond not sufficiently describing the properties should have been proferted with the motion filed and

served thereby giving the Court and appellant sufficient notice of what description he intends to prove and for the Court to be satisfied without going into the records as requested, that the appeal bond does not indeed sufficiently describe the properties. Appellee's failure to have proferted said alleged defective appeal bond with his motion denies appellant of that required notice and this Honorable Court, the opportunity to inspect and pass upon said document. Therefore, the motion should be denied. For reliance: Magbine v. Soko, [1982] LRSC 77; 30 LLR 441 (1982), decided March 1982 Term; and Washington v. Sackie, [1981] LRSC 28; 29 LLR 292 (1981), decided March 1981 Term

2. And also because appellant denies all and singular the naked allegations of both law and facts contained in counts 1 and 3 of said motion which is not supported by any evidence."

Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided. Civil Procedure Law, Rev. Code 1: 9.8(3)

Appellant has not denied the allegations in the motion but argued that the allegations are naked in that the movant never proferted copies of the documents accompanying the motion and cited for reliance the cases of Magbine v. Soko, [1981] LRSC 28; 29 LLR 292 (1981); and Washington v. Sackie, [1982] LRSC 77; 30 LLR 441 (1982).

The issue before us, as argued by appellant, is whether this Court of last resort is competent to decide on its own jurisdiction, especially so when it is challenged by a party through a motion to dismiss the appeal without proferting the documents relied upon. To render a judgment binding a court must have jurisdiction over the parties and the subject matter. Compagnie des Cables Sud-Americaine v. Johnson, [1952] LRSC 23; 11 LLR 264 (1952). An appellate court has power to dismiss an appeal either on motion of a party or on its own motion when there are sufficient grounds to warrant such dismissal. 4 C.J.S., Appeal and Error, § 2373.

Where the question of jurisdiction of the appellate court to hear a direct appeal is involved, it will be considered by the appellate court even though the question is not raised by the parties. 5 AM. JUR. 2d., Appeal & Error, § 656.

Counts one and two of the motion attacked the appeal bond as being defective in that properties offered as security are not sufficiently described in order to establish a lien on the bond as provided by statute and appellee fears that he may not recover should the judgment of the lower court be affirmed. Recourse to the affidavit of sureties, we observe that it does not sufficiently describe the properties offered so as to establish a lien on the bond in violation of the Civil Procedure Law, Rev. Code, 1: 63.2 (3), which provides that "the bond shall be accompanied by an affidavit of the sureties containing the following:

1. A statement that one of them is the owner or that both combined are the owners of the real property offered as security;

2. A description of the property sufficiently identified to establish the lien on the bond;

3. A statement of the total amount of the liens, unpaid taxes and other encumbrances against each property offered; and

4. A statement of the assessed value of each property offered,"

It is not sufficient for sureties on an appeal bond pledging real properties as security to merely state in the affidavit of surety that they are owners of realty and that the net worth of each property exceeds the amount of the bond, but they must describe the properties so offered sufficiently to make their location and identification an easy task. Gabbidon v. Toe, [1974] LRSC 24; 23 LLR 43 (1974); West Africa Trading Corporation v. Alraine [1975] LRSC 16; 24 LLR 224 (1975); Kerpai v. Kpene [1977] LRSC 4; 25 LLR 422 (1971); and Doe v. Dent-Davis, [1978] LRSC 56; 27 LLR 306 (1978). Counts one and three of the motion to dismiss the appeal are sustained as against the resistance.

Our distinguished colleague agrees with us that the violation of the statute referred to is sufficient to dismiss the appeal but he contends that the appellee should have proferted the alleged defective bond complained of since he is requesting us to refuse jurisdiction.

Our colleague further maintains that we should not examine the records before us even though appellee has requested us to take judicial notice of the records transcribed and forwarded to us in this case. His contention is that we cannot open the records just to decide the issue of jurisdiction. On the contrary, we maintain that this Court must first be assured of its jurisdiction over the parties and the cause before proceeding to hear the case. We agree, however, that we cannot open the records to decide any issue touching the merits and demerits of the case until we shall have decided the jurisdictional issues; but, we can examine the records to ascertain if the jurisdictional steps are taken so as to confer jurisdiction upon this Court over the parties and the cause. For the sake of argument, we ask, in case there arises a contention over an alleged defect in an appeal bond and its accompanying documents, that is, the appellant contends that it has met the requirements of the statute in full and the proferted documents attached to the motion were incorrect and misleading. Could not this Court of dernier resort take recourse to the records certified to it in order to mete out transparent justice? Would such an examination of the records before us be considered as opening the records as our colleague is now contending? Our reply is in the negative, because we have every right to take judicial notice of the records certified to us and to decide our own jurisdiction. The authorities on this issue hold that:

"Want of Jurisdiction. Want of jurisdiction in the appellate court, if it is patent, or can be readily ascertained by an examination of the record, warrants the dismissal, on motion of the appeal or writ of error ...." 4 C. J. S., Appeals and Error, § 2390.
The authorities further maintain that:

"While motions made before the record is printed should ordinarily be accompanied by a statement of facts on which they rest, or by printed copies of so much of the record as will enable the court to understand the case, a motion to dismiss an appeal to the Federal Supreme Court from a circuit court of appeals for want of jurisdiction, is not premature because the record has not been printed, where the Supreme Court is sufficiently advised as to the situation of the case from a printed transcript of the proceedings in the district court to dispose of the motion without doing injustice to the parties." 4 C.J.S., Appeals and Error, footnote 95 (g), p. 598.

The two main contentions raised by the appellants in the case Lazarus Michel and Lazarus etc. v. Ezra P. Prentice, et al, 234 U.S. 268-270, motion to dismiss Appeal, decided by the U. S. Supreme Court on June 8, 1914, were:

1. That no printed records having been submitted to appellants or to the court, the motion to dismiss or affirm should be denied or be postponed until the regular hearing of the cause.

2. That the question of jurisdiction in said case could not be determined without opening the records and looking into the merits of the controversy; hence, they contended that the motion to dismiss should be denied, or referred to the hearing on the merits.

This led to the principle of law just cited above. We shall, however, quote the portion of the opinion of the U. S. Supreme Court delivered by Mr. Justice Day:

"It is contended however that this motion is premature because the record in this case has not been printed. It is true that ordinarily such motions, made before the record is printed, must be accompanied by a statement of facts upon which they rest, or by printed copies of so much of the record as will enable the court to understand the case. Under the present practice, it is permissible to file the record printed in the court below, and we have a printed transcript of the proceedings in the district court. In this printed record matters which the briefs do not dispute are shown and we think we are sufficiently advised as to the situation of the case to dispose of it now without doing in justice to the parties ...
We reach the conclusion that the appeal must be dismissed." Ibid., 268-270.

In the instant case, the transcribed records, which the appellee is requesting us to take judicial notice of, is before us and which as a matter of law, we are bound to take judicial notice of as a Court; for a court is bound to take judicial notice of its own records in deciding its jurisdiction. Rasamny Bros. v. Brunet, 21 LLR 27 (1972).

This Court has held that "one of the main grounds for dismissal of an appeal is the lack of jurisdiction on the part of the court. Completion of the prerequisites for the perfection of an appeal is necessary to give the Supreme Court jurisdiction over the subject matter and the parties in an appeal; and the jurisdictional requirements cannot be waived even by the appellee in the absence of statutory authorization. This being so, this Court must of necessity, and if need be upon its own motion, always consider the question of its jurisdiction primary over any issue brought before it, since it is bound to take notice of the limits of its authority." K. Rasamny Bros. v. Brunet, [1972] LRSC 41; 21 LLR 271, 277 (1972); Marh v. Sinoe, [1978] LRSC 58; 27 LLR 320, 324-325 (1978). The prerequisites for the perfection of an appeal to confer jurisdiction of this Court over the person and the subject matter according to our statute include (a) the announcement of an appeal in open court after the rendition of final judgment, (b) the filing of a bill of exceptions within ten days after final judgment is rendered, (c) the filing of an approved appeal bond within sixty days after final judgment, and (d) the filing and service of a notice of the completion of the appeal within sixty days. Failure to comply with any of the above mentioned prerequisites, or the performing of any of the prerequisites beyond the time allowed by statute, or the filing of a defective appeal bond, even though filed within statutory time, will

render the appeal dismissible upon motion properly made, Civil Procedure Law, Rev. Code 1: 51.6, 51.7, 51.8, 51.9 and 51.16.

We disagree with our colleague when he maintains that the court should only take judicial notice of Liberian and foreign laws, historical facts and cases decided by the Supreme Court of Liberia; for we hold that it is one of the inherent rights of a court to take judicial notice of its own records especially in a case pending before it and this case is no exception.

Our colleague has also relied on Section 10.4 of the Civil Procedure Law, which reads thus:

"Furnishing papers to the court. The moving party shall furnish at the hearing all papers not previously filed and necessary to the consideration of the questions involved. Where such papers are in the possession of an adverse party, they shall be produced at the hearing by the latter on notice served with the motion papers. Only motion papers served in accordance with provisions of this section, shall be read in support of, or in opposition to the motion, unless the court for good cause shall otherwise direct. Civil Procedure Law, Rev. Code 1: 10.4(1) and (3)

The provisions of the statute just quoted do not preclude the court from taking judicial notice of its own records in the immediate case or proceeding before it, for the subheading plainly states "furnishing papers to the court. The statute therefore relied upon by our colleague is not applicable to this case, since the document in question is already a part of the records submitted to this Court in the case from the lower court for our review.

Granted that the contention of our distinguished colleague that the appellant has traversed the allegations contained in the motion to dismiss the appeal by denying them and introducing new facts, how can this Court of last resort justly decide the issue of the appeal bond, without examining its own records to ascertain whether or not the bond is defective, since, according to our colleague, the appellant has denied the defectiveness of the appeal bond and said bond is part of the records before us? Is it not but fair and just that in order to mete out transparent justice to both parties, that we examine the appeal bond in the records certified to this Court in the case to find out if it meets the statutory requirements? It is our considered opinion and we hereby hold that to render transparent justice, this Court must first have jurisdiction over the parties and the subject matter. Therefore, when the jurisdiction of the Court is contested, it must first decide upon its own jurisdiction before proceeding with the merits and demerits of the case. Hence, we have the full right to examine the records to ascertain whether the appellant has taken all the

jurisdictional steps provided by statute to confer jurisdiction upon this Court. Law writers are in agreement that:

"It is well settled that a court will take judicial notice of its own records, in the immediate case or the one proceeding before it, and of all matters patent on the face of such records, including all prior proceedings in the same case, but not of matters which may merely be inferred from facts appearing from the face of the record. The addition of new parties does not affect the applicability of this provision.

Thus, by judicial notice of its own records, a court may determine whether or not an appeal is pending, or whether a claim is barred by the statute of limitation. In direct contempt proceedings, the court will take judicial notice of the records of the court, and the acts of the respondent committed in court, and those reflected by pleadings filed by him. However, where under a statute, the basis of a certain penalty is a former conviction of the same offense, the court will not take judicial notice of such conviction, but it must be alleged and proved." 29 AM. JUR. 2d, Evidence, § 57.

The authorities further maintain that:

"Judicial Records. A court has knowledge of the genuineness of its own records. Notice will uniformly be taken by a court of its own records in the case at bar, and of all matters patent on the face of such records, including all prior proceedings in the same case though not of matters which may merely be inferred from facts appearing on the face of the records. This is true of appellate courts as well as of courts of original jurisdiction, and it has even been held that the appellate court may judicially recognize the records made upon the trial in the lower court...:" 15 RCL, §44.

The contention of appellant in count one of its resistence is therefore overruled. We must also overrule the principle enunciated in the cases Magbine v. Soko, [1981] LRSC 28; 29 LLR 292 (1981) and Washington v. Sackie, [1982] LRSC 77; 30 LLR 441 (1982) and we hereby recall these cases as far as the aforementioned principle is concerned, and sustain the portions of the opinion in Talery v. Wesley, [1972] LRSC 14; 21 LLR 116 (1972) and Kamara v. Khalill Niam Brothers, [1973] LRSC 2; 21 LLR 402 (1973) as they relate to the examination of the records to determine jurisdictional issues which were recalled by the opinion in the case Magbine v. Soko, delivered during the March 1981 Term.

Failure to file a valid appeal bond in contemplation of the statute is a ground for the dismissal of an appeal. Civil Procedure Law, Rev. Code 1: 51.4(c) and 51.16.

In view of the foregoing circumstances, the facts and laws cited, we have no other alternative but to grant the motion to dismiss the appeal and the same is hereby granted, and the appeal dismissed. And it is hereby so ordered. Motion granted, appeal dismissed.

MR. JUSTICE YANGBE dissents.

Count 2 of the resistance to the motion to dismiss reads:
"And also because appellant denies all and singular the allegations of both law and facts contained in counts 1 and 2 of said motion not supported by any evidence".

This is a positive and categorical denial of the contentions raised in the two count motion to dismiss. Yet, according to the majority opinion, appellant has failed to deny the contentions in the motion with respect to the alleged defective appeal bond and the majority opinion is predicated upon Civil Procedure Law, Rev. Code 1: 9.8. But what my distinguished colleagues did not take into consideration is the resistance of appellant to the effect that appellee should have proferted copies of the appeal bond to give appellant notice.

Reverting further to the issue of alleged failure of appellant to deny the averment contained in the motion to dismiss, it is my opinion, that a denial of issue of facts or law need not expressly be stated, but it may be by implication, and here is the authority to support this view.

"Every allegation of facts in any pleading if not denied specifically or by necessary implication shall be taken as admitted." Cavalla River Co. Ltd. v. Pepple, [1933] LRSC 13; 3 LLR 436 (1933) and Horton v. Horton, [1960] LRSC 39; 14 LLR 57 (1960).

Again the majority view overlooked that:

"A special traverse with an inducement of new matter, is in substance an argumentative denial of the facts traversed, but in form a direct denial" 71 C.J.S., Pleadings, §144-146.

The new issues raised by appellant in the resistance is the neglect of the appellee to profert the documents which he relied upon in the motion to dismiss, which assertion is a traverse or denial by implication of the averment stated in the motion in keeping with the law that I have cited herein above, coupled with the expressed denial in count 2 of the resistance quoted supra. Therefore, the Civil Procedure Law, Rev. Code 1: 9.8, cited in the majority opinion is not applicable in my judgment.
The law governing pleadings as well as motions is that:
"The fundamental principles upon which all complaints, answers, or replies shall be construed, shall be that of giving notice to the other party of all new facts which is intended to be proven ..." William v. Allen, [1894] LRSC 3; 1 LLR 259 (1894).

In Keller v. Republic, [1979] LRSC 5; 28 LLR 49 (1979), this Court, addressing itself to procedure, held that a bill of exceptions should be framed in details and the party should not leave the burden on the Court to search the records for the purpose of discovering evidence to support the contentions raised in the bill of exceptions. There was no question of lack of jurisdiction over the appeal in that case, except the procedural reason stated hereinabove, yet this Court refused to search the record and pass upon the points of contentions. In this case, we are confronted with the question of lack of authority over the appeal which is buttressed by my opinion that we have no authority to open the records and look for evidence for a party to decide a contended issue of want of jurisdiction. It is elementary and universally accepted that the first duty of a court is to determine whether it has acquired jurisdiction in a given case and this question can be raised by either of the party or the court itself, since jurisdiction cannot be conferred by consent of the parties except by law. Compagnie des Cables Sud Americaine v. Johnson, [1952] LRSC 23; 11 LLR 264 (1952). What then is our authority for opening the records in this case without first determining whether we have jurisdiction to do so? My answer is in the negative.

In Blacklidge v. Blacklidge, [1901] LRSC 1; 1 LLR 371 (1901), the defend-ant in that case in the court below questioned the jurisdiction of the court because he was summoned less than 15 days prior to the formal opening date of the term of court in which the case was venued. This Court in deciding the procedural issue of jurisdiction sounded this warning that:

"It is the duty of litigants, for their own interest, to so surround their causes with the safeguards of the law as to secure them against any serious miscarriage and thereby pave the way to the securing of the great benefits which they seek to obtain under the law. Litigants must not expect courts to do for them that which it is their duty to do for themselves".

In the majority opinion, this cardinal rule of law and procedure has been completely ignored; consequently, the majority has decided to open the records and search for evidence for appellee to substantiate the allegations stated in the motion which attacked the authority of the Court over the appeal. I agree that every court is competent to decide its own jurisdiction, but procedurally and logically, it should first be decided whether the court has acquired jurisdiction over the appeal before it can legally open the records at the appellate level. The point of contention here is whether we have authority to open the records in the absence of supporting documents relied upon in the motion, and not whether the records have been transcribed and forwarded to us. The statute cited infra demands that the supporting documents must be annexed to the motion and no paper that is omitted in the motion should be considered as evidence. There is no divergent view or the need and the effect of a profert in a proceeding in accordance with Walker v. Morris, [1963] LRSC 42; 15 LLR 424 (1963), to the effect that an exhibit is part of the pleading to which it is annexed and that all documentary evidence must be attached as parts thereof. Under the doctrine of stare decisis which my colleagues elected to depart from, they violated a basic procedural rule by holding that we have power to open the records in the case in which our authority has been attacked.

In Maurice et al. v. Diggs et. al.[1908] LRSC 2; , 2 LLR 3 (1908) we read that:

"A judgment or decree of the court rendered where there is want of jurisdiction over parties and subject matter is void.

Parties attempting to enforce a void judgment or decree may be held responsible as trespassers". Therefore, to open a case file and search for evidence in support of the contention of a party litigant where the authority over the appeal has been assailed, in my opinion, is an infringement upon the rights of litigants. In the majority opinion, my learned colleagues have cited common law to support their view. However, we must remember that according to law and practice in this jurisdiction, common law can only be resorted to in the absence of statutory provisions on a given point and here is the relevant portion of the local statute on motion:

"The moving party shall furnish at the hearing all papers not previously filed and necessary to the consideration of the questions involved. Where such papers are in possession of an adverse party, they shall be produced at the hearing by the latter on notice served with the motion papers. Only papers served in accordance with the provisions of this section shall be read in support of, or in opposition to the motion, unless the court for good cause shall otherwise direct". Civil Procedure Law, Rev. Code 1: 10.4.

It is useless to mention that, on the appellate level, we are precluded from taking additional evidence. Ibid 1:51.5(2). Therefore, it is obvious that no paper should be produced in support of any averment in a motion at the hearing; hence, all documents relied upon by a party must be proferted. Instead of proferting the necessary documents relied upon by appellee, appellee has asked the Court to take judicial notice of its records and relied upon the principle in Phelps v. Williams, [1928] LRSC 14; 3 LLR 54, 55 (1928). In that case, this Court was dealing with the doctrine of res judicata and there was no question of want of jurisdiction over the appeal. Therefore, the Court held that it was bound to take judicial notice of its records, whether or not its attention has been called thereto and there is no need to produce evidence in support thereof. Hence, in my opinion, certainly the Phelps-Williams case is not applicable to the issues raised in this case.

The records of which the Court is bound to take judicial notice are as follows: (a) private law of Liberia and foreign law, (b) notice of historical facts, (c) records in cases which have been decided by the Supreme Court of Liberia. Civil Procedure Law, Rev. Code 1: 25.1 and 25.2; Phelps v. Williams, [1928] LRSC 14; 3 LLR 54 (1928). The documents omitted in the motion do not fall under the sections of the statute hereinabove cited, therefore, we have no authority to open the case file while considering the case for want of jurisdiction over the appeal.

According to the majority opinion, another reason for granting the motion is that the reasons stated therein are legal grounds to dismiss the appeal.

The majority opinion overlooked the legal necessity of proferting documentary evidence in a pleading or motion, and what is the legal effect of failure so to do. Whether the grounds laid in the motion to dismiss are valid and sufficient for us to refuse jurisdiction is not my point of disagreement, nor is it relevant according to the attack in the resistance to the motion.

In the majority opinion, the cases K. Rasamny Brothers v. Brunet, [1972] LRSC 41; 21 LLR 271, 277 (1972) and Marh v. Sinoe, [1978] LRSC 58; 27 LLR 320, 325 (1978) were cited and

relied upon, but the resistance filed to the motions in these cases did not raise the procedural reasons of negligent failure of appellee to profert the documents which were considered defective. To be specific, in the first case cited in the majority opinion, a motion was made to dismiss the appeal bond for lack of revenue stamp on the appeal bond. The resistance was that the certificate of clerk of court which supports the motion was not stamped and that a similar motion was withdrawn after the case was called. The Supreme Court discounted these arguments, pointing out primarily, that the omission by appellant was patent on the face of the records before it, denying the Court the jurisdiction it would have acquired only through the perfecting of the appeal according to statute.

In the second case, Marh v. Sinoe, [1978] LRSC 58; 27 LLR 320 (1978), the grounds for the dismissal of the appeal in the trial and appellate courts were identical: namely, the (1) failure to file a bill of exceptions (2) failure to file approved appeal bond within the time allowed by law; and (3) failure to have served a motion for completion of appeal.

In the resistance, appellant contended that he had mailed the appeal bond within statutory time to the trial judge, therefore, he was not negligent. He also contended that there was no revenue stamp affixed on the motion, hence, it was defective. These were the issues raised in the motion and the resistance in each of the cases cited supra, and these are the points of contentions the Supreme Court decided; whereas, in the case at bar, the appellee was attacked for negligent failure to proffer the appeal bond and the affidavit of sureties, which are alleged to be defective. Therefore, it is crystal clear that the facts and circumstances in the case in point and the two cases cited earlier are in no way the same. In order to correctly apply the doctrine of stare decisis, the facts and circumstances in the previous holding of the Court and those in the case in point must be analogous otherwise, the doctrine is inapplicable. I have carefully checked all the local and foreign cases cited in the majority opinion, and I have found no case in which a similar contention, that is now the controversial issue in this case, was ever raised in any of the cases cited and the common law provision relied upon. The majority opinion is general and not specific.

My view is that the points of contentions in the motion to dismiss are mixed issues of law and facts predicated upon documentary evidence that are only referred to in the motion but not attached thereto in accordance with the practice and the law I have cited supra and we are not authorized to make research for either party in the administration of blind justice and in the atmosphere of cool judicial neutrality. In order to apply the laws, there must be facts supported by documentary evidence legally before the Court to be guided by. In this case, there is no evidence legally before us in the absence of any profert made of the appeal bond and the affidavit of sureties showing the defects complained against.

In view of the facts, circumstances and law I have cited above, I have withheld my signature from the judgment in this case. Hence, I dissent.

Kamara v Chea et al [1983] LRSC 123; 31 LLR 511 (1983) (21 December 1983)

AMARA KAMARA, Informant/Appellant, v. **KOFA CHEA** and **ASSOCIATE MAGISTRATE WILLIAM F. SATTO,** Respondents/Appellees.

INFORMATION PROCEEDINGS.

Heard: October 19 - 20, 1983. Decided: December 21, 1983.

1. An appeal cannot be dismissed on the ground that said documents were not timely filed where the trial judge had left the circuit in which he presided within the time required by statute for approval of bills of exceptions and appeal bonds, if the appellant exhibits postal receipts, forwarding the documents to the judge, which show on their faces dates within the said time limit.

2. It is necessary to the validity of a judgment that the court should have jurisdiction of the question which its judgment assumes to remedy or relief which that judgment undertakes to grant.

3. A judge presiding in any of the criminal assizes in Montserrado County, in the exercise or aid of the appellate jurisdiction conferred by law, can only entertain summary proceeding growing out of criminal proceedings pending before a magistrate, traffic judge or a justice of the peace, and not one emanating from a civil proceeding.

Informant/appellant brought summary proceedings against the co-respondent judge growing out of a default judgment in an action of summary proceedings to recover possession of real property. The summary proceedings having been decided against informant, he filed information before the Supreme Court. On review, the Supreme Court held that the notice of the completion of the appeal being filed out of time, the appeal was not properly before Court and therefore was dismissed. The Court also held that the criminal court for Montserrado County lacked jurisdiction to try summary proceedings against a judge arising out of a civil action in the court of first instance. The matter was dismissed without prejudice to informant to re-file in the proper forum.

J. D. Gordon of the Carlor, Gordon, Hne & Teewia Law Offices appeared for informant. Stephen B. unbar, Sr. appeared for the respondents.

MR. JUSTICE SMITH delivered the opinion of the Court:

This appeal grew out of a case of summary proceedings to recover possession of real property instituted against Amara Kamara, informant/appellant herein, by Kofa Chea, co-respondent/co-appellee, in the magisterial court for the City of Monrovia, Montserrado County. The records show that Associate Magistrate William F. Satto presided over the case, rendered a default judgment against the informant, and ordered issued a writ of possession. In the process of executing this writ, informant fled to the First Judicial Circuit Court, Criminal Assizes "B", Montserrado County, by a petition in the form of a letter dated September 13, 1982, addressed to Judge Martha K. Massoud, then presiding over the August 1982 Term of the said court, which letter in its essential part reads, as follows:

"One Miss Kofa sued me in the magisterial court, Temple of Justice, Monrovia; the writ was served on me, but when the case was assigned for trial, the writ could not be found in the court's file. Thereupon, the Associate Magistrate, William F. Satto, told my lawyer in the person of Counsellor J. D. Gordon that whenever the writ was found he would make an assignment.

Associate Magistrate Satto instead of assigning the case as promised, rendered judgement against me thereby depriving me of my day in court.

In view of the foregoing, I am respectfully requesting that you order Associate Magistrate William F. Satto to desist from further exercising jurisdiction in the case of summary proceedings to recovery possession of real property until you shall have heard this complaint."

Judge Massoud, up to the expiration of her term of court, did not reach this case; hence, it remained on the docket.

The records further show that on the 19 th day of January, 1983, Judge Eugene L. Hilton, resident circuit judge and at the time the presiding judge of the First Judicial Circuit Court, Criminal Assizes "A", Montserrado County, called up the petition and also rendered a default judgment against the petitioner, informant in this case, because he was absent and not represented by counsel when the case was called. Based upon the default judgment, the associate magistrate was mandated by Judge Hilton to resume jurisdiction and enforce his civil judgment. While in the process of enforcing the judgment by serving writ of possession on the informant and attempting to evict him from the subject property, the informant sought the intervention of the Chief Justice, complaining that although his complaint against the irregularities committed by the trial Magistrate Satto was still pending before Criminal Assizes Court "B, the said magistrate was enforcing his judgment against him.

Mr. Justice Yangbe, then serving as Chief Justice a.i., received the informant's complaint and on the 30 th day of March, 1983, directed Judge Harper S. Bailey to investigate informant's complaint, give appropriate relief in the premises, and make returns to his Chambers as to how his instruction was carried out.

In obedience to the instruction of the Chief Justice a.i. aforesaid, Judge Bailey instituted investigation into the matter and observed that although, according to the records, the summary proceedings were filed before Her Honour Martha K. Massoud, then presiding over the August 1982 Term of Criminal Assizes "B", yet the matter was heard by Judge Hilton of Criminal

Assizes "A", who rendered a default judgment against Amara Kamara, the informant, because of his failure to sign and receive the notice of assignment. That because Judge Hilton with whom he has concurrent jurisdiction had rendered judgement in the case, he (Judge Bailey) was without authority to review his said colleague. He therefore dismissed the informant's information and suggested that the parties seek redress in the People's Supreme Court.

The informant thereupon, by and through his counsel, J. D. Gordon, noted exceptions to the ruling and appealed the case before this forum of last review, contending in substance that although Judge Bailey had concurrent jurisdiction with Judge Hilton, yet, the proceeding was pending before Criminal Assizes "B" and not in Criminal Assizes "A" over which Judge Hilton presided, and hence his judgement by default in a case which was not pending before his court is void and unenforceable and, therefore, the concurrent jurisdiction rule could not apply in the instant case. The informant thereupon perfected his appeal before this Court.

While this appeal was pending, respondents filed a motion to dismiss the appeal on the grounds that the judgement appealed from was rendered on April 27, 1983, and informant's bill of exceptions which should have been filed within ten (10) days was not filed until sixteen (16) days thereafter. That the appeal bond was filed two (2) months and twenty-three (23) days after judgement, and also that the notice of the completion of the appeal was not filed within statutory time.

The informant resisted the motion to dismiss and attached to his resistance two post-office receipts showing that bill of exceptions and the appeal bond were mailed to the trial judge, who had already left for his resident circuit, within the statutory time. Counsel for respondents conceded that the trial judge left the Circuit of his assignment before expiration of the time for submission to him and filing of the bill of exceptions and the appeal bond by the informant. The respondents' counsel also conceded the fact that if the dates on the postal receipts are within the time allowed by statute, the documents (bill of exceptions and appeal bond) are presumed under the practice as having been filed within the time allowed by statute.

In many instances, judges leave their circuits of assignment immediately upon the expiration of their terms or even before the last day of a given term as a result of some unavoidable circumstances, without approving bills of exceptions and appeal bonds in cases in which their judgements were appealed from, thereby working hardship on the appealing parties. Such an issue came up in the case: Weah v. Republic, [1966] LRSC 77; 17 LLR 622 (1966), when the appellant mailed his bill of exceptions to His Honour Judge Lewis K. Free who had left the circuit for his approval, and here is what the Supreme Court said, Mr. Justice Roberts speaking for the Court:

"Failure to file a bill of exceptions within the statutorily prescribed period of time is not ground for dismissal of an appeal when the appellant proves, by postal receipt for a registered letter, that the bill of exceptions was timely tendered to the trial court."

In the instant case, informant having shown two postal receipts which show on their faces dates within the time limit prescribed by statute for the tendering and filing of the bill of exceptions

and the appeal bond, the appeal cannot be dismissed on the ground that said documents were not timely filed.

However, respondents' counsel contended during the argument that the notice of the completion of the appeal was not served within the sixty (60) days allowed by statute in order to give this Court jurisdiction to hear and decide the appeal. Informant's counsel, on the other hand, argued that the notice of the completion of the appeal could not have been issued and served within sixty (60) days after judgement because the trial judge had not returned the approved bill of exceptions and the appeal bond on time to enable him to have them filed with the clerk of court within the sixty (60) days after judgement; that by reason of said documents still being in the custody of the trial court, informant had no obligation to apply for the issuance of the notice of the completion of the appeal and have the same served, neither could the clerk have issued the same without having in his office the approved bill of exceptions and the approved appeal bond.

As cited supra, the tender of a bill of exceptions and an appeal bond to the trial judge within ten (10) days and sixty (60) days, respectively, evidenced by postal receipt, constitutes timely filing of the documents in satisfaction of the requirement of the law. Equally so, in our opinion, copies of the bill of exceptions and the appeal bond with certified or photocopies of the postal receipts should have been presented to the clerk of the trial court by the informant with a request to issue the notice of completion of appeal since this must be done within the time (60) days allowed by law; instead, informant elected to wait for the return of the bill of exceptions and the appeal bond to him by the trial judge before applying for the issuance and service of the notice of the completion of the appeal without the time limit within which to do so. The Court wonders why did the informant elect to wait over 60 days before serving notice of the completion of his appeal?

The notice of completion of appeal, which is a jurisdictional step, not having been served on the respondents until over two months and twenty-three (23) days, contrary to statute, to deny the motion to dismiss and sustain the contention of the informant's counsel would be opening a floodgate for negligent litigants and their counsel to pass through, thereby destroying the doctrine of stare decisis and rendering the Court inconsistent.

The Bench is divided on the issue, in that, the minority holds that informant could not have applied for the issuance of notice of the completion of the appeal when the informant had not received the approved bill of exceptions and the approved appeal bond from the trial judge, as the clerk of court should be in possession of all such documents to justify the issuance of the notice of the completion of appeal. Regrettably, however, we have found no law to support the holding of our distinguished dissenting colleagues on this elementary issue.

The other pertinent issue which we find presenting itself in these proceedings and not raised by any of the parties is, the jurisdiction of the First Judicial Circuit Court, Criminal Assizes "A:" or "B", Montserrado County, to entertain, hear and determine a summary proceeding against a magistrate or justice of the peace growing out of a civil case.

The case out of which these proceedings grew is a summary ejectment in which a default judgement was rendered by Associate Magistrate Sato. Judge Eugene L Hilton, presiding in the

First Judicial Circuit Court, Criminal Assizes "A", Montserrado County, heard and determined the informant's petition for summary proceeding against the associate magistrate and mandated the Associate Magistrate to resume jurisdiction and enforce his default judgement which he had rendered in a civil proceeding (summary ejectment).

It appears to us that some judicial actions need to be taken by this Court to set the record straight, since this Court is the last place of hope for man, and justice demands that irregularities in the procedural aspect of the adjudication process in the inferior courts should not be condoned by any act of this Court, but to immediately have any such irregularities corrected upon disco-very in the name of consistency in our practice and procedure and for transparent justice to be meted out.

Our distinguished colleagues who have dissented from us contend that the jurisdictional issue not having been raised by any of the parties, this Court should take no cognizance thereof, as doing so would be against the scope of review provided by statute. They also hold the view that all circuit judges have jurisdiction to hear and decide summary proceedings against magistrates or justices of the peace, and therefore, either Judge Hilton or Judge Bailey, presiding in the First Judicial Circuit Court, Criminal Assizes "A" and "B", respectively, had jurisdiction over the summary proceedings against the trial magistrate. They relied upon the jurisdiction specifically given to the First Judicial Circuit Court, Criminal Assizes "B", to hear and decide all summary proceedings from courts not of record in Montserrado County.

We the majority, cannot bring ourselves to agree with the holding of our distinguished colleagues on any of the argument advanced, because what they are saying, in essence, is that even if a case is non-judicial, for example a purely political matter, so long as the jurisdictional issue was not raised by any of the parties, neither this Court not the inferior court can sua sponte raise the issue of its jurisdiction and decide it.

The view of our distinguished colleagues on the jurisdictional issue is almost similar to that which Mr. Justice Shannon expressed in his dissenting opinion in the case: French Cable Company v. Johnson as reported in [1952] LRSC 23; 11 LLR 264 (1952). In that case, Mr. Justice Shannon felt that a jurisdictional issue raised for the first time in the appellate court should not be entertained despite the fact that it was the authority of the court that was questioned. The majority opinion, quoted AMERICAN LAW INSTITUTE, Restatement of the Law ofJudgements,§ 7 (1942). Section 7 of the quoted text, under the caption "competence of the court", states as follows:

"Even though the state in which a judgement is rendered has jurisdiction over the defendant, a court of the state has not jurisdiction to render a judgement against him if the state has not given to the court power to entertain the action. Although a state has jurisdiction over the person of the defendant, it may not have given to a particular court or it may not have given to any of its courts power to entertain the action. In such a case, the court has not competency to render a valid judgment. The court has not power to render a valid judgment, not because the state lacks power but because it has not conferred power upon the court."

Mr. Justice Davis, in his concurring opinion in that case, citing 14 AM. JUR., Courts, § 191, at 385-386, said: "Where judicial tribunals have no jurisdiction of the subject matter on which they assume to act, their proceedings are absolutely void in the strictest sense of the term; and a court which is competent to decide on its own jurisdiction in a given case may determine that question at any time in the proceeding of the case, when ever that fact is made known to appear to its satisfaction, either before or after judgement...."

Our distinguished colleagues hold that since none of the parties raised the jurisdictional issue, the question of whether the First Judicial Circuit Court for Montserrado Court, which is left with only criminal cases, could entertain, hear, and determine summary proceeding growing out of civil action, should not be passed upon by us. We disagree with this view because, in our opinion, the trial court being a criminal court having only criminal jurisdiction, should have first inquired to determine whether it had jurisdiction in summary proceedings growing out of a civil action.

Under our practice and procedure, civil practice is not the same as criminal practice. In Montserrado County, the criminal court is separate from civil court, and, therefore, a judge presiding in the Civil Law Court, Sixth Judicial Circuit, cannot exercise jurisdiction which is exclusively left to the First Judicial Circuit Court, which is divided into "A" and "B".

For a court to render a valid judgement, it must first determine whether it has jurisdiction. A court has the power and duty to examine and determine whether it has jurisdiction of a subject matter presented to it, and the question shall be considered by the court before it looks at other matters involved in the case. This the court may, and must, on its own motion do without waiting for the question of its jurisdiction to be raised by any of the parties involved in the proceeding. 20 AM. JUR. 2d., Courts, § 92, at 453. This Court must therefore examine and determine whether the First Judicial Circuit Court, Criminal Assizes "A" and "B" aforesaid, whose judgment we are asked to review, had jurisdiction over the subject matter to have rendered judgment;. and if not, such judgement is void and thus, not reviewable by this Court, for to do so would be a fruitless exercise. A judgment is wholly void in the event the subject matter is withheld from the jurisdiction of a particular court. It is therefore necessary to the validity of a judgement that the court should have jurisdiction of the question which its judgement assumes to remedy or relief which that judgment undertakes to grant.49 C. J. S., Judgments, § 19) (a) and (d).

In the counties other than Montserrado, the circuit courts established thereat exercise both criminal and civil jurisdiction, including probate, tax, admiralty and appellate jurisdiction of all appeal cases from the courts of first instance whether they be civil or criminal, as well as all summary proceedings against magistrates and justices of the peace within the judicial circuits. But in the County of Montserrado, there is established a separate civil court and a separate criminal court known as the First Judicial Circuit, which exercises jurisdiction over only criminal cases and it is subdivided into Criminal Assizes "A" and "B", respectively, because of the docket congestion in said circuit. The circuit court of law, equity and admiralty, known as the Sixth Judicial Circuit, exercises jurisdiction over only cases other than criminal. Judiciary Law, Rev. Code 17:3.1. Therefore, under sec. 3.3 of the Judiciary Law, a judge presiding in any of the Criminal Assizes (Montserrado County) in the exercise or aid of the appellate jurisdiction

conferred by law, can only entertain summary proceeding growing out of criminal proceedings pending before a magistrate, traffic judge or a justice of the peace, and not one emanating from a civil proceedings.

Furthermore, the Judiciary Law, Rev. Code 17:7.4, provides that: "Except as provided in paragraphs 2, 3 and 4 (which refer to areas over which provisional probate courts have jurisdictions, action for debt and tribal matrimonial cases in certain magisterial areas), appeals from decisions of Magisterial Courts shall be to the Circuit Court in the county in which the Magisterial Court sits; provided that the Circuit of the First Judicial Circuit shall hear such appeals only in criminal cases arising in Montserrado County and that the Circuit Court of the Sixth Judicial Circuit shall hear such appeals in cases other than criminal cases arising in Montserrado County" (emphasis ours).

Resulting from a question posed by the Bench, counsel for informant argued, and counsel for respondents agreed, that by reason of the jurisdiction conferred upon the First Judicial Circuit Court, Criminal Assizes "B", to hear all appeal cases from courts not of record in Montserrado County, all summary proceedings against the judges of those courts, habeas corpus and naturalization proceedings, the said court had jurisdiction to hear the summary proceeding against the trial magistrate growing out of a summary ejectment case. Our distinguished colleagues seem to be in agreement with this argument and thus dissent from us. We, however, strongly hold that either the Legislature or any administrative order giving this court such jurisdiction did not intend to confer civil jurisdiction on the criminal court contrary to the statute creating the criminal and civil courts.

The prime intent for conferring jurisdiction on the First Judicial Circuit Court, Criminal Assizes "B", Montserrado County, to hear and determine summary proceeding against judges of courts not of record in Montserrado County, was for said court to correct irregularities committed in the conduct of a criminal hearing, but not any irregularity in the conduct of a civil hearing. It is therefore construed by this Court that the jurisdiction conferred upon the Criminal Court "B" to hear and determine summary proceeding against judges of courts not of record or any officer thereof, was intended for summary proceeding growing out of criminal trials, and not in civil hearings which are left exclusively with the Civil Law Court created for that purpose.

Our distinguished colleagues, relying on the Civil Procedure Law, Rev. Code 1: 51.15, hold the position that this Court should not consider points of law not raised in the court below and argued in the briefs. We have already pointed out that the court, under the law cited, may upon its own motion raise the issue of jurisdiction and determine whether it has jurisdiction to hear and decide the subject matter presented to it for its decision. More than this, under the same section of the Civil Procedure Law, "scope of review", relied upon by our distinguished colleagues, there is an exception which provides that the appellate court may in any case consider points of law not raised in the interest of justice and base its decision on a plain error apparent on the records. For the benefit of this opinion, we quote the relevant portion of this section:

"1. Points of law first raised in appellate court. The appellate court shall not consider points of law not raised in the court below and argued in the briefs, except that it may in any case, in the interest of justice, base its decision on a plain error apparent on the record" (emphasis supplied).

We further hold that this Court, under the Civil Procedure Law, Rev. Code 1: 51.17, "Disposition of Appeal", has the authority to reverse, affirm, or modify wholly or in part, any judgement before it, as to any party. The court shall render a final determination or, where necessary or proper, remand to the lower court for further proceedings. The appellate court shall also render a judgement which should have been rendered by the trial court. Townsend v. Cooper, [1951] LRSC 16; 11 LLR 52 (1951). We are therefore of the opinion that the First Judicial Circuit Court should have rendered a judgement refusing jurisdiction to hear and determine the summary proceedings growing out of summary ejectment suit instituted in the magisterial court, because it lacks jurisdiction to do so, and not having rendered such judgement, this Court of last review shall render the kind of judgement which the trial court ought to have rendered.

Where in a civil trial the trial magistrate or justice of the peace proceeded by wrong rules other than those which ought to be observed at all times, especially where any of the parties claimed to have been deprived of his day in court, as in the instant case, the summary proceeding against such magistrate or justice of the peace is civil in nature and, therefore, cognizable only before the court exercising civil jurisdiction. And where it appears to the satisfaction of this Court that an inferior court has proceeded contrary to the rules which out to be observed at all times and/or said inferior court is without jurisdiction of the subject matter and it is apparent on the record that such inferior court has not jurisdiction conferred upon it by law to hear and decide such proceeding, the Supreme Court will not condone the act by knowingly reviewing a void judgement simply because the jurisdictional issue was not raised, but will correct the irregularity in the interest of justice.

In view of all that we have narrated hereinabove, it is our considered opinion that the judgement rendered by Judge Hilton in the First Judicial Circuit Court, Criminal Assizes "A", Montserrado County, ordering the trial magistrate to resume jurisdiction and enforce his civil judgment, is void for lack of jurisdiction. The summary proceeding instituted before the Criminal Court "B" of the First Judicial Circuit to review the civil action of the trial magistrate should be, and the same is hereby, dismissed without prejudice to the informant to reinstitute said proceeding before the proper judicial forum exercising civil jurisdiction. The motion to dismiss the appeal is hereby granted on the ground of untimely service of the notice of completion of the appeal; costs disallowed. And it is hereby so ordered.

Motion granted.

Smith v Hill et al [1882] LRSC 1; 1 LLR 157 (1882) (1 January 1882)

JAMES S. SMITH, Appellant, vs. **FENTON ANN HILL**, **0. G. R. HILL** and **THOMAS L. HILL**, Appellees.

[January. Term, A. D. 1882.]

Appeal from the Court of Quarter Sessions and Common Pleas, Maryland County.

Ejectment.

1. A conveyance of land made by a party who had and held an absolute title therein, bars all claim of heirs or persons claiming under the original title of the conveyor. A deed, lawfully executed, is evidence against all parties to it and it is evidence of all title or rights transferable by it.

2. In suits brought to recover real property unlawfully withheld it is a misjoinder for strangers to join in the action as plantiffs, where the grantee or person entitled to relief is living and under no legal disability.

This an appeal case that was originally tried in the Court of Quarter Sessions of Maryland County, Republic of Liberia, at its August term, A. D. 188o, and is brought up from said court upon a bill of exceptions, for review. Therefore the court proceeds to consider the character of the positions assumed by the said plaintiffs (now appellees) in their complaint.

1st, "The appellees say that Delia Hill, deceased, was possessed of the piece of land described in their complaint." 2nd, "That the title of the said Delia Hill hath lawfully come to them, the said appellees, and that the appellant James S. Smith unlawfully detains the land from the said appellees." 3d, "That the said James S. Smith obtained a certain deed of transfer from the said Delia Hill upon the terms expressed in said appellees' complaint." 4th, "That the two hundred and fifty dollars was not the true consideration agreed upon by the said Delia Hill and the said James S. Smith to be paid for the said lot number eighteen." 5th, "That although the said Delia Hill during her lifetime did transfer unto the said James S. Smith the piece of land, lot number eighteen, the said James S. Smith failed to do as he should have done, as was by mutual understanding the consideration agreed upon."

In our attempt to discriminate the right from the wrong involved in this case, we indulge the pleasant belief that it will require but a very little exercise of the mind to enable us to distribute to each party that exact justice that the reasonableness of the case allows.

The court says, the second plea in the answer of the defendant (now appellant) which alleges that the facts stated in the complaint of the plaintiffs (now appellees) in this case are not true, is supported by the law and evidence in this case, so far as it relates to that part of the allegation in the complaint which says that Delia Hill, deceased, was possessed of the lot of land, number eighteen, in the upper ward of the city of Buchanan, in the County of Grand Bassa, Republic of Liberia, and that the title of the said Delia Hill hath lawfully come to them, the said appellees; for by the admission of the appellees and the evidence in the case it is clearly shown that a consideration of two hundred and fifty dollars is declared upon the face of the said transfer deed, from the said Delia Hill to the said James S. Smith, to have been the amount paid for the said piece of land, lot number eighteen; and this transfer was made in the lifetime of the said Delia Hill, whereby all the rights that the said Delia Hill did have to the said lot of land, number eighteen, was transferred to the aforenamed appellant James S. Smith, in fee simple, forever. This being the case, certainly she was, in her lifetime, divested of every species of interest, as owner of the lot number eighteen, that could pass to her heirs, from the fact that the title of the said James S. Smith is complete and valid, in respect to said lot, as will be shown more clearly in the sequel.

We assert that the said transfer deed we so often refer to gives to the said James S. Smith a complete and bona fide title to the said piece of land in question. And we entertain the opinion that we are supported in this declaration by the universal doctrine of the law on written contracts and other instruments.

And notwithstanding the said appellees in their complaint allege that the amount of two hundred and fifty dollars, specified in the said deed, was not the true consideration agreed upon by the said parties, we say, if such was the case and the grantor, who had a right, at any stage of the arrangement that was being made for the transfer of the said land, to dispose of it in any way that would secure to the appellant the lawful right thereto, she did, by the terms of the said deed and the delivery thereof, establish in the said appellant a sufficient title to the said described premises. For the execution of a deed for real property is one of the most solemn acts that mankind can perform in the way of a business transaction; therefore, when it is properly and lawfully executed, it is evidence against all parties to it, and it is evidence of all title or rights transferable by it to all mankind. It is also the best evidence of its own terms and character, when fraud was not used as one of the ingredients to procure the same.

Our next consideration is to show that there was a misjoinder of plaintiffs (now appellees). Whatever may have been the character of the deed from the said Delia Hill to the said James S. Smith, other than was by its terms expressed therein, or unless it had been fraudulently obtained so as to entitle the appellees to bring this suit, they were bound by the warranty of the deed to defend the said appellant and his heirs in the peaceful enjoyment of the said described premises. The said Delia Hill's heirs, executors and administrators being her legal Securities to the said appellant, for his quiet possession of the said lot of land, he is forever estopped from bringing any suit against the said appellant for the said land on the ground of heirship.

Then, again, the said appellees, Fenton Ann Hill and O. G. R. Hill, not being parties to the deed executed by the appellant in favor of Thomas Woodfall Hill, his heirs, executors, administrators and assigns, and the said Thomas Woodf all Hill not being dead, the said Fenton Ann Hill and O. G. R. Hill had no right to join in this action brought in consequence of an ouster of the possession of the said Thomas Woodfall Hill, from the said piece of land, lot number eighteen, since their names do not appear to the deed as parties to the same. Here the misjoinder is very obvious, to our minds.

In respect to the motion made by defendant (now appellant) in the court below to dismiss the case, the motion being founded on an affidavit, it was not confined to the general rules of pleadings, for the very object of a motion is to obtain some rule or order of court, which the party who tenders it thinks becomes necessary, in the progress of the cause; or to get relieved in a summary manner from some matter which would work injustice. The inconvenience of this misjoinder in this case is apparent from the conclusion of the court below, consequently the motion to dismiss the case ought to have been sustained upon the plea of misjoinder, since, in an action at law, a misjoinder vitiates the entire declaration. Therefore this court says that the court below erred in not dismissing the case upon the plea of misjoinder, after hearing the same, and also in the giving of final judgment in this case.

Therefore, it is the decision of this court that the misjoinder of plaintiffs in the court below (now appellees in this cause) vitiated the entire declaration in the case, and that the title of the appellant James S. Smith to the said piece of land, lot number eighteen, as described in the aforementioned deed from the aforenamed Delia Hill, deceased, to the said James S. Smith, is a good and bona fide title for the said lot of land number eighteen, and that the appellees in this case are forever estopped from disturbing the said James S. Smith, his heirs, executors, administrators and assigns, in the peaceful enjoyment of all the rights conferred upon him by the said deed. And that by the terms of the said deed, the appellees in this case are legally bound to defend the appellant, James S. Smith, his heirs, executors, administrators and assigns, against any person or persons claiming any part of the said described premises; and the said appellant shall continue in the lawful possession of said lot number eighteen, described in this decision.

The judgment of the Court of Quarter Sessions of Maryland County, Republic of Liberia, given in this case as above referred to, at its August term, A. D. 188o, is hereby reversed ; and the appellees are ruled to pay all costs incurred in this action.

Sannoh v Fahnbulleh [1982] LRSC 56; 30 LLR 258 (1982) (1 July 1982)

BLAMA SANNOH, Appellant, *v.* **VARNIE FAHNBULLEH**, Appellee.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT, BONG COUNTY.

Heard: March 23, 1982. Decided: 1July 1, 1982.

1. The certificate of property valuation of the Bureau of Revenue accompanying an appeal bond only confirms that the property offered by the surety and described in his affidavit is indeed in his name and that it is of the assessed value stated in the affidavit. It does not perform the duties of the affidavit of sureties.

2. An appeal bond is incomplete without sureties, and the sureties would not be bound if they subscribed their signatures without first knowing from the face of the bond what sum of money they bind themselves for.
3. Although the trial court approves the amount of indemnification to be provided for in the appeal bond, the failure to include the sum in the body of the bond renders it defective and dismissible.
4. An appeal bond which does not state in its body the amount of the bond, and which is not accompanied by an affidavit of sureties containing a statement of the total amount of the liens, description of the property offered as security sufficiently identified by metes and bounds to establish the lien of the bond, is defective, and therefore renders the appeal dismissible.
5. The requirements for the completion of appeal are all jurisdictional steps and failure to comply with any of the requirements within the time allowed by statute shall be ground for dismissal of the appeal.

6. Denial of a motion to dismiss an appeal does not bar the refiling of another motion to dismiss, if the first motion was not denied on its merits, but rather on the grounds that it was not filed at least twenty-four (24) hours before the hearing, and the hearing was not had upon the denial of the motion.

This is a motion to dismiss an appeal to the Supreme Court from a final judgement in cancellation proceedings in the Ninth Judicial Circuit, Bong County. Appellee alleges that the appeal bond does not state in its body the penal sum; and that the affidavit of sureties fails to state the value of the property offered as security; that it fails to describe the property sufficiently by metes and bounds to establish the lien on the bond.

The Supreme Court, holding that an appeal bond which does not state in its body the amount of the bond, and which is not accompanied by an affidavit of sureties containing a statement of the total amount of liens and description of the property is defective, sustained appellee's contention, granted the motion and dismissed the appeal.

MR. JUSTICE SMITH delivered the opinion of the Court.

No appearance for appellant. *M. Fahnbulleh Jones* appeared for appellee.

An appeal in a cancellation proceedings instituted by appellant against appellee in the People's Ninth Judicial Circuit Court, Bong County, Republic of Liberia, having been perfected, and while said appeal was pending before this Court, appellee filed a motion to dismiss the appeal for defectiveness of the appeal bond, alleging as follows:

a. That the appeal bond does not state in its body the penal sum as required by law to indemnify the appellee;
b. That the affidavit of sureties fails to describe the metes and bounds of the real property offered as security; and
c. That the affidavit of sureties does not carry in its body the value of the property offered as security.

In this motion, the appellee asked this Court to take judicial notice of its own record and dismiss the appeal on the grounds as substantially stated hereinabove.

Appellant filed a four-count resistance to the motion. In his resistance, appellant did not traverse any of the issues raised in the motion. Instead, appellant contended that a motion to dis-miss the appeal was once made by appellee when this Court was sitting *en banc* during the March 1981 Term, and that the motion was dismissed by the Court for violation of the law; and, therefore, appellee is estopped from filing the same motion to dismiss for the second time.

At the call of the case, counsel for appellant was not in Court and recourse to the Marshal's returns to the notice of assignment shows that Counsellor Isaac R. Malobe, one of counsel of record for the appellant, was served but refused to sign the notice of assignment, stating as his reason, that he had a case assigned for hearing in the lower court for the same hour. Counsel for appellee, therefore, requested the Court for the invocation of the *Supreme Court Rules, Rule 4, Part 6, Subsections (a) and (c),* and to proceed to hear his side of the argument on the motion to dismiss since appellant's counsel had filed a resistance to the motion. *Rule 4, Part 6, subsection (a) and (c)* reads as follows:

"Subsection (a)

The Clerk shall issue a notice of assignment to be served on counsel for each case docketed, which notice shall be served and returned by the Marshal before hearing.

"Subsection (c)

If a party appears, and the other party does not appear but files a brief, the Court will proceed to hear the argument of the party appearing, and render its decision on the basis of the brief filed and the argument of the party appearing. If one party appears and the non-appearing party has not filed a brief, the non-appearing counsel shall be given forty-eight hours to file a brief and appear for hearing of the case and the party shall be simultaneously informed of the non-appearance of the counsel and the postponement of the hearing for forty-eight hours. If, when the case is again called for hearing the party or counsel again fails to appear or file a brief, the Court shall proceed to hear the argument of the appearing party and rule thereon."

In this case, counsel for both parties have filed their briefs and appellee's motion to dismiss the appeal has been resisted by the appellant; hence, the Court granted the request and proceeded to hear argument of the appellee on the motion to dismiss.

We shall now address ourselves to the issues raised in the appellee's motion to dismiss the appeal in the reverse order.

In count three of the motion to dismiss, appellee contends that the affidavit of sureties accompanying the appeal bond should have contained a statement of the assessed value of the real property offered as security as is required by statute. To decide this point of appellee's contention, we must take recourse to the controlling statute on the point, and it reads, as follows:

"Affidavit of Sureties. The bond shall be accompanied by an affidavit of the sureties containing the following:

3.1. A statement that one of them is the owner or that both combined are the owners of the real property offered as security;

3.2. A description of the property sufficiently identified to establish the lien of the bond;

3.3. A statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered; and

3.4. A statement of the assessed value of each of the property offered." Civil Procedure Law, Rev. Code, 1: 63.2.

Let us take recourse to the affidavit of sureties as found in the record before us. It reads, as follows:

"Personally appeared before me, the undersigned, a duly qualified justice of the peace in and for the County of Bong, Republic of Liberia, at my office in the City of Gbarnga, Bong County, Republic of Liberia, Kamu Doubleh and Karmo Johnson, sureties for the above named

petitioner/ appellant in the above entitled cause, and made oath according to law that each of them is the *bona fide* owner in fee simple of the real property offered as security in favor of the aforesaid petitioner/appellant in the above entitled cause of action, that said property being situated and located, as well as valued as indicated on the certificate of valuation issued over the signature of the proper authorized official of the Ministry of Finance of the Republic of Liberia; and that said properties are free from any and all liens, encumbrances, mortgages; and that all taxes on each piece of property offered as security have been fully paid to date; the assessed value of each piece of property being as mentioned supra, as will more fully appear on the face of the attached real estate certificate from the Real Estate Tax Division of the Ministry of Finance, R.L." (Sic).

As can be observed from a glance at this affidavit, there is no statement of the assessed value of the property offered as security mentioned therein; there is also no description of the property in the affidavit, sufficiently identified to establish the lien of the bond as in keeping with subsection (b) and (d), and paragraph (e) of section 63.2 quoted hereinabove. The absence of such statement as required by the statute, supports the contention raised by appellee in counts two and three of his motion to dismiss.

However, according to the affidavit, there are attached thereto certificates said to have been issued from the Real Estate Tax Division of the Ministry of Finance, describing the metes and bounds of the property and stating the assessed value thereof. The questions which have arisen by this situation are: (1) Whether the certificate from the Ministry of Finance containing the description of the property and the assessed value not signed or sworn and subscribed to before a Justice of the Peace by the sureties can be considered as part of the sworn affidavit? (2) Can any property not described in the affidavit by the sureties and the assessed value stated therein, be legally seized by court in case of default? Our answer to these questions is no.

The prime purpose for obtaining a certificate of property valuation is to protect rights against fraud. The certificate of the Bureau of Revenues accompanying appellant's appeal bond only confirms that the property offered by the surety and described in his affidavit is indeed in his name and it is of the assessed value stated in the affidavit. The certificate is to confirm that indeed the taxes on the property have been paid up to date or not, and whether there is any lien and other encumbrances against said property, which fact must have been stated by the surety in his affidavit and sworn to by him before a justice of the peace to the effect that, the facts as contained in the affidavit are true and correct. The Real Estate Tax Division is not required to perform the duty which is that of the sureties to perform.

In *Taylor v. Pasi and Yarseah*, [1977] LRSC 9; 25 LLR 453 (1977), this Court held that lack of proper description in the sureties' affidavit by metes and bounds of the property offered as a lien of the appeal bond is ground for dismissal of the appeal.

The above quoted affidavit as sworn to by the sureties not having contained a statement of the description of the property to establish the lien of the bond and a statement of the assessed value of the property offered as security, counts two and three of the motion to dismiss must be sustained.

The salient issue raised in count one of the motion is, the lack of a penal sum in the body of the bond although the same is approved by the trial judge, who fixed the amount of the bond to be $4,200.00. This question has come up several times before this Court and there are numerous opinions on the question, one recalling the other. For the benefit of this Opinion, we quote hereunder the body of the appeal bond as filed by the appellant and attacked by the appellee as being defective:

"APPELLANT'S APPEAL BOND

KNOW ALL YE MEN BY THESE PRESENTS: That we, Blamo Sannoh of Kakata, Gibi Territory, R. L., petitioner/ appellant/principal and Kamu Doubleh and Karmo Johnson, both of the City of Kakata, Gibi Territory, R. L., sureties, being freeholders and householders within the Republic of Liberia, are hereby firmly held and bound unto the Sheriff for Bong County in the just and penal sum of $_____, good and lawful money current within the Republic of Liberia, to be paid to the respondent/appellee in the above entitled cause, his legal representative(s) jointly and severally by these presents.

The condition of this obligation is that we will indemnify the appellee from all costs and all injuries arising from the appeal taken by the above petitioner/appellant from the judgement of His Honour Eugene L. Hilton, presiding by assignment over the February, A. D. 1979, Term of the Ninth Judicial Circuit Court, Bong County, Republic of Liberia, rendered on the 16th day of March, A. D. 1979, against petitioner/appellant, and that the said petitioner/ appellant will comply with the judgment of the court to which the said action may be removed."

As aforesaid, this bond was approved by the trial judge for the amount of $4,200.00 after it had been signed by the sureties and their witnesses without the penal sum fixed in its body. The question that has come up before this Court from time to time is, which of the amounts the law contemplates to be the penal sum for which the sureties, in case of default, can be legally held. Is it the amount fixed by the court at the time of the approval of the bond by the trial judge after the signatures of the sureties and their witnesses, or the amount fixed in the body of the bond before it is signed by the sureties and their witnesses? In other words, which of the amounts is the penal sum of the bond? Is it the amount fixed in the body of the bond or the amount fixed by the judge in the approval clause below the sureties' signatures?

Our statute on appeal bond states, as follows:

"Every appellant shall give an appeal bond in an amount to be fixed by the court, with two or more qualified sureties, to the effect that he will indemnify the appellee from all costs or injury arising from the appeal, if unsuccessful, and that he will comply with the judgment of the appellate court or of any other court to which the case is removed. The appellant shall secure the approval of the bond by the trial judge and shall file it with the clerk of the court within sixty days after rendition of judgment. Notice of the filing shall be served on the opposing counsel. A failure to file a sufficient appeal bond within the specified time shall be a ground for dismissal of the appeal; provided, however, that an insufficient bond may be made sufficient at any time during the period before the trial court loses jurisdiction of the action." Civil Procedure Law, Rev. Code, 1: 51.8.

The above quoted statute has been construed and interpreted by this Court differently in many Opinions. In *Saleeby v. Haikal*, [1961] LRSC 17; 14 LLR 356 (1961), Mr. Justice Pierre speaking for this Court held that, fixing the penalty of a bond is the sole responsibility of the judge and, as long as he fixes it, his manner of doing so cannot be questioned by the parties nor can it adversely affect the interest of either side in the case. In that case, as in the instant case, appellee filed a motion to dismiss the appeal on the ground that the amount was omitted in the body of the bond. The Court denied the motion, holding that it did not appear to the Court that the appellant's failure to have inserted the amount in the body of the bond could in any way erase the judge's act of fixing an amount as penalty when he approved the bond, nor is the document shown to have been filed without a penalty.

In 1963, this Court in *Mark-Reeves v. Republic*, [1963] LRSC 7; 15 LLR 229 (1963), recalled the Pierre Opinion in *Saleeby v. Haikal* supra. Mr. Justice Mitchell, speaking for the Court, held that it was evident that the statute imposed two separate and distinct duties upon the judge. First, he is required to fix the amount that must be laid in the body of the bond; and this must be done before

the sureties subscribe their signatures thereto, because they are supposed to know and accept the penal sum by which they are concurrently bound with the appellant. In the second place, the judge is again required to approve the bond, which cannot be done until after the principal and the sureties have subscribed their signatures thereto. The Court held that the bond itself is incomplete without sureties and that sureties would not be bound if they subscribed their signatures without first knowing from the face of the bond what sum of money they bind themselves for.

In support of this view of the learned Justice aforesaid, with which we are in perfect agreement, he quoted 11 C.J.S., *Bonds*, § 13, which reads as follows:

"It is essential to the existence of a bond that it contains an obligation which is an undertaking by the obligor to pay a sum of money to the obligee, and accordingly a bond will not be valid in which the amount of penalty thereof is omit-ted and a judgment thereon cannot be sustained, as such omission is a defect which cannot be supplied by oral proof of the amount intended."

Mr. Chief Justice Wilson, also speaking for the majority of the Bench, in *McBourough v. Nimley*, [1963] LRSC 36; 15 LLR 366 (1963), cited *Reeves v. Republic* as controlling on the point, and held in that majority opinion that the defectiveness of an appeal bond from which the specific amount of the obligation undertaken by the sureties was omitted at the time the bond was executed, cannot be cured by the court's subsequent fixing of the amount and the approval of the bond. In *Jackson et. al. v. Eastman-Mason[1972] LRSC 25; ,* 21 LLR 216 (1972), this Court also held that although the trial court has approved the amount of indemnification to be provided for in the appeal bond, the failure to include the sum in the body of the bond renders it defective and subjects the appeal to dismissal. The opinion rendered in *Saleeby v. Haikal*, [1961] LRSC 17; 14 LLR 356 (1961), is therefore hereby recalled.

Whilst this Court is inclined to discourage the dismissal of an appeal where the motion to dismiss is unmeritorious, and go into the merits and demerits of the case to impartially decide the rights and wrongs of the parties, the Court would be remiss to ignore a mandatory provision of the statute which defines the grounds upon which appeals may be dismissed, where the mandatory jurisdictional steps are disregarded by the appellant. Under our appeal statute, a defective appeal bond is a ground for the dismissal of an appeal. Civil Procedure Law, Rev. Code, 1: 51.8. An appeal bond which does not state in its body, the amount of the bond, and which is not accompanied by an affidavit of sureties containing statement of the total amount of the liens, description of the property offered as security, sufficiently identified to establish the lien of the bond, is defective and, therefore, renders the appeal as taken, dismissible. *Ibid,* 63.2(2) and (3).

Where an appeal bond contains no monetary provision, the bond is defective and a motion to dismiss the appeal will be granted. *Mingle v. Richards*, [1953] LRSC 1; 11 LLR 323 (1953).

As noted earlier in this opinion, the appellant has filed a resistance to the motion to dismiss the appeal, but did not deny the allegations set forth in the motion as constituting the grounds for the dismissal of the appeal. Rather, appellant contended that when the case was called during the March, A. D. 1981 Term of this Court, appellee made similar motion and it was denied by Court, and, therefore, he is estopped from making the motion for the second time.

According to our appeal statute, Civil Procedure Law, Rev. Code, 1: 51.4, filing of a bill of exceptions, filing of an appeal bond, and service and filing of notice of completion of the appeal are all jurisdictional steps. Failure to comply with any of these requirements within the time allowed by statute, shall be ground for dismissal of the appeal. The appeal must therefore be dismissed because the appellant has not exercised diligence to confer jurisdiction on the appellate court to hear the appeal. Jurisdiction of a court over the subject matter can be raised at any time up to judgment. *Hill v. Republic*, [1925] LRSC 7; 2 LLR 517 (1924).

The motion referred to by the appellant was made without giving the appellant twenty-four hours before hearing. *Rule 1 of the Supreme Court Rules, Part 2.* The Court, therefore, denied the motion, but did not hear the appeal at that time. It is our opinion that the appeal not having been heard, the appellee has the right to question the jurisdiction of the Court to hear the appeal at any time before judgment, because of material defect of the appeal bond. Appellant's resistance is, therefore, not sustained.

In view of the foregoing and the citations of law hereinabove made, it is the considered opinion of this Court that the motion to dismiss the appeal be, and the same is hereby granted, and the appeal dismissed with costs against the appellant.

It is also our considered opinion that a lawyer who negligently handled his client's case, should not go unpunished. Counsellor Isaac R. Malobe is one of the counsels of record for the appellant in this case. It was his binding duty as appealing counsel for his client, to have prepared and filed an appeal bond with all the necessary requirements; instead, he negligently presented an insufficient and defective appeal bond for his client, despite the fact that the lawyer/client relationship had been established. But still worst was the failure of the learned counsel to honor the notice of assignment from this Court for the hearing of his client's case which he had appealed to this Court. The learned counsel, in his attempt to refuse honoring the Supreme

Court's precept, told the Court's bailiff (Peter Paul) who was serving the assignment that he had a case assigned in the lower court, and hence, he could not attend upon the Supreme Court's assignment. In the meantime, the learned counsel attempted to offer the bailiff an amount of $1.00 to inform the Marshal that he did not see him. As a warning, not only to Counsellor Malobe but also to all members of the Supreme Court Bar, the learned counsel is hereby fined in the sum of $200.00 to be paid within forty-eight (48) hours; otherwise, the Clerk of this Court is hereby ordered to issue a commitment and place same in the hands of the Marshal, who shall have the Counsellor imprisoned in the common jail of Montserrado County, and there remain until the fine is paid and a revenue flag receipt exhibited to the Justice presiding in Chambers, who shall then order his release.

The Clerk of this Court is hereby ordered to send a mandate to the court below to resume jurisdiction over the case and enforce its judgment. And it is hereby so ordered.

Motion granted; appeal dismissed.

Inter-con security v Philips [2000] LRSC 4; 40 LLR 30 (2000) (12 May 2000)

INTER-CON SECURITY SYSTEMS, INC., Appellant, v. NATHANIEL B. PHILIPS and CHARLES C. TARN, Hearing Officer, Ministry of Labour, Appellees.

MOTION TO DISMISS APPEAL FROM THE RULING OF THE NATIONAL LABOUR COURT FOR MONTSERRADO COUNTY.

Heard: April 10, 2000. Decided: May 12, 2000.

1. Although the Civil Procedure Law provides that an appellant shall secure the approval of an appeal bond by the trial judge, an appeal will not be dismissed where another judge regularly sitting or assigned to the circuit approves the bond.

2. The failure of the judge who tried a case to approve an appeal bond is not one of the statutory grounds for the dismissal of an appeal.

3. The assignment of judges to preside over the inferior courts of record lies within the power and authority of the Supreme Court and is therefore beyond the scope and control of the appellant with regard to the approval of a bill of exceptions and an appeal bond.

4. A judge regularly sitting or assigned by the Supreme Court to an inferior court can approve a bill of exceptions and an appeal bond.

5. The approval of a bill of exceptions and an appeal bond by judges other than the judge who tried the case, but who have been duly assigned to the court, is not ground for dismissal of an appeal.

6. Where the last day for the filing of a bill of exceptions falls on a Sunday, that day shall be excluded from computations of the ten-day period prescribed by statute.

7. Where the failure of an appellant to file an approved appeal bond and to file and serve a notice of completion of appeal within the sixty day period prescribed by statute is due to vis majeure, the filing and service will be considered valid and a motion to dismiss the appeal will be denied.

8. Real property offered as security to a bond should be sufficiently described to establish the lien on the bond.

9. Real property pledged as security to an appeal bond should be described in the affidavit of sureties, failing which the appeal shall be dismissed.

10. Where the property used as security to an appeal bond is not sufficiently described and the bond thereby rendered defective, the movant in a motion to dismiss the appeal will be deemed to have waived the right to challenge the appeal bond if he fails to except to the sufficiency of the sureties or the deficiency of the bond by written notice of exceptions within three days after receipt of the notice of the filing of the bond.

Appellant Inter-Con Security System Inc. appealed to the Supreme Court from a judgment of the National Labour Court for Montserrado County affirming the ruling of the hearing officer of the Ministry of Labour holding appellant liable to Co-appellee Nathaniel B. Phillips for illegal dismissal. While the case was pending before the Supreme Court, the appellees filed a motion to dismiss the appeal, contending (a) that the bill of exceptions filed by the appellant had been approved by a judge other than the judge who had heard and decided the case, (b) that the bill of exceptions had been filed beyond the ten-day period prescribed by statute, (c) that the appeal bond had been approved by a judge other than the trial judge and had been filed beyond the sixty days stipulated by law, and (d) that the notice of completion of the appeal had been served and filed beyond the sixty days from the date of the judgment, contrary to the appeal statute.

The Supreme Court, while agreeing with the factual pre-mise of the motion for dismissal of the appeal, disagreed with the contention of the appellees that under the circumstances and the

applicable laws the appeal was dismissible. The Court noted, with reference to the bill of exceptions that while the statute provides for a period of ten days from the date of the judgment for approval and filing of the same, the ten day period would not obtain where the last day for approval and filing falls on a Sunday. In such circumstances, the Court said, the filing of the bill of exceptions on the eleventh day was permissible and does not constitute a basis for the dismissal of the appeal.

With regard to the contention that the bill of exceptions and appeal bond were approved by judges other than the judge who had heard and determined the case, the Court opined that it is legal for a judge other than the judge who hears a case to approve the bill of exceptions and appeal bond once the judge is assigned to and is regularly presiding over the court wherein the case was heard. The Court observed that the authority to perform such acts was vested in the judge by virtue of the assignment from the Supreme Court.

The Court also ruled that the failure of the appellant to serve and file its appeal bond and notice of the completion of the appeal within the sixty day period stipulated by statute was due to an involuntary prevention caused by the April 6, 1996 crises which constituted vis majeure. These events, the Court said, were beyond the control of the appellant and therefore could not constitute a basis for the dismissal of the appeal. The Court noted that it had the duty to take judicial notice of the crisis which prevented the filing of the appeal bond and notice of completion of appeal within the statutory time.

The Court also dismissed the contention of the appellees that the appeal should be dismissed because the appeal bond was defective since it did not sufficiently describe the property offered as security to the bond, holding that the appellees had waived the right to challenge the sufficiency of the bond or the sureties to the bond in not asserting such challenge within three days of receipt of the filing of the bond. The Court therefore denied the motion to dismiss and ordered the case docketed for hearing.

A. Blamo Dixon of Kemp & Associates, in association with Legal Consultants, Inc., appeared for the appellant. B. Anthony Morgan of Morgan, Grimes and Harmon Law Firm appeared for the appellees.

MR. JUSTICE MORRIS delivered the opinion of the Court.

On the 12th day of May, A. D. 1994 the co-appellee herein, B. Nathaniel Philips, filed a complaint with the Ministry of Labour against the Management of Inter-Con Security System alleging wrongful dismissal and refusal to pay his benefits. The records in this case disclose that

B. Nathaniel Philips was employed by the appellant, the co-respondent management herein, on the 7th day of March, A. D. 1991. The appellant dismissed him on the 8th day of May, 1994, stating as the reason the violation of Inter-Con's standard of conduct. On the 27th day of June, A. D. 1995, the Deputy Director of Labour Standards, Mr. Charles C. Tarn, ruled in favour of Co-appellant Philips, awarding him the sum of US$1,296.00 as benefits. To this ruling the appellant management excepted, and petitioned the National Labour Court for a judicial review. The petition was resisted, assigned for hearing, and heard on the 14th day of March, A. D. 1996 by His Honour William B. Metzger, Sr., Assigned Judge presiding over the National Labour Court for Montserrado County. On the same day, i.e. March 14, 1996, the judge ruled confirming the decision of the hearing officer, with the modification that the complainant, co-appellee herein, be paid two years wages. The appellant excepted to this ruling and announced an appeal to this Court for appellate review.

The appellant filed a bill of exceptions on the 25th of March, A. D. 1996, which was approved by Her Honour C. Aimesa Reeves, Resident Judge for the National Labour Court for Montserrado County. On the 30th day of July, A. D. 1996, Her Honour Gloria M. Musu-Scott, then Assigned Labour Court Judge for Montserrado County, approved appellant's appeal bond. A notice of completion of the appeal was also filed with the clerk of the trial court on the 30th day of July, A. D. 1996 and a copy thereof served on counsel for the appellees on August 2, 1996.

While the case was pending on appeal, the appellees filed a four-count motion to dismiss the appeal, contending, among other things, that the approval of the bill of exceptions by Her Honour C. Aimesa Reeves was contrary to statute in that His Honour William B. Metzger, the assigned judge who had heard and decided the case, should have been the one to approve the bill of exceptions as the law requires. In count two of the motion, the appellees contended that the appeal bond filed by the appellant was fatally defective since it was not approved by the trial judge who had heard and decided the case, as required by law, but was instead approved by Her Honour Gloria M. Musu-Scott, who had not heard the case. The appellant, respondent herein, in countering the assertions made in the motion, contended that the appeal could not be dismissed by this Court because the bill of exceptions and the appeal bond were approved by other judges regularly sitting or assigned to the trial court by the Chief Justice. The respondent also averred that the failure of the judge who tried and decided the case to approve the bill of exceptions and the appeal bond was not a ground specified by the statute for the dismissal of the appeal.

In the case King Peters Heirs v. Gigger, [1978] LRSC 52; 27 LLR 287 (1978), Syl. 2 & 3, text at 289, this Court held that "[a]lthough the Civil Procedure Law, Rev. Code 1:51.8, provides that the appellant shall secure the approval of the appeal bond by the trial judge, an appeal will not be dismissed where another judge, regularly sitting or assigned to the circuit, has approved the bond...[and that] the failure of the trial judge to approve an appeal bond is not one of the statutory grounds for the dismissal of an appeal." The records in this case reveal that His Honour Judge Metzger, who was assigned to the National Labour Court for Montserrado County at the time, heard and disposed of this case, but thereafter was reassigned to another court and succeeded by the resident judge of the National Labour Court, Her Honour C. Aimesa Reeves. It was this latter judge that signed the bill of exceptions tendered by the appellant. We also observe

from the records that Her Honour Gloria M. Musu-Scott, who was subsequently assigned to the National Labour Court, approved appellant's appeal bond on the 30th of July, A. D. 1996, following the April 6, 1996 crisis in Monrovia.

It is important to note at the juncture that the assignment of judges of our inferior courts lie within the power and authority of the Supreme Court and therefore is beyond the scope and control of an appellant for the approval of a bill of exceptions and an appeal bond. Hence, another judge regularly sitting or assigned to an inferior court by this Court can approve a bill of exceptions and an appeal bond. As such, the approval of the bill of exceptions and the appeal bond in the instant case by judges other than the judge who tried and decided the case, but who were subsequently assigned to the trial court, is not ground for the dismissal of the appellant's appeal, as we clearly propound-ed in the King Peter's Heir's case, cited supra. In point of fact, the failure of the trial judge, His Honour William B. Metzger, Sr., to approve the appellant's bill of exceptions and appeal bond is not one of the stated statutory grounds for the dismissal of an appeal within this jurisdiction. Hence, counts 1 & 2 of appellees' motion to dismiss the appeal are hereby overruled.

Appellees also contended that the bill of exceptions and the appeal bond were filed beyond the statutory period of 10 and 60 days, respectively. In countering this assertion, the appellant contended that the 24th day of March, being the 10th day for the filing and approval of the bill of exceptions, was a Sunday, and therefore was excluded from the computation of time required for such filing. We are in agreement with the appellant's explanation that the filing of the bill of exceptions on the 25th day of March, A. D. 1996, is provided for by law. The bill of exceptions was therefore approved within the statutory period of 10 days. See Lartey v. Lartey, [1944] LRSC 3; 8 LLR 194 (1944), Syl. 2, text at 199-200; Civil Procedure Law, Rev. Code 1:1.71, Computation of Time.

Another contention advanced by the appellees in the motion was that the appellant failed to file the appeal bond and the notice of completion of appeal within 60 days from the date of the ruling of the trial judge, which was made on the 14th day of March, A. D. 1996. The appellees therefore contended that the appellants' appeal bond was defective and, hence, that the appellees were not brought under the jurisdiction of this Court. The appellant, on the other hand, contended that it did not file its appeal bond and the notice of appeal within the 60-day period required by law because of the April 6, 1996 crisis in Monrovia, the circumstances surrounding which were beyond its control. We are in agreement with the assertion of the appellant regarding its inability to file its appeal bond and the notice of the completion of appeal within the 60-day period required by law. We note that this was in direct consequence of the April 6, 1996 crisis in Monrovia, a fact well known in this jurisdiction. This Court therefore takes judicial notice of this historical fact, as we are required to do by Chapter 25, Section 25.2, of the Civil Procedure Law. The appeal bond and the notice of completion of appeal are therefore valid, and it is the opinion of this Court that the appellees were thereby brought under the jurisdiction of this Court. We hold also that the appellant was involuntarily prevented from complying with our appeal statute

due to vis majeure, an irresistible force which was beyond the control of the appellant. BLACK'S LAW DICTIONARY 1572 (6th ed. 1990).

The final issue raised by appellees in their motion and argued before this Court is that the affidavit of sureties which accompanied the appeal bond is deficient since it did not contain a description of the metes and bounds of the real property offered as security. The respondent counter argued that the appellees had waived their right to raise such issue because they had failed to except to the sufficiency of the sureties to the appeal bond. Our statute provides that the property offered for security should be sufficiently described to establish the lien on the bond. Civil Procedure Law, Rev. Code 1:63.2(3)(b). This Court has held that real property pledged in an appeal bond should be described in the affidavit of sureties, failing which the appeal shall be dismissed. West African Trading Corporation v. Alraine (Liberia). Ltd., [1976] LRSC 23; 25 LLR 3 (1976), text at pages 5 & 6. We are in agreement with the con-tention of the appellees as to the law referred to and with respect to our prior holding. We observe, however, that the appellees had failed to except to the sufficiency of the sureties to the appellant's appeal bond by a written notice of exceptions within 3 days after receipt of the notice of filing of appeal bond. Our law provides for exceptions to be taken to sureties of a bond within 3 days upon notice of filing of the bond. For reliance, see Civil Procedure Law, Rev. Code 1:63.5(1)(2).

The failure of the appellees to avail themselves of this statutory provision constitutes a waiver to challenge the appel-lant's appeal bond. In the case Kerpai et al. v. Kpene[1977] LRSC 4; , 25 LLR 422 (1977), Syl. 6, text at 428, this Court held that "failure of appellee to except in the court below to the insufficiency of the sureties to an appeal bond within 3 days after receipt of notice of the filing of the bond constitutes a waiver of his objection and warrants denial of a motion to dismiss the appeal." The contention of the appellees is therefore not sustained, given their failure to except to the securities of the appellant's appeal bond. The bond is therefore allowed by this Court.

Wherefore, and in view of the foregoing, it is the considered opinion of this Court that the motion to dismiss the appellant's appeal should be, and the same is hereby denied. The appeal is therefore ordered proceeded with on its merits. Costs are to abide the final determination of this case. And it is hereby so ordered.

Motion to dismiss denied.

LIDC v El Nasr Export & Import Co. [1982] LRSC 61; 30 LLR 295 (1982) (9 July 1982)

LIBERIA INDUSTRIAL DEVELOPMENT CORPORATION, represented by its Chairman, Le ROY E. FRANCIS, Appellant, *v.* **EL NASR EXPORT & IMPORT COMPANY**, represented by its Manager, MOHAMED TAHA AHMED, Appellee.

MOTION TO DISMISS AN APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: May 11, 1982. Decided: July 9, 1982.

1. After the filing of an approved bill of exceptions and the service of the notice of completion of the appeal, the trial court loses jurisdiction over the matter and cannot legally entertain and pass upon a motion for justification of bond.
2. An insurance company that is authorized by law may execute a surety bond; otherwise, there must be at least two or more natural persons, one or both of whom are owner or owners of the real property offered as security under the Bond.
3. A commercial bank, not authorized by statute to execute a surety bond, cannot legally execute surety bonds within the Republic.
4. Where the affidavit of sureties attached to the appeal bond does not contain a description of the property, sufficient enough to establish a lien of the bond, it is proper to dismiss the appeal.

From a final judgement in a bill of equity for foreclosure of a leasehold mortgage, appellant noted its exceptions and announced an appeal to the Supreme Court. Subsequent to the service of notice of completion of appeal, appellee moved to dismiss the appeal on grounds of material defects in the affidavit of sureties. Appellant conceded the errors complained of, but contended that appellee should have attacked the bond within three (3) days from the date notice of filing of the bond was served.

The Supreme Court held that after service of the notice of completion of appeal, the trial court lost jurisdiction over the case, and, hence, appellant could not have attacked the bond in the trial court as contended by appellant. The motion to dismiss was granted.

Lewis K. Free, Sr. appeared for appellant. *Edward R. Moore and John Wreh Togba* appeared for appellee.

MR. JUSTICE YANGBE delivered the opinion of the Court.

This is an appeal from a judgment (decree) rendered by the Civil Law Court for the Sixth Judicial Circuit Court, Montserrado County, in a bill in equity for foreclosure of a leasehold mortgage. The appellee has filed a three-count motion to dismiss the appeal for alleged defects on the affidavit of sureties and the defects essentially are, as follows:

1. That the affidavit of sureties does not carry a description of the real property offered as security on the bond, sufficiently identified to establish a lien on the property;

2. That said affidavit of sureties, contrary to law, neither names two natural persons, one or both of whom are, owner or owners of the real property offered as security under the bond, and of value equal to the amount approved in the appeal bond by the presiding judge of the trial court; nor does said affidavit, alternatively, name an insurance company authorized to execute surety bonds within the Republic; instead, said affidavit of sureties seeks to evade the alternative legal requirements as to who may be sureties by combining the name of only one natural person, whose property valuation is far below the required amount, together with the name of an artificial or corporate person, that is not an insurance company authorized to execute surety bonds within the Republic;

> 3. That there is a material discrepancy between the Finance Ministry's certificate of property valuation, and appellant's appeal bond and affidavit of surety, in that, said certificate shows property valuation for persons whose names do not appear on the affidavit of sureties. Moreover, the new names of Richard Wiles & Mai Padmore et. al., which first appear in said certificate, but appear in neither the affidavit of sureties nor the appeal bond, carry a valuation of Two Hundred Fifty Thousand Dollars ($250,000.00), or eighty-seven percent (87%), of the Two Hundred Eighty-Two Thousand Dollars ($282,000.00), which latter amount is the total property valuation contained in the certificate.

The appellant has also filed a five-count resistance in effect admitting the errors complained of by the appellee, but appellant has contended that appellee should have attacked the bond within three days from the date the notice of the filing of the bond was served on appellee. Appellant relied on the Civil Procedure Law, Rev. Code, 1: 63.6 (1) in support of his contention.

Appellee, for its part, has argued that because at the time it received the notice of the filing of the appeal bond the trial court had lost jurisdiction in the case, it did not file a motion for justification of bail.

The statute requires that notice of filing of the appeal bond shall be served on the appellee. *Ibid.*, 1: 51.8. There is neither evidence, nor does appellant contend, that it served the notice of the filing of the appeal bond on the appellee. However, appellee admitted receiving the notice for completion of the appeal on the 7th of July 1980, in which reference is made to the filing of the appeal bond.

This Court has held on numerous occasions that it is the service of the notice of the completion of the appeal on the appellee which places him under the appellate jurisdiction of this Court. North v. Clarke, [1925] LRSC 2; 2 LLR 491, 492 (1925). Further, where after the filing of an approved bill of exceptions the appellant fails to file an approved bond within the time allowed by law, the appellee may move the appellate court for an order to the trial court for enforcement of its judgment. Civil Procedure Law, Rev. Code 1: 51.8.

Therefore, in our opinion, after the filing of the approved bill of exceptions and the service of the notice of the completion of the appeal, the trial court lost jurisdiction over the case; hence, appellee should not be blamed for failure to file a motion for justification of bail after receipt of the notice of the completion of the appeal. *Estime v. Raymond Concrete Pile, Co.*, [1970] LRSC 19; 19 LLR 485, 487 (1970).

An insurance company which is authorized by law may execute a surety bond, otherwise, there must be at least two or more natural persons who meet the requirements of the Civil Procedure Law, Rev. Code 1: 63.2. There is no showing that the Commercial Bank of Liberia is authorized by statute to execute a surety bond. The property offered as security by B. C. McCabe, who is the only natural person who signed the bond as surety, is only $32,000.00, less than the $250,000.00 (Two Hundred and Fifty Thousand Dollars), the penalty contained in the appeal bond fixed by the trial judge. Therefore, the appeal bond is insufficient, which is a valid ground to dismiss the appeal.

The affidavit of sureties attached to the appeal bond in this case, does not contain a description of the property sufficiently identified to establish the lien of the bond. *Ibid*, 1: 63.2; *West African Trading Corporation v. Alraine (Liberia) Ltd.*, [1975] LRSC 16; 24 LLR 224 (1975); and *Taylor v. Pasi et al[1977] LRSC 9;* , 25 LLR 453.(1977)

In view of what we have said hereinabove and the law cited, the motion to dismiss the appeal is hereby granted and the appeal is dismissed with costs ruled against the appellant. The Clerk of this Court is ordered to send a mandate to the trial court ordering the judge therein presiding to resume jurisdiction over the case and enforce the judgment. And it is hereby so ordered.

Motion granted.

MR. JUSTICE MABANDE *dissents.*

On December 1, 1979, Appellee El-Nasr Export and Import Company petitioned the Sixth Judicial Circuit Court, Montserrado County, to foreclose a mortgage that was entered into by and between it and the Liberia Industrial Development Corporation. Appellant Liberia Industrial Development Corporation neither filed an answer nor appeared at the trial. A judgment by default was entered against it, to which it excepted and prayed for an appeal to this Court. During the pendency of the appeal, a motion was filed to dismiss the appeal on the single ground that the appeal bond was defective. Appellant resisted the motion, contending that the movant/appellee was guilty of waiver and, consequently, could not challenge the validity of the bond.

At the hearing of the motion to dismiss the appeal, each party pleaded that his adversary was guilty of waiver of the issues raised in the pleadings. The issues, therefore, before us are: (1) whether a movant or a respondent who fails to traverse an adversary's allegations raised against him may be deemed to have admitted the same? and (2) whether the admission of the fundamental conflicting claims of the opposing party litigants render their respective claims dismissible?

Averments in a pleading to which a responsive pleading is required should be denied by a party against whose interest or rights those averments are made. A failure to controvert an averment against a party's interest is an admission. Our Civil Procedure Law on this issue reads thus:

"Effect of failure to deny: Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading. Averments in a pleading to which no

responsive pleading is required shall be taken as denied or avoided." Civil Procedure Law, Rev. Code 1: 9.8(3).

According to the Civil Procedure Law, a party is entitled to traverse every defense in law or fact, or any claim made against him by his adversary in his pleading. A failure to make a responsive pleading denying such claim or defense is deemed an admission. However, if no responsive pleading is required for an averment, it need not be specifically denied or avoided, since the law imposes no responsibility to deny when no right is invaded.

Every averment in a motion or a resistance against the interest of a party is required to be denied. The averment in the motion that the bond was defective was not denied by the appellant in its resistance; hence, according to the controlling law, that averment is deemed admitted by the appellee. However, the averment in the resistance that the movant/appellee was guilty of waiver of a right to challenge any defect in the bond was not controverted by the appellee. A failure by the appellee to deny this attack on the very existence of its motion is also deemed admitted as true. I am therefore of the opinion that an admission by a movant that his motion has no foundation in law is equivalent to an admission that the motion does not in fact and law exist. Under such circumstances, especially as a court has no authority to raise any issue for a party, I am of the strong opinion that the right to file the motion to dismiss the appeal did not vest in the appellee. Its motion was therefore not legally filed; hence, it should not have been granted, as doing so was to decide an incontrovertible issue.

The averment of the waiver of a right to challenge the validity of the bond admitted by the appellee decisively nullified the existence of the motion to dismiss and its resistance. The merit of the motion was therefore not pending before this Court. Consequently, the Court should neither have heard the merits of the motion nor granted it. The very foundation of the motion having been admitted by appellee as waived, the waiver rendered any consideration of the motion or the resistance a useless exercise. For these reasons, I have dissented.

Birch v Quinn [1897] LRSC 8; 1 LLR 309 (1897) (1 January 1897)

DORSEY BIRCH, Appellant, vs. **ISAM QUINN**, Appellee.

[January Term, A. D. 1897.]

Appeal from the Court of Quarter Sessions and Common Pleas, Sinoe County.

Ejectment.

1. Several verdicts rendered in the same case in favor of the same party will not operate as a bar to an appeal to a higher judicature from the judgment entered thereupon, nor does it decide the matter in controversy so conclusively as to prevent the appellate jurisdiction from reviewing the whole cause and giving such judgment as it deems proper and legal. A verdict to be valid must be in conformity with the facts submitted and the legal instructions of the court.

2. In ejectment the plaintiff must show a legal and not simply an equitable title to the property in dispute; the weakness of the defendant's title will not of itself enable him to recover.

3. To enable a party to make a transfer of property he must first have acquired a title therein himself. Under the Constitution the wife takes a life-estate in one third of the real property of the husband of which he died seized.

4. Lands will escheat to the State when all the legal claimants become either extinct or legally disqualified to hold property. The mere possession of government lands for twenty years will not give the occupant a vested title therein, nor does it deprive the Government from conveying the same.

5. Where a party permits another by his silence and tacit assent to acquire and improve property which he claims, with the view to entrap, he will lose his relief.

This case has created considerable interest in the public mind on account of the surroundings, and it has had no little attention of this court because of its novelty. In many respects it is without a parallel in appeal cases brought before this court for review. From the record we notice that in the court below this case have had four trials upon its merits and three successive verdicts in favor of the appellee by three regularly empanelled juries, and that final judgment was rendered by the court upon the last of said verdicts, in favor of said appellee (or defendant below). While all of this may be strongly urged—as it has been by the learned counsellor for the appellee—as conclusive that the right of the appellee to the property in dispute should be considered as settled, yet the court cannot forget that ejectment is a suit in which there is involved mixed questions of

both law and fact. The former is to be determined by the court, upon sound legal principles, which is to enlighten the jury in determining the facts submitted to them; and the latter is that which the jury will unbiasedly apply, connecting said instruction of the court with the facts presented in the case. Therefore the law provides that the verdict of the jury should be conformable to the law as laid down by the court and the facts in the case; should it be otherwise, and especially in cases of ejectment, the very foundation of legal rights to real property would be convulsed, if not absolutely destroyed. It is the province of the jury to try and determine the facts; but when their conclusions are either against the law, the evidence, or the legal instructions of the court upon a motion, the verdict should be set aside and a new trial ordered, that the ends of justice may be fully met.

In this action both the appellant and appellee claim ownership to farm land No. 24 in the settlement of Lexington, Sinoe County, the appellee being in possession. In actions of ejectment it has been laid down as a rule, both by ancient and modern law writers, that it is necessary in ejectment for the plaintiff to show in himself legal proof, i. e., a good and sufficient title to the land in dispute, against the whole world. He must not only have a title, but he must be clothed with the legal title to such lands; an equitable title, as a general rule, will not answer ; he must recover, if at all, on the strength of his own title and not on the defects in that of his adversary's. This is an elementary principle in actions of ejectment and it has been reiterated over and again by this court, as possession only gives a right against every person who cannot establish a better right.

The testimony in this case supports the following facts, which were submitted for the determination of the court and jury below, and now to this court for its determination:

First, that in the year 18— one Abram Sterling drew his emigrant allotment to the land in dispute and obtained for same a deed in fee simple from the Republic of Liberia; that subsequently the said Abram Sterling died intestate, leaving a widow, but no surviving issue of his body—the testimony showing none.

Second, that shortly after the death of the testator, Sally Ann Sterling, his widow, took to lodging with the appellant, who supported her until her death.

Third, that before her death it is said she made a will or testament, giving the land in dispute to the appellant.

Fourth, that this will or testament is said to be lost and that no trace of it can be found either in the book of probate or in the registry department.

Fifth, that the appellee sets up title to the same land under grant from the Liberian Government as his emigrant allotment, said deed having been issued, as required by the law in such cases, and further, that the appellee took possession of the same.

By this action the appellant seeks to eject the appellee, claiming prior ownership under the aforementioned will of the widow S. A. Sterling. This court is of the opinion, and in fact does say, that to establish the right of ownership of the land in dispute the appellant must show the legal title of the testator, Mrs. S. A. Sterling, under whose last will and testament he claims, and failing in this, his action must fall. It is a well-settled rule of law that the transfer of property must be by the true owner, as one cannot legally give away that which he does not legally own. By the eleventh section of the Constitution of the Republic of Liberia, the wife of a deceased intestate husband has a life estate in one third of the real property of which her husband died seized. This allowance does not in any way operate as a transfer or conveyance of such property, but only as a use or occupation, and the enjoyment of rents flowing out of such estate; nevertheless, she may, by the aid of the law, in assuming his debts obtain an equitable title, or even a legal title thereto, which in this case does not appear in the testimony. The very term "life estate" presents to the mind an estate which terminates at the death of the possessor. It is a settled policy of governments, that in case of an absolute failure of the legal ownership to lands, the same reverts back, or escheats to the original grantor—the State in this case. There is also another well-settled doctrine, established before the time at which the great "cake" flourished, which has not since been disturbed, and which reads, "Mere possession of government land, though open and exclusive and uninterrupted for twenty years, creates no impediment to its recovery by the Government or by anyone who within that period receives a conveyance from the Government." (1st U. S. Digest, p. io.)

There is another feature in this case which the court desires to examine. The record shows that one James Birch, a son of the appellant, sold the appellee a portion of said land some years ago. At the January term of this court, 1872, in the case of Willis Blunt against J. W. Barbour, this court laid it down as a settled principle of law, that it is contrary to equity and good conscience that a man should stand by and allow his neighbour to expend money for the purchase and improvement of property and conceal the fact that he is the owner and thus entrap his neighbor and then come forward and take advantage of his laches. The rule in equity is, that he must assert his claim to property or lose his relief. (1st Story, Equity, 192, 384, 388; 2nd Story, Equity, 1537, 1542, 1546; Adams on Equity, 156, 151.) The court is free of doubt in saying that Sally Ann Sterling could not legally give to the appellant the land in question, it not having been transferred

or conveyed to her by her husband. This court therefore fails to see why the judgment of the court below should be disturbed.

Therefore the judgment of the court below is confirmed, and the appellant ruled to pay all legal costs; and the clerk of this court is ordered to notify the court below to the effect of this judgment.

Ex Parte E. W Williams [1934] LRSC 27; 4 LLR 189 (1934) (7 December 1934)

Ex parte E. W. WILLIAMS.
PETITION FOR THE RESTORATION OF REAL ESTATE.

Argued November 27, 1934. Decided December 7, 1934. 1. The papers filed in every action should all be properly entitled of the cause, and of the name of the parties in the character in which they appear, whether as plaintiffs or defendants &c. 2. An action is a proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right. 3. This Supreme Court can only exercise original jurisdiction in cases affecting ambassadors, public ministers and consuls, and those to which a county is a party. Its jurisdiction in all other cases is appellate.

On application for the restoration of certain real property to the petitioner, application denied. E. W. Williams for petitioner.
MR. JUSTICE DIXON delivered the opinion of the Court. This matter is before this Court by means of a petition filed in this Court by Counsellor E. W. Williams for himself, in which he recites to this Honorable Court: a) that he is the de facto and de jure owner of three pieces of real property; b) that at the April term of this Court, 1933, in consequence of a judgment rendered in his favor supporting that of His Honor M. N. Russell, the Judge of the Circuit Court presiding in the First Judicial Circuit, in an ejectment proceeding, he was put in possession of said three pieces of property by means of an order issued out of this Court, which possession he did enjoy for some months; c) that sometime thereafter, for reasons unknown to him, the Marshal of this Court proceeded to Brewerville, where said pieces of property are presumably situated (he having failed to set this fact out in his petition), and thereupon ousted and ejected him from said premises, wherefore he now comes to this Court and prays

that he be again
restored to the possession of said pieces of property. This Court, taking judicial notice of its records, observes that the question
of these three pieces of property was adjudicated by this Court in the year 1913 and at some other subsequent time, and as the trial
of the facts has already been elaborated upon in said trials, a recapitulation in this opinion is unnecessary. With reference to
the petition which is the subject of these proceedings, this Court will remark that said document cannot be considered by it as a
legal instrument to be dealt with by this Court, in that there is no title of the cause nor anyone named as respondent. The statute
defines an action to be "an ordinary proceeding in a court of justice by which one party prosecutes another party for the enforcement
or protection of a right, or the redress or prevention of a wrong. The party complaining shall be known as the plaintiff, and the
adverse party as the defendant." 1 Rev. Stat., § 252. The Court regrets to have to observe that the document filed by Mr. Williams
contains none of these legal requisites. The next issue that claims the attention of this Court with respect to said document as
filed by Mr. Williams is that the purported petition bears on its face an issue which involves the necessity for the production of
evidence to establish the truthfulness or falsehood of the allegations set forth, in which instance the jurisdiction of this Supreme
Court is incompetent. The Constitution gives the Supreme Court original jurisdiction only in all cases affecting Ambassadors or other
public Ministers, and Consuls, and those to which a County shall be a party. In all other cases this Court has appellate jurisdiction
both as to law and fact with such exceptions and under such regulations as the Legislature shall from time to time make. Lib. Const.,
art. IV, sec. 2.

There is no Legislative enactment existing whereby this Court can exercise original
jurisdiction in settling questions in which property is involved, nor can the Legislature legally make any such enactment, as it
would be contrary to the express provisions of the Constitution. This Court can be applied to to review the judgment of subordinate courts, and of such courts only;
but not decisions already given by itself, except in another trial where the principle enunciated can be found not to be tenable
in law, and therefore a necessity should arise for overruling the former opinion. This Court has already laid down the principle
that the fact that a change in the membership of the Court is about to take place or has already occurred is not in itself sufficient
for granting a rehearing; nor will a re-argument be ordered should the decision of one general term not meet the approval of the
Judges composing a second general term. 18 Ency. of Pl. & Practice so, and n. 1 ; Daniel and George v. Comp. Trasmed., [1934] LRSC 10; 4 L.L.R. 97, i Lib.

New Ann. Ser. 99 (1934). The question concerning the ownership of the property which is the subject matter of the said petition, having been finally adjudicated by this Court at its November term, 1932, affirming a previous decision at its April term, 1928, and thereby permitting enforcement, by the Marshal of this Court, of said decisions to put Mr. R. M. Phelps in possession of the property in question, this Court finds itself incompetent to review said decisions referred to and therefore is of opinion that said petition should be denied with costs against petitioner; and it is so ordered.
Application denied.

Bhatti v Henries et al. [2000] LRSC 1; 40 LLR 3 (2000) (12 May 2000)

SUPREME COURT OF THE

REPUBLIC OF LIBERIA

AT THE

MARCH TERM, 2000

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M. S. BHATTI, Chairman of the Board of Directors and Shareholder, FIRST UNITED AMERICAN BANK, Informant, v. HIS HONOUR WYNSTON O. HENRIES, Resident Circuit Judge, JOSEPH M. ANDREWS, Assigned Circuit Judge, Sixth Judicial Circuit, and ALI SAKSOUK TEXTILE CENTER, by and thru its Proprietor, ALI SAKSOUK, Respondents.

INFORMATION PROCEEDINGS.

Heard: March 27, 2000. Decided: May 12, 2000.

1. Execution upon a money judgment is the legal process of enforcing the judgment, usually by seizing and selling the property of the judgment debtor.

2. The procedure for the enforcement of a money judgment is that the clerk of the court in the county in which the judgment was first entered issues a writ of execution which is placed in the hands of the sheriff commanding him to levy upon the personal and real property of the judgment debtor, and to make returns thereto as to whether the judgment is unsatisfied, or wholly or partially satisfied.

3. It is erroneous for a court, in a writ of execution issued upon a judgment for enforcement thereof against a corporation to command the sheriff to arrest the living body of an officer for the debts and obligations of the corporation.

4. The sole purpose of the writ of execution is to command the ministerial officer to seize and sell property of a judgment debtor in order to satisfy a debt or obligation. It is not designed to arrest the judgment debtor at the time of service of the writ.

5. A person shall not be arrested or imprisoned for disobedience of any money judgment or order requiring the payment of money except those money judgments enforceable by punishment for contempt under section 44.71(3) or by imprisonment under section 44.71(2) if execution is not satisfied. Civil Procedure Law, Rev. Code 1: 44.71(3) and 44.71(2).

6. Under section 44.71(3) of the Civil Procedure Law, money judgments are enforceable by contempt proceedings against a trustee or a person acting in a fiduciary relationship for the payment of a sum of money for a default or dereliction of his duty or for the support of a wife, child, or other defendant.

7. Under section 44.71(2) of the Civil Procedure Law, judgments are enforceable by imprisonment if execution is not satisfied in cases involving adultery, seduction of a wife or child, illegally taking away or harboring a wife or child or ward under 21 years of age, enticing an incompetent away from his or her lawfully appointed trustee or guardian, or injury to the reputation when the words spoken or written are actionable per se.

8. In contempt proceedings for the enforcement of a money judgment, the procedure is that service of summons is effected against the debtor in the same manner as service of summons to show cause why the contemnor should not be held for the alleged offense which defeats, impairs or impedes, or prejudices the rights or remedies of the judgment creditor.

9. Where a writ of execution has been issued against a corporation, for which an officer has been cited to a conference, it is incumbent upon the trial judge to order the officer to identify assets of the corporation to be levied upon to satisfy the judgment, and upon the failure of the corporate officer to show the assets of the corporation the judge is duty bound to have such officer held in contempt of court.

10. A conference citing corporate officer to ascertain the reason which prevented a judgment debtor corporation from satisfying a mandate of the Supreme Court, sought to be enforced by an execution writ against a corporation is not contempt proceeding against the corporation, and any order of the judge committing corporate officers to jail growing out of such conference is erroneous and contrary to the statutory law governing enforcement of a judgment through contempt proceedings.

11. A writ of execution against a corporate body does not run against its chairman or other officer.

12. Corporate officers are not personally liable for the debts and obligations of a corporation except as otherwise provided by law.

13. A corporation is a separate and distinct legal entity from its members, officers, and shareholders, and, as such, its officers, members, and shareholders are not liable for its liabilities and/or obligations.

14. Information will lie where a trial judge improperly executes the mandate of the Supreme Court.

The informant, M. S. Bhatti, a shareholder and chairman of the board of directors of the First United American Bank, sought the intervention of the Supreme Court by the filing of a bill of information to prevent the enforcement of a money judgment in an action of damages brought by Co-Respondent Ali Saksouk Textile Center in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, against the First United American Bank. The appeal of the defendant bank from the judgment in the damages action was dismissed by the Supreme Court and the judgment ordered enforced. The trial judge thereupon ordered the issuance of a writ of execution. The writ contained a clause commanding the sheriff to arrest the body of the informant if the defendant bank failed to show any land, goods, or chattels which could be seized and sold to satisfy the court's judgment.

Following service of the writ of execution, the informant, as chairman of the board of directors of the defendant bank, along with counsel for the bank, was cited to a conference by the judge. When counsel for the defendant bank asserted that the judgment has not been satisfied by the bank because it had been looted and vandalized during the April 6, 1996 civil crisis, which had resulted into its closure, the trial judge ordered the a writ of arrest issued against the informant. Whereupon the informant executed an agreement to make payment of the amount in satisfaction of the judgment and the corporate obligations thereunder.

The informant contended (a) that although he was not a party to the damages suit brought against the First United American Bank, the trial judge had demanded that he should satisfy the judgment against the bank because of the fact that he was a shareholder and chairman of the board of directors of the bank; that in pursuing this course the trial judge was im-properly executing the mandate of the Supreme Court; that he was made to sign under duress a stipulation

to make payment of the judgment debt of the bank; and that the action taken against him was improper as a corporate officer cannot be held liable for the debts and obligations of a corporation.

The respondents denied that the informant was held liable for the debts and obligations of the defendant bank or that he executed the payment stipulation under duress. Rather, they said, the informant was held in contempt for failing to show assets of the corporation to be seized and sold to satisfy the judgment of the court.

The Supreme Court disagreed with the respondents, noting that the writ of execution clearly stated that the sheriff should arrest the body of the informant if the sheriff did not find property of the corporation to be sold. The inclusion in the writ of execution of a clause for the arrest of the informant was erroneous, the Court said, observing that the sole purpose of the writ is to have the ministerial officer seize and sell the property of the judgment debtor in satisfaction of the debt.

The Court also agreed with the informant that he was made to executed the payment agreement under duress, noting that the informant had executed the agreement only after the trial judge had ordered him imprisoned and that was the only means by which he could have avoided being imprisoned. The Court rejected the respondents contention that the informant was ordered imprisoned in contempt of court for failing to show property of the corporation which could be seized. The Court opined that, firstly, the conference to which the informant, in his capacity as chairman of the board of directors of the defendant bank, had been cited, along with the bank's counsel, was designed to ascertain from the bank's counsel the reason for the failure of the bank to comply with the mandate of the Supreme Court, and did not therefore constitute contempt proceedings either against the defendant bank or the informant. Secondly, the Court said, an officer of a corporation cannot be held for the debts and obligations of the corporation, and that the enforcement of the Court's mandate against the informant in his private capacity was contrary to the Court's mandate, for which information was the appropriate remedy.

The Court therefore granted the information, reversed the order of arrest of the informant, and ordered the trial court to resume jurisdiction over the case and enforce the judgment to the extent that the corporate officer identifies property of the corporation to be seized and sold to satisfy the judgment.

Snonsio E. Nigba of Legal Services, Inc. appeared for the informants. Salia A. Sirleaf of the Henries Law Firm appeared for the respondents.

MR. JUSTICE JANGABA delivered the opinion of the Court.

This case is before us upon a bill of information growing out of the judgment and mandate of this Court, given during its March Term, A. D. 1998.

The facts as culled from the certified records transmitted to this Court reveal that the co-respondent herein, Ali Saksouk Textile Center, by and thru its proprietor, Ali Saksouk, instituted an action of damages against the First United American Bank, by and thru its chairman of the board and president, M. S. Bhatti, in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, during its December Term, A. D. 1995. Following the trial of the facts, the plaintiff was awarded US$4,000.00 and US$l00,000.00 as special damages and gene-ral damages, respectively. From this judgment the defendant bank appealed to this Court.

On the 22nd day of July, A. D. 1997, during its March Term, A. D. 1997, this Court granted the appellee's motion to dismiss the defendant bank's appeal on the ground that the appeal was defective. The trial court was accordingly ordered by this Court to resume jurisdiction over the case and enforce its judgment.

On the 5th day of August, A. D. 1998, this Court, in a further judgment and mandate, granted a bill of information filed by the plaintiff in the damages suit and mandated the trial court to again resume jurisdiction over the case and enforce its judgment against the banking institution, consistent with the bill of costs as prepared by the acting clerk of court.

The trial court, acting pursuant to the mandate of this Court, prepared a writ of execution on the 10th day of September, A. D. 1998, commanding the sheriff of the trial court to seize and sell the lands, goods and chattels of the First United American Bank and the proceeds used to satisfy its judgment in the total amount of US$107,044.80 and L$1,910.00, inclusive of inter-est calculated at the rate of 6% per annum. The sheriff was also commanded by the trial court to arrest the body of the president and chairman of the board of directors in the absence of any land, goods, and chattels of the defendant bank which could be seized. It is from the enforcement of the writ of execution that the informant fled to this Court upon a bill of information alleging, among other things, that the defendant bank was a domestic corporation authorized by law to do banking business in Liberia, and that the informant is merely a shareholder and chairman of the board of directors of said bank.

The informant contended principally that the trial judge had held him personally liable for the corporate debts and obligations of the defendant bank contrary to the decision and mandate of this Court. The informant also contended and argued that a named officer of a corporation is not a party to a suit brought against the corporation, and that corporate officers and shareholders are not liable for the debts and obligations of a corporation. The informant alleged that his counsel was cited on December 11, 1998 by His Honour Joseph Andrews, Assigned Circuit Judge for the Sixth Judicial Circuit Court, Montserrado County, to ascertain from said counsel for the defendant bank why the Supreme Court's mandate which the trial court had been ordered to enforce, had not been complied with by the defendant bank. The informant asserted that

notwithstanding the explanation made by counsel for the defendant bank, the trial judge had ruled that the clerk of court should prepare a commitment and serve same on the informant to have him imprisoned. In count 9 of the amended bill of information, the informant additionally contended that he was under duress when he signed an agreement of payment to satisfy the Supreme Court's mandate, and that he had done so only to avoid imprisonment. The informant therefore prayed this Honourable Court to prohibit the respondent judge from holding him personally liable for the debts and obligations of the defendant bank.

The respondents, on the other hand, in their returns filed to the information, contended succinctly that the informant was not held to be personally liable for the corporate debts or obligations of the defendant bank, but rather that he was held in contempt for his failure to identify and show assets of the corporation, he being a director and officer of the corporation and one of the custodians of the corporation's assets. The respondents also contended that the informant had signed the agreement of payment without duress and that he had agreed to make a stipulation for the balance payment of the judgment without any reservation. The respondents argued further that the defendant bank had assets to satisfy this Court's mandate at the time the informant signed the payment agreement to make payment in two installments, with the proviso that he would prepare and sign a stipulation to pay the balance of the judgment. The respondents argued additionally that contrary to the claim made by the informant, he, the informant, was held in contempt of court by the trial judge for disobeying his order to identify the assets of the defendant bank. The respondents therefore prayed this Court to dismiss informant's information and to order the enforcement of this Court's mandate.

The issue which is decisive of the final determination of this case is whether or not a corporate officer can be held personally liable for the debts and obligations of a corporation?

A recourse to the records in this case shows that the clerk of the trial court issued a writ of execution on the 10th day of September, A. D. 1998 upon orders of His Honour Wynston O. Henries, resident judge of the Sixth Judicial Circuit Court, Montserrado County, commanding the sheriff, inter alia, to arrest M. S. Bhatti, chairman of the board of directors and president of the defendant bank should the sheriff fail to find any lands, goods and chattels of the said defendant, unless Mr. Bhatti could pay the sheriff the amount of the judgment or show property of the defendant bank to be seized and sold to satisfy the judgment amount. This Court observes from the face of the writ of execution that the trial judge did order the arrest of the aforenamed corporate officer of the defendant bank should the sheriff fail to find any assets to satisfy the judgment unless the said corporate officer identified property for seizure and sale.

This Court recognizes the universally held principle that "execution upon a money judgment is the legal process of enforcing the judgment usually by seizing and selling property of the debtor." BLACK'S LAW DICTIONARY 568 (6th ed. 1990). Moreover, our Civil Procedure Law, Rev. Code 1, provides that the clerk of the court in the county in which the judgment was first entered against the defendant party shall issue a writ of execution and place same in the

hands of the sheriff of the county where such judgment is rendered directing the said sheriff to levy upon the personal and real property of the judgment debtor. Civil Procedure Law, Rev. Code 1: 44.39(2). The same law states further that the sheriff shall within 60 days after issuance of the judgment execution make returns to the clerk of the court from which the writ of execution is issued. The statute also requires the sheriff to attach to the execution upon its return to the court, a schedule of the property on which he has levied together with an itemized appraisal of its value. The sheriff is required additionally to endorse on the execution whether it is returned unsatisfied or wholly or partially satisfied. Civil Procedure Law, Rev. Code 1:44.39(2)(3)(4). It was therefore erroneous for the trial court, in the writ of execution, to command the sheriff to arrest the living body of the chairman of the board of directors and president of the defendant bank since the sole purpose of the writ of execution is to command the ministerial officer or sheriff to seize and sell the property of the judgment debtor in satisfaction of the debt and not to arrest, at the time of serving a writ of execution, a judgment debtor.

The records in this case also show that His Honour Joseph W. Andrews, the Assigned Circuit Judge for the Sixth Judicial Circuit Court, Montserrado County, December Term, A. D. 1998, directed the clerk of court on the 8th day of December, A. D. 1998, to cite counsel for the defendant bank, along with Mr. M. S. Bhatti, to a conference in his chambers scheduled to be held on the 11th day of December, A. D. 1998, at the hour of 2:00 p. m. in connection with the case. We observe from the minutes and ruling of the 8th day chambers' session, same being Friday, December 11, 1998, that the trial judge wanted to ascertain from counsel for the defendant bank why the mandate of this Court had not been implemented by the defendant bank. At the conference, counsel for the defendant bank made a submission alleging substantially that the April 6,1996 crisis had affected the banking institution in that the bank had been subjected to looting and vandalism, and that these had resulted in the closure of the bank. It was further alleged by the bank's counsel that as a consequence of the aforementioned events the bank had no assets to satisfy the mandate of this Court.

Counsel for plaintiff resisted the submission and the judge sustained the resistance. The judge further ordered the clerk of court to prepare a commitment to be placed in the hands of the sheriff to be served on Mr. M. S. Bhatti to have him imprisoned for his deliberate refusal to show the trial court any property to be executed upon in satisfaction of this Court's judgment. Counsel for informant excepted to this ruling and gave notice that the informant would take advantage of the statute. A commitment was accordingly prepared on the 11th day of December, A. D. 1998 to commit to jail Mr. M. S. Bhatti as a defendant, charging him with contempt of court for his failure to satisfy this Court's mandate. On the same day, December 11, 1998, an agreement of payment was prepared and signed by the parties and their counsels and approved by the trial judge. We therefore agree with the informant's assert-ion that under the facts and circumstances enumerated in this case, he had signed the agreement of payment under duress to avoid imprisonment. Section 44.1 of the Civil Procedure Law provides that "a person shall not be arrested or imprisoned for disobedience of any money judgment or order requiring the payment of money except for those money judgments en-forceable by punishment for contempt under

section 44.71(3) or by imprisonment under section 44.71(2) if execution is not satisfied. Section 44.71(3) provides that money judgments are enforceable by contempt proceedings against a trustee or a person acting in a fiduciary relationship for the payment of a sum of money or a default or dereliction of his duty or for the support of a wife, child or other defendant. Section 44.71(2) provides that judgments are enforceable by imprisonment if execution is not satisfied in cases involving adultery, seduction of a wife or child; or illegally taken away or harboring a wife or child or ward under 21 years of age; enticing an incompetent away from his legally appointed trustee or guardian; or injury to the reputation when the words spoken or written are action-able per se. Section 44.73 provides for the enforcement of a money judgment through contempt proceedings. The pro-cedure therein is that a writ of summons is issued and served upon the judgment debtor in the same manner as service of summons to show cause why he should not be punished for contempt for the alleged offense which defeats, impairs or impedes, or prejudices the right or remedies of the judgment creditor to the action. The court is by law required to make a final order directing that the judgment debtor be punished by a fine, imprisonment or both. This order may be enforced, if necessary, by arrest of the judgment debtor under a warrant of arrest.

The trial judge correctly ruled when he sustained plaintiff's resistance to the defendant's submission, but erred when he ordered the issuance of a commitment to imprison Mr. M. S. Bhatti in his private capacity. The essence of the conference of December 11, 1998 in the chambers of the trial judge was purposely intended to ascertain from the judgment debtor the reason which prevented the defendant bank from satisfying the mandate of this Court. It was incumbent upon the trial judge to order Mr. M. S. Bhatti, as president and chairman of the board of directors of the defendant bank, to identify assets of the corporation in satisfaction of the money judgment, failing which, the judge was duty bound under the law to hold him in contempt for his failure to identify or show assets of the corporation. The conference, as shown by the records in this case, was not a contempt proceeding brought against the banking institution, by and thru its president and chairman of the board of directors, Mr. M. S. Bhatti. Thus, the ruling of the judge ordering the commitment of M. S. Bhatti at the con-ference was erroneous and contrary to the statutory provisions governing the enforcement of judgment through contempt proceedings. As far back as in 1913, this Court held that "a writ of execution against a corporate body such as a township does not run against the body of its chairman." Wilks v. Page, [1913] LRSC 12; 2 LLR 126, Syl. 2, text at 129 (1913). This principle propounded in the Wilks case has been consistently upheld in a long line of cases by this Court. Karpeh v. Manning, [1936] LRSC 14; 5 LLR 162, Syl. 8 (1936); Liberia Oil Refining Company v. Mahmoud, [1972] LRSC 24; 21 LLR 201, Sy1. 1 (1972); Eitner v. Sawyer, [1977] LRSC 47; 26 LLR 247, Syl. 3 (1977). Also, section 2.6 of the Association Law of Liberia, Rev. Code 5, clearly provides, inter alia, that corporate officers are not personally liable for the debts and obligations of a corporation, except as otherwise provided by law.

A corporation, under our law, is a separate and distinct legal entity from its members, officers and shareholders; and as such, its officers, members and shareholders are not personally liable for the liabilities and/or obligations of the corporation. The mandate of this Court out of which these information proceedings grew, specifically mandated the trial court to resume jurisdiction over the case and enforce its judgment against the defendant bank for the satisfaction of the

money judgment in the action of damages for breach of contract. The enforcement of this mandate against Mr. M. S. Bhatti in his private capacity was therefore contrary to our previous decision and mandate. The trial judge indeed improperly executed the mandate of this Court, for which information will lie.

Wherefore, and in view of the foregoing, it is the consi-dered opinion of this Court that the bill of information should be and the same is hereby granted. The Clerk of this Court is hereby ordered to send a mandate to the lower court comman-ding the judge presiding therein to resume jurisdiction over the case and enforce its judgment against the corporation to the extent that the management or corporate officers should identify assets of the corporation to be sold and the proceeds therefrom applied in satisfaction of this Court's judgment, as provided by law. Costs of these proceedings are disallowed. And it is hereby so ordered.

Information granted.

Page v Ward et al [1983] LRSC 138; 31 LLR 637 (1983) (22 December 1983)

ELLEN H. PAGE, Widow of the Late JAMES H. PAGE, SR., deceased, Appellant, v. **LOUISE BROWN WARD**, Administratrix of the Intestate Estate of the Late JAMES H. PAGE, SR., deceased, Appellee.

APPEAL FROM THE MONTHLY AND PROBATE COURT FOR MONTSERRADO COUNTY.

Heard: November 22, 1983. Decided: December 22, 1983.

1. Although a lawyer is obligated to his client and in accordance with his oath of office to protect only his legal interest, he is also bound under the same oath and ethics of the profession to aid the court to conform to the very statutes the lawyer has sworn to defend and uphold.

2. The probate court is the guardian of such unfortunates as widows and children and it is its legal duty to protect them, give appropriate orders and instructions for the proper administration of an estate within the time limit allowed by statute and for the preservation of the estate in status quo ante, including maintenance and support of minors and widows of the decedent.

3. If an administrator acts in pursuance of and in accordance with law, he need not secure an order of court to protect him in the discharge of his duties.

4. A wife who leaves her husband and renounces all conjugal intercourse with him for a considerable period prior to his death is not as a rule entitled to administer his estate nor is she to object to the granting of the administration thereof to others.

5. The law conferring the right of administration on a widow contemplates the case of a wife who lives with her husband until his death.

6. A wife who has been divorced has no right to administer on the estate of her husband.

7. A probate judge has no authority to review a decision of his predecessor, absent fraud or misrepresentation.

The decedent, James H. Page, Sr., was married to Louise Brown Ward, appellee, out of which marriage six children were born. This marriage was dissolved and Mr. Page subsequently married Ellen H. Page, appellant, who remained his wife up to the time of his death. Upon the death of James H. Page, Sr., his former wife, Louise Brown Ward, petitioned the Probate Court for Montserrado County for letters of administration to administer his intestate estate. The letters were granted and she proceeded to administer the estate along with co-administrator William H. Washington, curator of intestate estates. Thereafter, the widow, Ellen H. Page, filed a petition before the Probate Court for Montserrado County praying for the revocation of letters of administration granted by the Court in favour of Louise Brown Ward and to be appointed administratrix instead.

A lease agreement entered into by one of the administrators of the estate for a period of fifteen (15) years, without first obtaining permission of the court, was admitted into probate by then Probate Judge His Honour H. Victor Stryker. Subsequently, Her Honor Luvenia Ash-Thompson became probate judge and ordered the cancellation of the agreement on the grounds that Judge Stryker was misled when he ordered the admittance into probate of the lease agreement.

The letters of administration of Louise Brown Ward were revoked and Ellen H. Page, the widow, was appointed administratrix of the intestate estate of the late James H. Page, Sr. From this decision of the judge, an appeal was announced to the Supreme Court.

The Supreme Court, in passing upon the issues presented in the case, held that the ruling of the probate judge, dated November 3, 1982, though erroneous in certain respects, be confirmed as to other aspects, with certain modifications, as follows: 1. that the appointment of appellant, widow of the late James H. Page Sr., as administratrix to administer her deceased husband's estate is confirmed; 2. that in the absence of a petition filed by any eligible heir of the late James H. Page Sr., to administer the estate within seven (7) days from the date of the reading of the Court's mandate in the trial court, with due notice to the parties, the widow who was appointed administratrix, should act as the sole administratrix of her husband's estate for the purpose of closing same as the law directs; 3. that the decree of Judge Stryker, dated February 9, 1976, be enforced; 4. that the allowances that were being paid by the lessees, as per the lease agreement dated April 16, 1977, to the only minor child and the widow, respectively, of the decedent, be paid retroactively, from the date the payment thereof ceased to exist with due consideration given to the increase of the rents that were being received and deposited in escrow from the lessees aforesaid.

James G. Bull appeared for the appellant The Carlor, Gordon, Hne & Teewia Law Firm appeared for the appellee.

MR. JUSTICE YANGBE delivered the opinion of the Court.

The probate judge consolidated the petitions that were filed before her and made one ruling, notwithstanding that the appellant had filed two separate approved bills of exceptions, which were the subjects of this appeal. Following the hearing of the arguments before this Bench, we adopted the same procedure by consolidating the two bills of exceptions, all the briefs filed and we heard the arguments of the parties; we will now rule accordingly.

Among the several reasons numerated in the two bill of exceptions, is the ruling of His Honour H. Victor Stryker, former probate judge, dated February 9, 1976, and because of the importance we attached to it, we decided to quote its relevant portion, as follows:

“Administrator, James Page, Junior, is present in court, likewise administratrix, Ellen Page. It is the orders of this court that this estate be closed by Monday the 16 th instant and the administrators report as to how the estate was handled must be filed by 2:00 p.m. on the 16 th. This is a simple estate and there is no reason for protracted delay thereof. There is one building located on United Nation Drive which is bringing in an annual rent of $1,500.00 and since the widow does not receive realty from an intestate estate in fee, but for her lifetime, it is hereby ordered, that $500.00 be given to the widow annually which is 1/3 for her lifetime and after her death, the children of James Page will apply to the probate court for the appointment of an administrator pendent lite to issue an administrator's deed to them for the property on which the building stands. All other real property of the intestate estate are to be divided in the following manner; 1/3 to the widow for life, for this they .should not issue a deed, the court will decree that the remaining 2/3 must be divided share and share among the children. This is simple, therefore, if by the 16th the administrators fail to carry out these our orders so that this estate which has been opened since 1971 can be closed, the court reserves unto itself to take necessary action against the administrators."

Neither party was dissatisfied with this ruling, nor noted exception thereto; therefore, it is final nor was the only thing remaining for the full implementation thereof by the lower court the report of the administrators. It is also crystal clear that, had the above quoted ruling been fully executed by the lower court, the controverted contentions that developed after the 16 th of February 1976, would have definitely been avoided. The report of James H. Page Junior, administrator of the estate, showed that the only minor child of the late James H. Page Senior and widow of the intestate were being supported out of the income from the estate. It was admitted that both the allowances had ceased, as a result, the minor child is out of school and is being supported at the mercy of friends.

Among the many factors featuring in the records are the many changes of counsel on both sides in this case and each new sets of lawyers for the parties adopted a different approach to the case, which, instead of minimizing the delay to close the estate, to the best interest of their respective clients, blocked the timely implementation of Judge Stryker's ruling. We agree that a lawyer is obligated to his client and in accordance with his oath of office to protect only his legal interest, but he is also bound under the same oath and ethics of the profession to aid the court to conform to the very statutes the lawyer had sworn to defend and uphold. The delay to timely and fully carry out the ruling of February 9, 1976, had certainly occasioned the inconvenience suffered by

the minor child and the widow. This is ridiculous, for while we can postpone the constructions of buildings, bridges and monuments, we cannot postpone education or defer daily bread. Allowances for maintenance and support are of extreme necessity and the halting thereof has and will surely continue to take adverse effect by creating social and economic problems on the recipients.

The probate court is the guardian of such unfortunates and it is its legal duty to protect them and to give appropriate orders and instructions for proper administration of an estate within the time limit allowed by statute and for the preservation of the estate in status quo ante, including maintenance and support of minors and widows of decedents.

The decree of Judge Stryker further required that the administrators should have reported to the court on the 16 th of February 1976, as to how he administered the estate and as a prerequisite for closing of same on that date. The records show that the report was submitted to the court as per the decree without any objection. There is no evidence whatsoever in the records before us, that the estate is indebted to anyone, and verse versa, therefore, why the estate was not closed, as per the decree referred to supra, is a puzzle in this case. This estate was opened since November 1971 and up to 1976 is over and above the statutory period of one year within which it should remain open. Consequently, one of the crucial questions that has presented itself in this case, which we cannot accept in reaching a final conclusion on the contention germane to the points tendered in the two bills of exceptions is, what is the legal effect of the acts of the lower court, subsequent to February 9, 1976, the date of the decree of Judge Stryker quoted above, and the validity of the lease agreement for fifteen years, dated April 16, 1977 to expire 1997, signed by James H. Page Junior as co-administrator of the estate?

In our opinion, the answer to this question will finally resolve the problems in this appeal. In the ruling of Her Honour Luvenia Ash-Thompson, dated the 3`a of November, 1982, she quoted verbatim the report of the administrator, James H. Page Junior yet, the command of the ruling of Judge Stryker was not carried out by the closing of the estate.

The probate judge, Her Honour Luvenia Ash-Thompson, ruled, inter alia, that with reference to the authority of the administrator, James H. Page Junior, to unilaterally dispose of the property of the estate without orders of court, and in her opinion, her predecessor was mislead when he ordered the passing into probate the lease agreement, demising the only piece of property earning an income. In accordance with one of the seven counts of the bills of exceptions, the learned Judge Ash-Thompson, is blamed for failure to uphold the ruling of Judge Stryker only as far as it relates to James H. Page Junior to continue to lease the only income producing property of the estate for support of the widow. We cannot understand why appellant focused her mind upon and is only interested in the execution of the lease agreement or support of the widow and totally ignored the closing of the estate as per orders of Judge Stryker, which in our opinion, if done, would have surely put a final end to all the disputes. This act on part of appellant has reminded us of the story of Shylock and the exact pound of flesh without shedding a drop of blood.

Whilst it is true that a judge cannot review the acts of his predecessor except where the courts acted upon fraud or misrepresentation, in this case, there is no evidence whatsoever showing

deception perpetuated at any stage, or apparent in the report of Administrator James H. Page Junior, or that there was any objection interposed thereto by either party.

Consequently, in our opinion, there was no justification for the holding that Judge Stryker was mislead instead of the full execution of his ruling within the time limit specified therein. Judge Stryker having ordered the closing of the estate upon the filing of the report by the Administrator James H. Page Junior, on the date stated in his ruling supra, there was absolutely nothing remaining to be done save the filing of the report and closing of the estate in accordance with law. Therefore, in our opinion, anything that was done after filing of the report that was not geared towards the objective of the February 9, 1976 ruling quoted earlier, was void ab initio under the doctrine of concurrent jurisdiction.

However, an apologetic but not a legal excuse in this direction is that the estate was not closed and therefore it had to be managed; hence, we are told, this Court should review what had transpired subsequent to February 9, 1976, in the best interest of the estate, and in regard to the public importance which is attached to the issues tendered in the two bills of exceptions. We will, therefore, address ourselves to the remaining points of contentions of the party litigants which we deem pertinent for our final decision in this appeal.

Appellant asserted in the first paragraph, page two, count one of one of her briefs, that on the 20 th of September 1982, appellee, as administratrix of the estate of the late James H. Page Senior, filed a petition praying the probate court to order the lessees of the lease agreement, signed by James H. Page Junior, administrator of the estate, to surrender the leased property of the estate on the ground that the lease is invalid. Later on the 21st, the appellant also filed before the probate court a petition praying for the removal of the appellees as administratrix of the estate and to appoint her as such administratrix. Appellant claimed that the two petitions are unrelated, therefore, the probate judge erred when she consolidated the two petitions in her ruling in which she raised the issue of the validity of the lease agreement. We will discuss infra the legal standing of the appellee as she relates to the entire estate, therefore, we will here only focus our attention and pass upon the question of consolidation of the petitions.

The issues raised in the two petitions contained facts and law that are common to each, except that the reliefs prayed for in each are separate - removal of appellee as administratrix of the estate and to appoint appellant in her stead, for the lessees to the lease agreement, signed by administrator, James H. Page Junior, to vacate and surrender the leased property for alleged invalidity of the lease. Therefore, in our view, it was not error in the trial court when the judge consolidated the two petitions in her ruling. Civil Procedure Law, Rev. Code 1: 6.3 (1 & 2).

Appellant has argued that the appointment of the curator for Montserrado County to administer the estate of the late James H. Page Senior is illegal and cited as reliance the Decedents Estates Law, Rev. Code 9: 111.1.

Recourse to the joint letters of administration granted to Mrs. Louise Brown Ward and Mr. William H. Washington, does not indicate that he, Mr. Washington, was appointed in his official capacity as curator for Montserrado County, but rather as a private individual, appellee contended.

This argument is well supported by the joint letters of administration; nevertheless, it does not erase the fact that Mr. William H. Washington is not qualified in accordance with section 111.1 of the statute cited above to administer the estate, for, in the case at bar, there are persons who are eligible for appointment, such as the widow and the daughter, Pheo Page-Askie who are present in Liberia. Additionally, prior to the appointment of Mr. Washington, on August 26, 1982, letters of administration were granted by the court to Abraham H. Butler and James H. Page Junior, and the latter is alive, therefore, the appointment of Mr. Washington, whether as curator or as private person, did not arise. Ibid.

Appellant again argued that, even though, Pheo Page-Askie is the daughter of Decedent Page, and as such she is eligible for appointment to administer her father's estate, but her appointment can only be made upon petition either filed by someone who has interest in and is eligible to administer the estate or by himself. The Decedents Estates Law, Rev. Code 9: 111.3 (1) reads, as follows:

"Any person interested in the estate of an intestate, or of a person alleged to be deceased, or any person to whose appointment as administrator all distributees consent pursuant to section 111.1, or a curator, creditor or a person interested in an action brought or about to be brought in which the intestate or the person alleged to be deceased, if living, would be a proper party, may present a petition to the court having jurisdiction praying for a decree granting letters of administration to him or to another person upon the estate of the intestate or the person alleged to be deceased."

See also the same act, section 111.4 (1).

In our opinion, these sections of the statute are not merely procedural, but they are mandatory and should be fully complied with, therefore, there is no room for discretion. The lower court and the appointee not having adhered to the statutory procedure herein quoted above, the appointment of Mrs. Pheo Page-Askie is irregular and constitutes a reversible error.

The records in this case further reveal that Mrs. Louise Brown Ward, the divorced wife of decedent and the appellee in this case, petitioned the probate court alleging: 1) That she is a former wife of the intestate and bore for him six children who all are presently within the United States of America; 2) that she and her son, James H. Page Junior, previously petitioned for letters of administration; 3) that on the 26 th of August 1971, James H. Page Junior and Abraham H. Butler were granted letters of administration; 4) that Abraham H. Butler died and James H. Page Junior left the Country for the United State of America; and 5) that she petitioned to administer the estate, conserve it and protect the interest of her six children in the estate.

The appellant argued that the former wife of the decedent had no legal standing, her children having reached the age of maturity; and that additionally, she did not fall within the category of priority. Hence, appellant said, the former wife was not qualified to be appointed as administratrix of the estate.

Looking carefully at the contents of the petition from a maternal point of view, we certainly share the same feeling with appellee as a concerned mother of her absent children, which apparently influenced the learned judge when she granted the petition. However, we are not

inclined to permit such feeling to override the accepted requirement and procedure of the law controlling principal and agent. We are, also in agreement with the argument of appellant in accordance with the Decedents Estates Law, Rev. Code 9:111.1. Therefore, we hold that since the children have reached the age of maturity and are residing outside of the Republic of Liberia, their mother should have obtained a power of attorney from the absent children to authorize her to represent them and protect their interest in the estate; in the absence of such authority or as guardian ad litem for the children, Mrs. Louise Brown Ward, the appellee, is without any legal authority to so act. Hence, the decree granting her the letters of administration to manage the estate is a reversible error.

Another authority to buttress our holding in this respect reads thus: "A wife who leaves her husband and renounces all conjugal intercourse with him for a considerable time prior to his death, is not as a rule entitled to administer his estate, nor is she in a position to object to the granting of the administration to others. The laws conferring the right of administration contemplates the case of a wife who lives with her husband till his death, and faithfully performs all her duties to his family, not one who voluntarily separates herself from him and performs none of the duties imposed by the relation. A wife who has been divorced has no right to administer the estate of her husband, and the right of either party to act as administrator may be defeated by an agreement of separation. Where there has been no agreement of separation or divorce, mere unfaithfulness on the part of the wife, if condoned, may not be sufficient to work a forfeiture of her right of administration. A wife who left her husband and lived in meretricious relations with another has been refused letters of administration on her husband's estate 11 RCL 36, § 24."

The third issue for our consideration and decision is: "Whether an administrator may dispose of real property of an estate without an order of the probate court?" Before referring to the authority to resolve this contention, it is vital to observe here that the disposition of the property in this case is a lease for fifteen years and not an outright sale of the property. With regards to the need for orders of court, the authorities state: "If an administrator acts in pursuance of, and in accordance with law, he need not secure an order of court to protect him in the discharge of his duties." 31 AM. JUR. 2d., Executors and Administrators, § 156, at 92, and 58 ALR 530.

The fourth issue of appellee's argument is, "Whether it was not ultra vires for an administrator to dispose of real property of an estate independent and exclusive of the other administrator or administrators who are present and without an order of the probate court?"

The lease of the property of the decedent by the co-

administrator, James H. Page Jr. alone, for fifteen years for valuable consideration, is not repugnant to any law. Appellee contended that the lease is inimical to the estate, but he did not point out how and he did not show anything in this regard to support the disadvantage alluded to by him. To the contrary, the records show that when the 1977 agreement signed by coadministrator, James H. Page Junior became operative, the property consisted of a two-storey building. A term of fifteen years was provided with graduated rents of $2,500.00, $3,000.00 and $3,500.00 annually.

As we have mentioned hereinabove, "a wife who leaves her husband, and renounces all conjugal intercourse with him for a considerable period prior to his death, is not as a rule entitled to administer his estate, nor is she in a position to object to the granting of the administration to others. The laws conferring the right of administration contemplate the case of a wife who lives with her husband till his death...." It is quite clear that with regard to a divorced husband's estate, as in this case, the former wife, as the appellee herein, cannot legally attack the legality of an agreement concluded by the administrator. Hence, the trial court erred when it set aside the lease agreement of April 16,

1977, signed by Co-administrator James H. Page Junior, upon the objection of appellee.

The fifth and last contention of the appellee was as follows:

"Whether the present case presents a community of interest between the widow of the estate and the lessees of the estate to be joint parties?"

The records further show that Messrs. Hansan Mokbel & George Kadim are the lessees to the agreement, dated 16 th of April 1977, which was assailed by the appellee and set aside by

the probate judge; therefore, the ruling of the Probate Judge to the effect that they were parties in interest was neither an error nor repugnant to the February 9, 1976 ruling. Hence, the same

is sustained in this respect.

Before concluding this opinion, it is commendable to observe that apart from what we have considered in our opinion as reversible errors committed by Her Honour Judge Ash-Thompson, she consistently continued to recognize the legitimate interest and position of the widow in the estate and the fact that the closing of the estate is overdue. Accordingly, she appointed the widow as administratrix and ruled that it be closed by December 31, 1983. Perhaps if the appeal was not announced, the closure of the estate would have been concluded by now.

Considering the facts, circumstances and the citations of law controlling, the ruling of the probate judge, dated November 3, 1982, be and same is confirmed with the following modifications: 1. That the appointment of appellant and widow of the late James H. Page Senior, as administratrix to administer her deceased husband's estate is confirmed; 2. that in the absence of a petition filed by any eligible heir of the late James H. Page Senior, within seven (7) days from the date our mandate is read in the trial court, with due notice to the parties herein, to administer the estate, the widow who was appointed administratrix, should act as the sole administratrix of her husband's estate for the purpose of closing same as the law directs; 3. that the decree of Judge Stryker, dated February 9, 1976, be enforced; and 4. that the allowances that were being paid by lessees as per the lease agreement dated April 16, 1977, to the only minor child and the widow, respectively, of the decedent, be paid retroactively, from the date the payment thereof ceased with due consideration given to the increase of the rents that are being received and deposited in escrow from the lessees aforesaid.

The Clerk of this Court is ordered to send a mandate to the lower court, commanding the judge therein presiding to immediately resume jurisdiction over the estate and carry out these instructions within thirty (30)) days from the date our mandate reaches the trial judge. Costs are disallowed. And it is so ordered.

Judgment affirmed with modification.

Loufram Construction Co. v Pupo et al [1983] LRSC 137; 31 LLR 626 (1983) (22 December 1983)

LOUFRAM CONSTRUCTION COMPANY AND/OR LOUFRAM ORGANIZATION, INC., represented by and thru its President, PRYDE DAVIS, Appellant/Petitioner, v. **HIS HONOUR JUDGE FRANCIS N. PUPO**, Judge, People's Debt Court, and **THE LIBERIAN BANK FOR DEVELOPMENT & INVESTMENT (LBDI),** A Financial Institution operating under the laws of the Republic of Liberia, represented by and thru its President, DAVID K. VINTON and General Manager, MOBERT M. TITUS, Appellees/Respondents.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE DENYING ISSUANCE OF THE WRIT OF PROHIBITION.

Heard: November 17, 1983. Decided: December 22, 1983.

1. Mandatory procedural steps of a statute must be fully observed by a trial judge or else prohibition will lie.

2. Logic, which is the source of the law, would dictate that the sheriff must first levy the properties by a writ of execution before he notifies the public of the time and place of the sale of said properties.

3. The posting of a notice of sale by the sheriff must be after, and not prior to, the service of the writ of execution.

Co-appellee/respondent, The Liberian Bank for Development and Investment (LBDI), brought an action of debt by attachment against appellant/petitioner, Loufram Construction Company and/or Loufram Organization, Inc., for the sum of $513,028.47 (Five Hundred Thirteen Thousand Twenty-Eight Dollars and Forty-Seven Cents) in the Debt Court of Montserrado County. As a result thereof, garnishment was placed upon appellant/ petitioner's cash deposits in the TRADEVCO Bank. In the lower court, the petitioner/ appellant confessed judgment and a payment stipulation was prepared and signed by both parties and approved by the Debt Court Judge. In his ruling, the judge stated that the appellant having admitted to the indebtedness and confessed judgment, it was thereby adjudged liable in the amount sued for, disallowing costs. The judge then instructed the clerk of court to write a letter to TRADEVCO Bank, informing the

manager thereof that the attachment proceedings and the garnishment against appellant were lifted.

When the appellant failed to comply with the stipulations, a writ of execution was then issued and allegedly served on the appellant. Thereafter, a notice of sale was issued on the 1" of June, 1983, under the signature of the sheriff of the Debt Court for Montserrado County, for the sale of the properties seized pursuant to the writ of execution.

When the appellant learnt of the notice of sale through a publication in the Daily Observer Newspaper, it filed a five-count petition before the Chambers Justices, praying for the issuance of the extraordinary writ of prohibition to prevent the sale. The Chambers Justice ordered the writ issued, heard the petition and denied same. The appellant appealed to the Full Bench.

The Court *en banc reversed* the ruling of the Chambers Justice and the judgment of the lower court, granted the petition for a writ of prohibition, and thereby restrained the lower court from proceeding with the sale of the properties. The Court held that the trial judge had acted not only contrary to the stipulation entered into between the appellant and the co-appellee, but also that he had acted contrary to rules and the provisions of the statute which should have been observed by him. The Court observed that the notice of the sale of the property of the appellant was issued and posted twenty-nine days prior to the issuance of the writ of execution, when indeed the reverse should have obtained. The Court noted that logic should have dictated that to the lower court that it should have first levied on the property before notifying the public of the sale of the property.

Lewis K Free, Sr. appeared for the petitioner/appellant. *Joseph Williamson and Joseph P. H Findley* appeared for respondents/appellees.

MR. JUSTICE MORRIS delivered the opinion of the Court.

The Liberian Bank for Development and Investment (LBDI), Co-respondent/co-appellee herein, entered an action of debt by attachment against the Loufram Organization Inc., petitioner/ appellant herein, for the sum of $513,028.47 in the Debt Court of Montserrado County. Garnishment was also placed upon petitioner's (Loufram Organization's) cash deposits in the Tradevco Bank. Petitioner/appellant confessed judgement and a payment stipulation was made, signed by both Liberian Bank for Development and Investment and Loufram Organization and approved by the Debt Court Judge. The judge then rendered the below final judgement:

"The court in rendering its final judgement in this case says that at the call of the said case, the defendant herein admitted being indebted to the plaintiff in the amount of $513,128.47 sued for by the plaintiff and therefore defendant confessed judgement. Defendant having confessed judgement, he is hereby adjudged liable and he is required to pay the sum of $513.028.47 to the plaintiff same being the amount sued for by the plaintiff. Costs in these proceedings are disallowed by the court. The clerk of this court is hereby asked to write and inform the Manager of the Bank of Tradevco that the attachment proceedings as well as that of the Garnishment against Loufram Organization Inc. and/or Loufram Construction Company is lifted based upon

the judgement rendered in the said case by this court and stipulations prepared and signed by both parties concerned and approved by this court. AND IT IS HEREBY SO ORDERED.

Given under my hands and Seal of this Honourable Court, this 17th day of June, A. D. 1982.

Sgd. Francis N. Pupo /t/ Francis N. Pupo

JUDGE, PEOPLE'S DEBT COURT, MO. CO. R.L.

We also recite word for word the payment stipulation executed for the benefit of this opinion: "PAYMENT STIPULATION

WHEREAS, The Liberian Bank for Development & Investment, a financial institution organized and existing under the laws of the Republic of Liberia, hereinafter known and referred to as "LBDI", which term shall extend to and include its assigns and successor-in-business, granted loan to LOUFRAM ORGANIZATION INC., represented by its president, Pryde Davis of Monrovia, Liberia, and referred to as the defendant with an outstanding balance of $466.389.52 including principal, accrued charges; and

WHEREAS, the defendant having defaulted to make payment, LBDI has entered an action of debt by attachment, to recover the amount of $513,028.47 including counsel fees; and

NOW THEREFORE, the parties hereto mutually agree as follows to wit:

1. That the defendant hereby acknowledges its indebtedness to the plaintiff and confesses judgement in the sum of $513,028.47, same being the amount sued for,

2. The defendant at the signing of this stipulation will make a down payment of $20,000.00, the balance $493.028.47 plus interest at the rate of 111/2% per cent per annum to be paid as follows:
July 31, 1982 $35,000.00
August 31, 1982 20,000.00
September 30, 1982 55,000.00
November 30, 1982 17,868.00
December 31, 1982 55,975.00
January 31, 1983 10,000.00
March 31, 1983 30,000.00

Therefore, $20,000.00 each and every calendar month following March 31, 1983, and $5,000.00 additionally every calendar quarter.

Upon the signing of this stipulation, the defendant shall execute and deliver to the plaintiff an assignment of proceeds accruing from the Coast Guard Project and all future contracts, with full power and authorities for the plaintiff to collect said contractual proceeds and deduct the installment that is due and pay over to the defendant the residue.

A failure to notify the plaintiff of future contracts will constitute an event of default under this stipulation in which case, a writ of execution may be issued upon application of plaintiff for the enforcement of the judgement.

In witness whereof, the parties have hereunto set their hands and affixed their signatures on this 17th day of June, A.D. 1982.

WITNESSES: FOR: THE LIBERIAN BANK FOR DEVELOPMENT & INVESTMENT (PLAINTIFF)

Sgd. Signature not legible

By: D. K. Vinton Sgd. Signature not legible By: Signature not legible Sgd. Signature not legible For: Loufram Organization By: Pryde Davis - Defendant It/ Pryde Davis - Defendant

APPROVED: Francis N. Pupo JUDGE, DEBT COURT, MONT. COUNTY"

On February 7, 1983 Mr. Pryde Davis, the President of Loufram Organization wrote the below letter to the Minister of Public Works.

"February 7, 1983 Capt. James Burphy Minister of Public Works Ministry of Public Works (RECEIVED MARCH 31, 1983) Monrovia, Liberia Mr. Minister:

On June 24, 1982, we wrote to the Ministry authorizing an assignment of payment due us from the Coast Guard Project to The Liberia Bank for Development and Investment (LBDI). We are writing at this time to revoke that assignment.

We are taking this action because, although LBDI has the assignment of proceeds from this project, they have on several occasions refused to give us financial assistance, and have been deducting large sums of money from our payments each time to satisfy a previous obligation without regards to our financial needs for this project. We are therefore concerned that if this is permitted to continue we will be unable to complete this project for lack of funds.

Please find attached our latest appeal to LBDI and their response which is typical of all previous reactions.

Kindest regards,

Very truly yours, Sgd. Pryde Davis /t/ Pryde Davis PRESIDENT

Predicated upon this letter revoking the assignment, counsel for The Liberian Bank for Development and Investment then went to court on the 17 th day of May, 1983 and made the following record:

"Counsel for plaintiff says a payment stipulation was entered into on the 17th day of June A. D. 1982 between The Development Bank and Loufram Organization Inc., represented by its

president, Pryde Davis, that the defendant corporation has failed to live up to the terms of the stipulation. Counsel prays court for a writ of execution to be issued against the corporation for the enforcement of the court's judgement. And respectfully submits."

The Court then ruled that:

"THE COURT: The above application of plaintiff's counsel is hereby granted, and the clerk is accordingly ordered to issue the writ of execution prayed for against the within named defendant for the satisfaction of the court's judgement rendered in the said case and to place in the hands of the sheriff a writ of execution after its issuance to be served on the within named defendant.

And the sheriff is hereby required to make his returns thereto as to the manner of service. AND IT IS HEREBY SO ORDERED."

Based upon the above ruling of the judge, a writ of execution was issued and allegedly served on the Loufram Organization and a notice of sale was also issued on the 1' of June, 1983 under the signature of William A. Slocum, sheriff, Debt Court of Montserrado County for the sale of the properties allegedly seized under the writ of execution. The notice of sale states that pursuant to the writ of execution, the Sheriff of the Debt Court for Montserrado County will expose to sale at public auction to the highest bidder the properties seized on Friday, July 29, 1983 at the precise hour of 10:00 o'clock in the morning.

Having read the notice of sale in the Daily Observer Newspapers, the petitioner (defendant in the court below) filed a five-count petition praying for the issuance of the extraordinary writ of prohibition, claiming in count 2 of its petition that the corespondent judge had proceeded contrary to rules to be observed at all times. The respondents maintain in their returns that prohibition will not lie because the court had jurisdiction and did not proceed contrary to rules. The Chambers Justice heard and denied the petition and it is now before us on an appeal. The only counts which we feel are pertinent for the determination of this case are count two of the petition and counts three, four, five and six of the returns. In count 4, the respondents contended that an order modifying or vacating an attachment does not affect the merit of the parent action. This point being tenable in law is conceded.

Respondents argue in count 5 that courts are bound to enforce stipulations which parties may validly make, when they are not unreasonable or against good morals or sound public policy. We also agree with this contention and hold that a stipulation like a contract should be governed by its terms. The payment stipulation makes only the following provision for the issuance of a writ of execution:

"A failure to notify the plaintiff of future contracts constitutes an event of default under this stipulation in which case, a writ of execution may be issued upon application of plaintiff for the enforcement of the judgement." The authorities on the subject maintain the following:

"Rules applicable to the construction of contracts, as discussed in contracts....have generally been held applicable in the construction of stipulations, and they have been construed in accordance therewith. The primary rule in the construction of stipulations is that the court must, if possible,

ascertain and give effect to the intent of the parties. The construction, however, is not dependent on the secret purposes, motives, or expectations of one of the parties. Also, the court will not, by construction, extend a stipulation so as to give it an effect beyond its terms and beyond what the parties intended. Its language will not be so construed as to give it the effect of an admission of a fact obviously intended to be controverter, or a waiver of a right not plainly intended to be relinquished." 83 C.J.S., *Stipulation, § 11* (a) pages 26.27.

"When the language is plain and free from ambiguity, the understanding of the parties must be ascertained from its terms, and then whatever those terms fairly imply will be deemed embraced within it. However, the courts are strongly disinclined to import into an unqualified stipulation reservations or qualifications which might readily have been inserted by the parties if such had been their intention. In any event, it is never permissible for a court to do violence to a stipulation and indulge in inference of fact in direct contradiction to its express terms." *Ibid.*, § 11 (d). In counts 3 and 6, the respondents strongly contended that the writ of execution and the notice of sale were in strict compliance with the statute in such cases made and provided. Since this is the decisive issue in this whole case, we shall recite the relevant statutes:

"WRIT OF EXECUTION

"2. After a judgement is entered unless a stay of execution takes effect under section 51.20 or immediately after payment is due on such judgement or part thereof under section 44.22, and therefore a judgement is satisfied or vacated or the time limited for commencing an action upon the judgement expires, an execution may be issued by the clerk of the court in the county in which the judgement was first entered to the sheriff of the county where judgement was rendered directing him to levy upon the real and personal property of the judgement debtor. If a levy on real property is to be made under an execution issued by a court not of record, the execution shall be directed to the sheriff and not to a constable." Civil Procedure Law, Rev. Code 1: 44.39(2).

"SALE OF REAL PROPERTY

3. Notice of sale. A printed notice of the time and place of the sale containing a description of the property to be sold shall be posted at least eight weeks before the sale in three public places in the city or township in which the property is located, and, if the sale is to be held in another city or township, in three public places therein. Every judgement creditor having a judgement which was a lien for at least twenty days prior to the time fixed for the sale upon the real property to be sold shall be served with a copy of the notice personally or by registered mail, return receipt requested, at the address shown upon the judgement docket, at least ten days prior to the time fixed for the sale. If a newspaper is published in the county in which the property is located, a copy of the notice shall be published therein at least once in each two-week period during the eight successive weeks preceding the time fixed for the sale. An omission to give any notice required by this paragraph, or the defacing or removal of a notice posted pursuant hereto, does not affect the title of a purchaser without notice of the omission or offense." *Ibid. §* 44.43(3).

It is our understanding of the above provisions of the statute that an execution duly issued is served by the sheriff prior to the posting of the notice of sale. Recourse to the writ of the

execution we observe that although the writ was issued on May 17, 1983, yet it was not served until the 30t h of June, 1983 according to the returns of the sheriff which is recited hereunder:

"On the 30th day of June, 1983 court's Bailiff James Payne carried out and served the within named writ of execution on the defendant, Loufram Organization, of which the company plant was executed. And the bailiff reported.

Therefore I now make this as my official returns to the Clerk of this Honourable Court this 30th day of June, 1983. Sgd. William A. Slocom Sheriff, Debt Court, Mo. Co."

The notice of sale is dated June 1, 1983, a period of 29 days prior to the service of the writ of execution on the appellant corporation. The notice informs the public that the properties as described therein which were levied by the sheriff would be sold to the highest bidder on July 29, 1983 at 10:00 o'clock in the morning. Although from the l' day of June 1983 to July 29, 1983 may constitute the eight weeks required by the statute, yet we feel, and this is our considered opinion, that the eight weeks should commence after, and not before, the service of the writ of execution, for it is only then that the sheriff would with certainty know the properties levied to be exposed to the public for sale to satisfy the judgement. There is no other writ of execution in the records served on the petitioner prior to June 1St 1983, the date of the notice of sale, and the notice of sale specifically states in the second and last paragraphs that:

"WHEREAS, the defendant company failing to make payment, a writ of execution was issued and the Sheriff of the Debt Court for Montserrado County levied upon properties in Sinkor and Paynesville, Montserrado County on which is erected a five (5) bedroom split level unit and a wood workshop described as follows, to wit:..."

NOW, THEREFORE, the public notice is hereby given that pursuant to the writ of execution aforesaid, the Sheriff of the Debt Court for Montserrado County will expose to sale at public auction to the highest bidder, the above described properties on Friday, July 29, 1983 at the precise hour of 10:00 o'clock in the morning to raise the amount of $403.028.47 now due and outstanding. Interested party may inspect the premises prior to the date of the sale.

We hold that this procedure is irregular and contrary to the provisions of the above statute. Secondly, from June 30, 1983 to July 29, 1983 is less than eight weeks in violation of the statute controlling.

The Justice in Chambers held that nowhere in the entire records had it been shown that the trial judge acted under void authority when he dissolved the attachment, entered final judgement in the debt case, approved the payment stipulation or, in the enforcement of its judgement, ordered the issuance and service of the writ of execution. Therefore, prohibition will not lie. While we agree in part with the Chambers Justice in his holding, yet, we strongly hold that the mandatory procedural steps of the statute must be fully observed or else prohibition will lie. Logic which has been characterized variously as the source of the law, dictates that the sheriff must first levy the properties by a writ of execution before he notifies the public as to the time and place of the sale of said properties. We also hold that the posting of the notice of sale by the sheriff must be

after and not prior to the service of the writ of execution as is in the instant case. Therefore prohibition will lie.

For all these facts and circumstances narrated and the laws cited, it is the opinion of this Court that the judgement be reversed, the petition granted and the peremptory writ of prohibition ordered issued restraining the sale of the properties under the present writ of execution and the notice of sales. The Clerk of this Court is hereby instructed to send a mandate to the lower court commanding the judge presiding therein to resume jurisdiction over this cause and give effect to the judgment and opnion of this Court. Costs disallow. And it is hereby so ordered.

Petition granted; judgment reversed

Vincent-Harding v Harding [1983] LRSC 67; 31 LLR 200 (1983) (7 July 1983)

GLADYS M. VINCENT-HARDING, Appellant, v. **Professor Dr. C. J. E. HARDING**, Appellee.

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

Heard: May 15, 1983. Decided: July 7, 1983.

1. The financial capacities of the parties will not necessarily relieve the husband of his legal obligations to support his wife since "a plea of poverty is to no avail to relieve him of such obligation."
2. Where a statute specifies the only manner in which an act is to be performed, no court has the authority to extrapolate the legislative intent beyond the specific wordings of such a statute.
3. Under the statute, the husband, in *pendente lite is* to provide suitably for the support of his wife as, in the court's discretion, and as justice require, having regard to the circumstances of the case and of the respective parties.
4. The financial capacity of the parties will not necessarily relieve the husband of his legal obligation to support her of such obligation.
5. An order or direction to the husband to support his wife does not require a separate action of maintenance and support, and the disposition of a demand for support is not governed by the rules obtained in regular actions.
6. The responsibility for the payment of rent to third party for the matrimonial residence of the parties rests upon the husband *pendente lite.*

7. Any act on the part of a party by which he implicitly recognizes the validity of a judgment against him operates as a waiver of his right to appeal therefrom.
8. The right of appeal is favored by law, and it will not be held to have been waived except upon clear and decisive grounds.
9. Where a judgment or decree involves distinct and severable matters or demand, a waiver of or estoppel as to only one or a part thereof, will not prevent an appeal as to the residues.

Appellant instituted an action for maintenance and support against her husband, the appellee herein. The lower court ruled that the wife was entitled to support, but that the husband had no responsibility to continue rental payments for her home if he did not reside therein. On appeal to the Supreme Court, the judgment was affirmed with the modification that in addition to other support, rental payments be continued.

Raymond Hoggard appeared for the appellant. *Nelson W. Broderick* appeared for the appellee.

MR. JUSTICE KOROMA delivered the opinion of the Court.
On January 23, 1982, Gladys M. Vincent-Harding filed in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, a three-count petition, praying the court to enter a decree commanding her husband, C. J. E. Harding, to provide maintenance and support for her and to continue to do so until such time when their marriage is dissolved, consequence to a divorce suit pending in court, or when her husband returns and assumes his marital duties. She contended in her petition that for no justifiable reason, her husband had abandoned their bed and abode in September 1981 and had refused to return and neglected to maintain and support her, although gainfully employed at various jobs and earning a minimum monthly salary of four thousand dollars.

In a three count answer, the respondent denied neglecting or refusing to support his wife to the effect that he pays rental and utility bills for the premises on which the petitioner, his wife, lived in the amount of more than $4,000.00 per year, and which premises he, the respondent, was compelled to abandon because of the pugnacious attitude and tendency of his wife which was becoming imminently dangerous to his life and physical wellbeing. Respondent also contended that: (1) he earns a monthly salary of $859.49 net and not $4,000.00 while his wife makes a monthly salary of $937.17 net in addition to other incomes she receives from business ventures; (2) that while he, the respondent, had the responsibility to provide support and maintain his wife, the petitioner, yet, she the petitioner, has the financial capacity to provide her own food and clothing; (3) that he, the respondent, alone without any help from petitioner, who is the mother, provides support for their four children studying abroad. Notwithstanding these circumstances, the respondent offered to provide monthly allowance for the petitioner in the sum of $150.00 in addition to the annual rental payment for the premises where petitioner is living.

In a seven-count reply, the petitioner prayed for the dismissal of the answer on the ground that it is evasive and contradictory and that the averments therein amount to the crime of perjury. Petitioner contends that (1) the respondent had sworn to lies and false statements mainly intended to mislead the court and by so doing, to fraudulently suppress justice; (2) that the respondent had falsely and contradictorily stated his monthly salary in these and the certiorari proceedings now before the Supreme Court; and (3) that he has falsely stated paying the utility bills for the petitioner and supporting the children abroad. On the contrary, petitioner contended that she is the one who pays the utility bills in order to discontinue the constant disconnection of the premises because of failure on part of the respondent to pay the said bills and that she, the petitioner, supports and maintains all the children. Petitioner further contended that under the laws of Liberia, the financial capacity of a wife is immaterial and irrelevant and constitutes no legal ground or defense in maintenance and support. Finally, petitioner contended that the respondent has no authority to assume the function of the court by suggesting what he is willing to pay monthly allowance for petitioner's support; that it is the court's authority to determine the amount for maintenance and support which should not be less than 1/5 nor exceed 1/3 of the respondent's income after due consideration is given to surrounding circumstances.

Following arguments of these issues raised in the petition, answer and reply, the trial court decreed that in view of the financial capacities of both parties, and the support given by the respondent to maintain the children, that: (1) the said respondent pays a monthly sum of $300.00 to support the petitioner effective March 1, 1982; (2) that the payment of the rent for the premises where the petitioner lives would be the responsibility of the petitioner or respondent, depending on whosoever desires to live therein after March 31, 1982. And that the payment of the $300.00 by respondent to the petitioner will continue until the divorce case pending between them is finally determined.

From this ruling of the trial court, the petitioner noted exceptions and has appealed to this Court on a three-count bill of exceptions, two of which we consider germane to the final determination of this case and are herein summarized below:

(1) That the trial judge committed a reversible error when he entered a decree awarding the petitioner/appellant $300.00 a month without taking evidence to determine the total earning of the respondent in order to decide the amount petitioner is entitled to receive.

(2) That the trial judge committed a reversible and prejudicial error when he ruled that the petitioner was gainfully employed and making higher salary than the respondent, and disregarded the averment that she, the petitioner, was exclusively responsible for the education and maintenance of the four children who are now in England.

Disposing of these issues in their reverse order, we take recourse to the records in this case commencing with the petition. In the two-count petition, the petitioner prayed for the court to enter decree, in keeping with the circumstances and award her an amount sufficient for her adequate maintenance and support until at such time when the existing circumstances shall have been removed by a court of competent jurisdiction or when the respondent returns to his marital duties. There is nowhere in the petition that the petitioner averred maintenance and support for the four children who are now being educated in England nor did she pray for the decree to include such item. In filing this petition for support of dependent, the petitioner took advantage of chapter five, sub-section 5.3 (a) of the Domestic Relations Law, Rev. Code 9: 5.3(b), but did not include sub-section 5.3 (b) which requires a father to support his child or children. The petition being void of any allegation or averment as to the maintenance and support of the children, it could not be otherwise concluded that the respondent was performing this duty placed upon him by law. Hence in his answer to the petition, he admitted not supporting his wife as far as food and clothing were concerned but that he was exclusively maintaining and supporting his children abroad. The denial of this averment or allegation in the reply did not necessarily constitute a part of the petition filed in court for maintenance and support of the petitioner. If the respondent was not supporting and maintaining his children as the petitioner claims in her reply and she needed a redress for this statutory violation of the respondent's responsibility, it was obligatory on her part to have made this fact of neglect or refusal of a binding duty, an integral part of her petition to the court. Having failed to do so, the disposition made of this issue by the court constitute no error.

Further to this count of the bill of exceptions, this Court fails to see where the ruling of the trial court is prejudicial to the petitioner with respect to the fact of her financial capacity. For she has not denied earning a monthly net salary of $937.17, running taxi and boutique businesses, all of which add up to a very gainful and lucrative employment. The mention of this fact by the trial judge, in our opinion, does not obliterate the respondent's legal obligation to his wife nor does it constitute a reversible prejudicial error.

In count one of the petitioner's bill of exceptions, she strongly and strenuously contended that the trial judge committed a reversible error when he did not take evidence in order to determine the total earning of the respondent, of which the petitioner is entitled to not less than 1/5 or more than 1/3. She argued that the exercise by the court in entering a decree without first taking evidence was an abuse of discretion and a denial of petitioner's entitlement, and therefore a reversible error. Our microscopic search of the statutes has failed to yield any findings as to the legal support for this argument. Neither chapter 5, subsection 5.3 (a), nor chapter 9, sub-section 9.3, of the Domestic Relations Law supports the contention of the petitioner as to what constitutes her entitlement in an action for maintenance and support. The Domestic Relations Law, Rev. Code 9:93, under the caption *alimony pendente lite,* provides for the court to direct the husband *pendente lite* to provide suitably for the support of his wife as, in the court's discretion,

and as justice requires, having regard to the circumstances of the case and of the respective parties. In keeping with this statute, which should receive a sensible construction by the court so as to effectuate the legislative intention, it could not be better construed that the employment status and financial capacity ofthe parties constitute part of the embodiment of the circumstances of the case and of the respective parties. The financial capacity of the parties will not necessarily relieve the husband of his legal obligation to support his wife since "a plea of poverty is to no avail to relieve him of such obligation. *Dean v. Dean*, [1939] LRSC 14; 7 LLR 47 (1939). However, such circumstances of the parties, as positively admitted by the wife in this ease, will certainly mitigate the husband's obligation as justice requires. The time and conditions under which the court may direct the husband to support his wife is when an action is brought during the lifetime of their marriage, as in this case, divorce, and during the pendency of such action. Therefore, an order or direction to the husband to support his wife under subsection 9.3 of the Domestic Relations Law does not statutorily require a separate action of maintenance and support so as to demand disposition as in regular actions. It was therefore no reversible error on part of the trial court to have ordered or directed the husband to pay the amount of $300.00 per month for the support of his wife without taking evidence. Count one of the bill off exceptions is therefore not sustained.

In the brief filed and argued before this Court, the respondent/ appellee raised two legal issues which deserve our judicial consideration.

(1) That the sum of money to be allowed as support by one spouse to the other in such cases, is within the court's discretion having regard to the circumstances of the case and which discretion can not be subject to review except where it is shown to be abused.

(2) That since the entry of the decree on March 1, 1982 ordering the respondent to pay the petitioner $300.00 per month until the divorce action is finally determined, the said respondent has constantly paid while the petitioner has always received and acknowledged said payment. Having excepted to the degree and appealed therefore to this Court, the acceptance, receipt and acknowledgment of the monthly payment up to the present, is tantamount to acquiescence, ratification and confirmation of the decree of the trial court as rendered, thereby waiving and abandoning her right of appeal and is barred and estopped from proceeding with or prosecuting the said appeal.

In passing on the first argument, we take recourse to the decree of the trial court wherein we observe that the court disregarded the payment of money to a third person for real and personal property and services furnished to the wife especially when it ruled "Any one of them who desires to occupy the house rented by them will hereafter March 31, 1982, exclusively be

responsible for the payment of the rents therefor." See court's decree, Sixth Judicial Circuit, March Tenn A. D. 1982, 5th day's jury session, March 20, 1982. Where the statute specifies the only manner in which an act is to be performed, no court has the authority to extrapolate the legislative intent beyond the specific wording of such a statute. Our law does not give us authority either to add to or take away from what the Legislature has commanded unless the said command breaches provisions of the Constitution. *George v. Republic*, *14* LLR 158, 159 (1960). It is our holding that the trial court had no authority to terminate the rental payment to a third party for the real property that was being used by the petitioner, neither did it have any authority to make said rental payment optional to any of the parties living on the said property after March 31, 1982. Domestic Relations Law, Rev. Code 9:9.3., the responsibility for rental payment for the use of the real property of a third party does not shift. Therefore, the discontinuation of the rental payment consequence of the decree was not only an abuse of discretion but a violation of the statute made and provided in this case.

As to the award of $300.00 decreed by the trial court, we hold that there was no abuse of discretion. However, this Court having the judicial authority to reverse, remand, affirm and/or modify judgments, rulings, orders or decrees of any subordinate court in its appellate consideration of such matter, shall take advantage of this authority at the conclusion and in the judgment of this opinion.

In connection with the second point of contention of the respondent/appellee, embracing waiver and estoppel, we shall take recourse to common law authorities in the settlement of this issue. Under consent to or acquiescence in judgment, we find the following:

"It has been broadly asserted that any act on the part of a party by which he impliedly recognizes the validity of a judgment against him operates as a waiver of his right to appeal therefrom, or to bring error to reverse it, and clearly one who voluntarily acquiesces in or ratifies a judgment against him cannot appeal from it. The acquiescence which prohibits are appeal, or destroys it when taken, is the doing or giving of the thing which the decree commands to be done or given Failure to appeal from a portion of a judgment constitutes acquiescence in that portion. "4 AM JUR.2d., *Appeal and Error,* §242.

Further in Corpus Juris Secundum, it is held that: "A party may not only waive his right to appeal or maintain a proceeding in error by express agreement or stipulation, but a waiver may also be implied from, or the party may be estopped by an act, course of conduct, or agreement which is inconsistent with such right. A waiver or release of errors cannot be implied, however, nor can an estoppel arise from acts or agreements which are not clearly inconsistent with the right to appeal or bring error. The right of appeal is favored by the law, and it will not be held to have

been waived except upon clear and decisive grounds, and where a judgment or decree involves distinct and severable matters or demands, a waiver or estoppel as to only one or a part thereof will not present an appeal as to the residue." 4 C. J. S., *Appeal and Error, §* 211.

Applying these legal citations to the case at bar, we find that although the petitioner/appellant received and applied the fruits of the judgment ($300.00 per month since March 1982) to her own benefit thereby impliedly ratifying the said judgment yet, she cannot suffer waiver and estoppel in prosecuting an appeal because the judgment or decree appealed from involves distinct and several matters. In that, while the trial judge awarded $300.00 per month as support for the petitioner/appellant, he simultaneously decreed the discontinuation of the rental payment as provided by the Domestic Relations Law. By this act or decree of the trial judge, the payment for services furnished to the petitioner/appellant, wife of the respondent/appellee, were discontinued, contrary to the statutes made and provided for such cases. Hence, the right of appeal from said judgment or decree involving several matters cannot be considered waived and the respondent/appellee estoppel simply by the act of receiving $300.00 per month. The argument of respondent/ appellee in this respect is therefore not sustained.

Wherefore and in view of all the facts, legal citations and circumstances surrounding the case, it is our holding that the judgment appealed from should be and the same is hereby confirmed with the following modifications:

(1) That the amount of $100.00 per month is hereby added to the $300.00 award payable retroactively by the respondent/ appellee to the petitioner/appellant as of March 1, 1982 until the final determination of the divorce action now pending in court between the parties.

(2) The payment of the rental allowance and services (utility) bills, which were terminated on March 31, 1982 by virtue of the decree of the trial court, are to be resumed and done retroactively as of April 1, 1982 by the respondent/appellee to the petitioner/appellant for the real property on which the petitioner/appellant is living and for services (utilities) furnished her until the final determination of the divorce case. The payments of the rental allowance and services bills are strictly contingent upon convincing proof in the court below that the property and utilities for which said payments are being done, have been and are being used and utilized by the petitioner/appellant as justification for said payments.

(3) That besides the payments of these amounts, cost is disallowed. And it is hereby so ordered.

Ruling affirmed as modified.

Caine et al v Yancy et al [1982] LRSC 97; 30 LLR 858 (1982) (28 September 1982)

AUGUSTUS F. CAINE, SEKU FREEMAN et al., Petitioners, *v.* **HIS HONOUR M. FULTON YANCY**, JR., Circuit Judge presiding by assignment over the February Term, A. D. 1982, of the People's Fifth Judicial Circuit, Grand Cape Mount County, the Clerk of Court, People's Fifth Judicial Circuit, Grand Cape Mount County, and **MOMOLU LAMIE FAHNBULLEH et al.**, Respondents.

PETITION FOR A WRIT OF MANDAMUS TO THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT, GRAND CAPE MOUNT COUNTY.

Decided September 28, 1982.

1. A surety on a bond shall be any insurance company authorized to execute surety bonds within the Republic of Liberia, or two or more natural persons who are owners of one or more pieces of property located within the Republic of Liberia.

2. As long as the property is owned by the sureties, is located within the Republic, and is of the assessed value equal to the total amount of the bond, exclusive of all encumbrances, such sureties are legally qualified.

3. It is the trial judge, and not any other judge, who shall approve the bond.

4. Where the trial judge leaves the circuit, proof that it was deposited in a post office of the Republic within the time allowed by statute will be sufficient evidence of it having been submitted within statutory time.

5. Recording of a bond on the docket for surety bond liens in the office of the clerk of the circuit court is intended merely to create a lien on the real property, but it is not a prerequisite to the approval of the bond.

6. Granting or refusing of an appeal is not left with the discretion of the trial judge. Mandamus shall lie to compel him to perform such duty.

7. For purposes of a bond, it is not required that the property offered be located in the county in which the case is tried, or where the subject of the trial is located.

The petitioner in these proceedings sought mandamus to compel the co-respondent judge to approve of its appeal bond presented to him, following the rendition by him of a final judgment against the petitioner and an appeal therefrom to the Supreme Court. The co-respondent judge, when presented with the appeal bond for his approval, refused to approve the same, contending that the property used to secure the bond was situated in Montserrado County rather than in Grand cape Mount County where the case was heard and the judgment rendered. The judge also stated that any judge, especially the resident judge of the circuit in which the case was tried could approve the bond.

The Justice in Cambers *granted* the petition and ordered the judge to approve the bond, stating that the contentions upon which the judge based his refusal to approve the bond was legally untenable. The Justice noted that in this jurisdiction, an appeal was a matter of right and that where any act of refusal of a trial judge has the tendency to defeat that right, mandamus would be granted to compel him to act.

Nelson W. Broderick appeared for petitioners. Respondent *Judge Fulton W. Yancy pro se* appeared for the respondents.

SMITH, J., presiding in chambers

The records in these proceedings disclose that the co-respondent judge rendered judgment in an ejectment case against the petitioners who announced an appeal therefrom. The appeal was granted and a bill of exceptions filed. But before the appeal bond was ready, the co-respondent judge had left the circuit for his residence at Harper, Maryland County. The petitioners in these proceedings elected not to mail the appeal bond to the judge in Harper, but instead to dispatched their counsel to Harper with the appeal bond for the judge's approval of the same. The co-respondent judge refused to approve the appeal bond on the grounds that the property offered as security was located in Monrovia, Montserrado County, and not in Grand Cape Mount County, where the case was pending and tried, and that he was no longer in jurisdiction because he had left the circuit and was assigned to another circuit. The co-respondent judge also stated that any other judge, especially the resident judge, could approve the bond under the law. The co-respondent judge relied on the dissenting opinion of Chief Justice Grimes in the case *Adorkor v. Adorkor*, [1936] LRSC 15; 5 LLR 172, 177 (1936), but the said dissenting opinion is not controlling.

Under our appeal statute "every appellant shall give an appeal bond in an amount to be fixed by the court with two or more legally qualified sureties to the effect that he or they will indemnify the appellee from all costs or injury arising from the appeal, if unsuccessful, and that he/they will comply with the judgment of the appellate court, or of any other court to which the case is removed. The appellant shall secure the approval of the bond by the trial judge and shall file it with the clerk of the court within sixty days after rendition of judgment" (emphasis mine). Civil Procedure Law, Rev. Code 1: 51.8. According to this statutory provision, the sureties to the appeal bond must be legally qualified. The purpose of the bond is to indemnify the appellee, and the appellant must secure the approval of the bond by the trial judge and not any other judge. The question posed by this provision of the statute is, who is a legally qualified surety?

In keeping with the statute, *Ibid.*, 1: 63.2(1) and (2), the answer to the above question is clear; for, a surety on a bond shall be any insurance company authorized to execute surety bond within the Republic of Liberia, or two or more natural persons, who are owners of one or more pieces of property located within the Republic of Liberia (not necessarily in the county in which the case is tried, or where the subject of the trial is located). However, the property so offered must have the assessed value equal to the total amount of the bond, exclusive of all encumbrances. In order to create a lien on the real property, it is the duty of the party in whose favor the bond is given, to have it recorded in the docket for surety bond liens in the office of the clerk of the circuit court in the county where the property is located, and this is not a prerequisite to the approval of the bond. Under this provision of the statute, it is not necessary that the property offered as security be located in the county in which the civil action is pending. As long as the property is owned by the sureties and is located in the Republic, and is of the assessed value equal to the total amount of the bond, exclusive of all encumbrances, such sureties are legally qualified.

As to the question of which judge shall approve the appeal bond in keeping with Statute, *Ibid.*,1: 51.8, as cited herein above, it is the trial judge, and not any other judge, who shall approve the bond. Also see the cases: *Adorkor v. Adorkor*, 5LLR 172 (1936), and *Russ v. Republic*, [1936] LRSC 17; 5 LLR 189 (1936). The bill of exceptions and the appeal bond must be approved by the trial judge, and if the trial judge had left the circuit, proof that it was deposited in a post office of the Republic within the time allowed by statute, will be sufficient evidence of it having been submitted within time. *Adorkor v. Adorkor*, [1936] LRSC 15; 5 LLR 172(1936).

From the several legal citations made hereinabove the contention of the co-respondent judge as contained in his returns and argued before us is legally untenable. The granting or refusal to grant an appeal is not, in this jurisdiction, left with the discretion of the trial judge. Appeal is a matter of right and where any act of the judge tending to defeat this right by his refusal to perform the judicial duty required of him by law, mandamus will lie to compel him to perform such mandatory duty.

In view of the respondent judge's refusal to approve the appeal bond, which was a mandatory duty required of him, the petition for a writ of mandamus be, and is hereby granted, and the peremptory writ of mandamus is ordered issued, compelling the co-respondent judge to approve the appeal bond *nunc pro tunc* immediately upon distribution of copies of this ruling to the parties.

Since the appeal bond was not mailed to the respondent judge for approval, and the petitioners elected to send their counsel by air to secure the approval of the bond, refund of the $143.00, claimed by the petitioners against the co-respondent judge, is legally untenable and cannot, therefore, be ordered; but rather, such amount being incidental to the taking of the appeal, may be recovered as costs against the appellees in the court below, if the appellants, petitioners in these proceedings, are successful on appeal. Costs disallowed. And it is hereby so ordered.

Petition granted.

Reeves et al v Johnson [1979] LRSC 4; 28 LLR 30 (1979) (1 June 1979)

MYRTLE REEVES et al., Executor and Executrices of the Last Will and Testament of the late W. THOMAS BERNARD, SR., Petitioners, v. **HER HONOUR GLADYS K. JOHNSON**, Commissioner of Probate for Montserrado County, MARTHA STUBBLEFIELD-BERNARD

and KARIN BUHRIG, also Executrices of the Last Will and Testament of W. THOMAS BERNARD, SR., Respondents.

PETITION FOR A WRIT OF CERTIORARI GROWING OUT OF THE RULING FROM THE PROBATE COURT FOR MONTSERRADO COUNTY

Heard: May 21, 1979. Decided: June 1, 1979.

1. The Decedents Estates Law and Probate Procedure Law mandates that in all estates, whether testate or intestate, an inventory must be taken showing all of the assets of the estate within a maximum of two months after the granting of the letters. The law also requires that should additional assets be discovered after the first inventory, another inventory called a supplemental inventory shall be taken.
2. In the absence of an inventory, legacies mentioned in a Will cannot be available for distribution to legatees.
3. A widow's petition for dower focuses on the need for compliance with the statute requiring inventory and appraisement, as dower cannot be admeasured without an inventory and appraisal of the assets of the estate.
4. The Decedents Estates Law and Probate Procedure Code provides that all estates, whether testate or intestate, must be administered and closed within twelve months; and only in cases where there are foreign debts should an estate be allowed to remain open longer than twelve months.
5. As the custodian of all estates, the probate court is vested with the authority and responsibility to oversee the administration of a testate estate even where the testator exercises his right not to require the executors and executrixes to file a bond. So where there is any form of mismanagement of the testate estate, even in the absence of a requirement for a bond from the executors and executrixes, the probate court should take immediate remedial actions to protect the estate.
6. The judge of a court of record can review and rescind or modify his ruling only within term time. Therefore, the judge of a probate court, which has a month-to-month term, cannot review and rescind or modify a ruling four months after it was rendered.
7. If it is determined that a judgment or ruling is irregular or erroneous, it must be corrected by some proper proceeding for that purpose; it cannot be merely disregarded and the proper judgment or ruling entered anew. During the term in which the judgment or ruling was entered, the correction may be made by an order of the court upon a mere suggestion of the error.
8. Certiorari will lie to review and reverse a second ruling of a probate court which purports to reverse and rescind a ruling after the term in which the first ruling was made and to reinstate said first ruling.

9. The payment of accrued costs by a petitioner for the writ of certiorari is not mandatory; rather, it is discretionary on the part of the Chambers Justice to require the payment of accrued costs before the issuance of the alternative writ.

W. Thomas Bernard, Sr. who died in a tragic motor accident, left a Last Will and Testament in which he named his brother, wife, sisters and a Ms. Karin Buhrig as executor and executrixes of his estate. He provided in the Will that his executor and executrixes should not be required to file a bond.

More than two years after the executor and executrixes were sworn into office, they had not filed an inventory as required by law and the estate was by then in existence longer than provided for by law. Meanwhile, the brother and sisters of the late W. Thomas Bernard, Sr., executor and executrixes, filed a petition for proper accounting against Ms. Karin Buhrig, one of the other executrixes, demanding that she account for the assets of the Yes Transport Company, which was part of the corpus of the estate. Also, the widow of W. Thomas Bernard, Sr., herself being an executrix, filed a separate petition to allow her to exercise the right of election of a dower in the estate in lieu of what was provided for her in the Will.

The probate judge first ruled that the widow's petition for dower be set aside until after the disposition of the petition for proper accounting and the filing of an inventory by the executor and executrixes. Four months later, even though the petition for proper accounting had not been disposed of and no inventory of the estate had been filed by the executor and executrixes and approved by the probate court, the widow repeated her petition for exercise of her dower rights. This time, the probate judge granted the petition for dower right. From this second ruling of the probate judge granting the right to elect dower in lieu of provisions in the Will, the petitioners prayed for the alternative writ of certiorari, which was granted by the Chambers Justice. However, because of the constitutional issue raised in the pleadings with respect to the exercise of dower rights by the widow, the Chambers Justice referred the matter to the Full Bench for hearing.

After hearing arguments pro et con, the Supreme Court ruled that the probate court judge erred, when four months after she made the first ruling suspending the disposition of the petition for dower right pending the disposition of the petition for proper accounting and the filing of inventory, she made a second ruling granting said petition for dower right, thereby purporting to rescind the first ruling. The Supreme Court ruled that the probate court, being a monthly court, can review and rescind or modify a ruling only within the term in which it was delivered, not four months after its delivery. The Court said that only the Supreme Court could review that ruling after the expiry of the term time. The Supreme Court also ruled that the executor and executrixes had violated the law requiring the filing of an inventory within a maximum of two months after being admitted to their offices and had also violated the law requiring the closing of

estates within one year after the granting of the letters testamentary. The Supreme Court held further that even though the testator exercised his right not to require his executor and executrixes to post bonds, yet the probate court, as the custodian of all estates, intestate and estate, had the responsibility, duty and authority to ensure that the executor and executrixes perform their offices properly. Because they were found not to be doing so, the probate court should have taken appropriate remedial action. The Supreme Court also ruled that dower cannot be admeasured without an inventory of the estate. Accordingly, the probate court properly held in its first ruling on the petition for dower rights that said petition be suspended pending the filing of an inventory of the estate and the approval of that inventory by the probate court.

Specifically because the probate court had erred in attempting to rescind its first ruling on the petition for dower right outside of the term time in which it was rendered, the Supreme Court granted the peremptory writ of certiorari and ordered that the admeasurement of dower rights should await the filing and approval of an inventory of the estate.

Joseph J. F. Chesson appeared for petitioners. M. Fahnbulleh Jones appeared for respondents.

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

Our Decedents Estates Law and Probate Procedure Code man-dates that in all estates, whether testate or intestate, an inventory must be taken showing all of the assets of the estate. The law also requires that should additional assets be discovered after the first inventory, another inventory, called a supplemental inventory, shall be taken. We quote hereunder the relevant statute word for word for the benefit of this opinion.

"Inventory and Appraisement

Within two months after his appointment, unless a longer time shall be granted by the court, every executor or administrator shall make and return a verified inventory and appraisement in one written instrument, of all the property of the decedent which shall come to his possession or knowledge, including a statement of all encumbrances, liens, and other charges on any item. Such property shall be classified therein as follows:

a. *Real property with plot or survey description;*
b. *Furniture, household goods, and wearing apparel;*
c. *Corporation stocks described by certificate numbers;*
d. *Mortgages, bonds, notes, and other written evidence of debt, described by name of debtor, recording data and other identification;*
e. *Bank accounts, insurance policies of which the estate is the beneficiary, and money;*
f. *All other personal property accurately identified, including the decedent's proportionate share in any partnership, but no inventory of the partnership property will be required."*
g. *"Requirement as to Appraisement*

At the time letters testamentary or letters of administration are granted, the court shall appoint two suitable, disinterested persons as appraisers, to whom the executor shall exhibit the inventory. The appraisers shall determine and state in figure opposite each item contained in the inventory the fair net value thereof, as of the date of decedent's death, after deducting the encumbrances, liens and charges there-on, and forthwith deliver such inventory and appraisement, certified by them under oath, to the personal representatives who shall file it with the court. The appraisers shall be allowed such reasonable fees, necessary disbursements and expenses as may be fixed by the court, which shall be paid by the executor or the administrator as expenses of the administration."

"Supplementary Inventory and Appraisement

Whenever any property not mentioned in the inventory comes to the knowledge of an executor or administrator, he shall either make a supplementary inventory thereof and cause such property to be appraised, such supplementary inventory and appraisement to be returned within thirty days after the discovery thereof, or include the same in his next accounting, unless the court shall order a particular manner of return. Decedents Estate Law, Rev. Code 8:119.1 & 119.2.

Our review of the records of this case reveals that none of these statutory requirements was complied with in the handling of this estate. Moreover, it is clear from the quoted text of this law that the Legislature made no exceptions to the rule with respect to any estates cognizable before the probate courts of this country.

The decedent in this case has been dead for more than two years. Nevertheless, compliance with this law has not been required or enforced, although the estate has been in the Probate Court for Montserrado County, and has been involved in bitter contest between the widow (herself an

executrix) and another one of the executrixes, on the one hand, and the executor and the two other executrixes, on the other hand. The relevance of this situation to the certiorari proceeding before us will be seen later in this opinion.

Moreover, Rule 6 of the Probate Court Rules governing estates reads, as follows:

"Every executor or executrix named in a will, or administrator, administratrix, guardian or trustee appointed by court, shall within twenty days after their qualifications, return a full inventory of the estate under their charge, with bond to cover the same for the court's approval; and all additional property not included in the first inventory shall immediately upon discovery be reported to the court for supplemental inventory to be made thereof. In every case the bond covering the estate shall be double the inventoried valued thereof."
This rule is not in conflict with the statute quoted herein above, except as to time within which inventory should be filed. Therefore it is as binding on all estates, as is the enacted statute quoted above. Issues, which have arisen in the case out of which this certiorari proceeding grows, show clearly the wisdom of this statute and of this rule of the probate courts; and later we shall say more about bonds in such cases.

Now here is the history of the matter. The late W. Thomas Bernard died in a tragic motor accident on the 6th of March, 1977. His Last Will and Testament offered in the Probate Court for Montserrado County in Monrovia devised and bequeathed real and personal property to his widow and several children named therein and nominated in the fifteenth clause thereof the executrixes and executor of his said Last Will and Testament in these words:

"I hereby appoint my wife, Martha Bernard, my brother, Vivian **Reeves**, and my sisters, Myrtle and Thelma **Reeves**, and Karin Buhrig, sole executor and executrixes of this Last Will and Testament or testamentary papers by me at any time heretofore made; and because of the confidence I have in my executor and executrixes, I hereby direct that they be allowed to serve in said capacity without giving bond or security whatsoever."

The Will was proven and the following oath was administered to the executor and executrixes on the 23rd of June, 1977:

"We, Martha Bernard, Vivian **Reeves, Myrtle Reeves, Thelma Reeves** and Karin Buhrig, executor and executrixes of the testate estate of the late William Thomas Bernard, Sr., deceased of the City of Monrovia, Montserrado County, Republic of Liberia, do hereby solemnly swear that to the best of our abilities and skills will faithfully and truly administer the aforementioned estate and execute the desires and wishes of the said testator in accordance with the directives of this Honorable Court. SO HELP US GOD."
Each and all of them named hereinabove were sworn and each of them signed the oath to faithfully execute the desires and wishes of the testator. Letters testamentary were issued in accordance with the oath taken by them and administration of the estate was entered upon, without an inventory having been taken or appraisers appointed by court as is required by statute and by rule of court.

The records before us show that after letters testamentary had been issued, and in the absence of any protests against the Will, the widow who was also nominated and qualified as executrix on the 12th of April, 1977, filed a petition in the Probate Court for Montserrado County, which petition reads, as follows:

"And now comes before this Honorable Court, Martha Bernard, widow of the late W. Thomas Bernard, Sr., petitioner in the above entitled cause and most respectfully petitions this Honourable Court as follows to wit:

1. That petitioner is the widow of the late W. Thomas Bernard, Sr., who died on the 6th of March, A. D. 1977, and also one of the executrixes of the Last Will and Testament of the late W. Thomas Bernard, Sr., which has been offered for admission into probate in keeping with law.
2. That in her good judgment petitioner elects to take one third of all shares of stocks owned by the testator, W. Thomas Bernard, Sr., in all companies, corporation and businesses, and one third of all bank accounts in any and all banks within the Republic of Liberia and elsewhere in the world that her late husband died in actual or constructive possession of in lieu of whatever and all personal properties or money bequeathed to her under the Will, and one third of all testator's personal properties except for the furnishings and appliances within the house they lived in at the time of testator's death, which are reserved to petitioner under the Decedents Estates Law.
3. That petitioner further says that she elects to have a fee simple title of the dwelling house, in which both she (petitioner) and the testator, W. Thomas Bernard, Sr., her late husband, lived at the time of his death, together with the grounds inside of the fence and any other houses that form a part of the corpus of the estate in lieu of whatever real property testator bequeathed to petitioner and petitioner's rights to one third of all real properties owned by testator at the time of his death.

Wherefore, your petitioner prays this court in keeping with chapter 4, section 4.1, sub-section 1,3,4, & 5 of the New Decedents Estate Law, approved May 26, 1972, to order that the said real and personal properties elected by petitioner be apportioned and given to petitioner in accordance with law and procedure; and grant unto petitioner such other and further relief in the premises as may seem just and proper."

We shall come back to this petition of the widow and pass upon the effect it has had on this certiorari proceeding.
About a year later, that is to say in April 1978, Myrtle **Reeves, Thelma Reeves, and Vivian Reeves**, co-executrixes and executor, respectively, of the Will, filed an application in the probate court asking that their co-executrix, Karin Buhrig, account for assets of the Yes Transport Company, and other properties alleged to be portions of the decedent's estate entrusted to her management. The application is quoted as follows:

"In Re.: The Application of Vivian **Reeves, Myrtle Reeves**, and Thelma **Reeves**, executor and two of the executrixes of the Testate Estate of the late W. Thomas Bernard, Sr. of Monrovia, Liberia, for proper accounting to be made by Karin H. E. F. Buhrig, general manager of Yes Transport
Applicants showeth the below reasons, to wit:

1. That the late W. Thomas Bernard, Sr., their brother, died having contrived in his Last Will and Testament, naming them as the majority executor and executrixes to administer the affairs of his said estate.
2. That they have been qualified and issued letters testamentary by this Honourable Court to administer the said testate estate.
3. Having been clothed with such legal authority by this Honourable Court, in keeping with the law in such cases made and provided, they applied to the said Karin H. E. F. Buhrig, general manager, for an account of some of the assets of the business under her supervision, which she has refused to do, as per the attached document or letter from her in reply to their request dated November 23, 1977.
4. Executor and executrixes respectfully request court to require said General Manager Buhrig to account fully for the following:

(a) Funds from Yes Transport, Inc.;

(b) Rents from motel in Sinkor;

(c) Shop on Camp Johnson Road;

(d) Duplex in Sinkor;

(e) Houses on Bushrod Island;

(f) Gas station in Sinkor;

(h) Proceeds from rubber farm on Dublin Island Road, Kakata;

(i) To produce deeds or relevant documents for property in Germany

(j) The insurance policy in the name of W. Thomas Bernard for the education of daughter Vivian;

(k) Vehicles that have been sold; and

(l) The Mercedes Benz ordered by the late W. Thomas Bernard prior to his demise.

Wherefore, in view of the fact that applicants are account-able to this Court and to the legatees and beneficiaries of the said estate to execute the terms of the said Last Will and Testament of Testator, W. Thomas Bernard, Sr., which applicants would be unable to do if the assets were devastated. Hence, applicants pray Your Honour to cause a writ of summons to be issued and served on the said Karin H. E. F. Buhrig, general manager of Yes Transport, Inc., to appear before Your Honour to make a detail account of the above listed items and to grant unto applicants such further and other remedy as the nature of the case admits of and that justice demands."

According to count seven of the petition for the writ of certiorari, although the widow had filed a petition for the court to grant her certain elected properties of the estate in lieu of devises and bequeaths made to her in the Will, no notice of this petition had been served on the other executrixes and the executor up to the time they applied to the court for Karin Buhrig, another of the executrixes, to account for her management of the Yes Transport Company, etc. What effect this alleged failure to notify the other executor and executrixes of the filing of the widow's petition was to have in the handling of estate is not important in keeping with the position we have taken. Of course, counsel for the widow denied that they had failed to notify the executor and other executrixes of the filing of the aforesaid petition.

On the 13th day of April 1978, the court met and called the case to pass upon the widow's petition for her to be granted property she had elected as her dower in lieu of what was devised and bequeathed to her in the Will. Counsel for the widow called the court's attention to the failure of respondents to react to the widow's petition. Respondents' counsel resisted the request for hearing of the widow's petition until after the assets of the estate had been accounted for by co-executrix Karin Buhrig. He made the following record:

"Applicant therefore requests court to defer the hearing and finalization of the petition for admeasurement of dower until after the disposition of the application for proper accounting of the assets or other incomes of the estate from which the widow and other legatees and beneficiaries would derive their said benefits. Applicants not having filed an answer obviously conceded the legality of the petition, but it is premature to dispose of same at this stage and unsettled status of this estate."

The court then entered the following ruling with respect to the widow's petition, as well as the application for proper account-ing:

"The Court: The petition of Martha Bernard, which has been before this court for over a year now for the ad-measurement of her dower will be passed upon after the court is satisfied that the property or properties to be admeasured are available. Presently there is an application for proper accounting by one of the executrixes based on certain complaint or allegation in respect of the very same funds from which the widow's shares had to be admeasured. To be specific, there is in the said application for accounting an allegation that certain withdrawal has been made from the deceased's personal account at the Bank of Liberia. It is in the best interest of the widow that her petition be heard, which will be granted because it is her constitutional right, and also because it has not been challenged by anybody, but said hearing shall be conducted after the application for proper accounting has been heard and settled. It is then that the court and the parties themselves will be able to determine what constitute the one third of the personal money or deposit belonging to the deceased. We therefore rule that the petition will not be passed upon until it is established that the funds asked for are still where they should be, and if not there now because of interference, that they are put back so that they can be admeasured unto the widow. And it is hereby so ordered."

The widow's counsel excepted to this ruling and gave notice that he would take advantage of the statute in such cases made and provided. The matter was then suspended. As we have said, this was on the 13th of April, 1978.

Four months later, on the 19th of July, 1978, the estate matter was called again, and the widow insisted upon the hearing and determination of her petition for admeasurement of dower. So for the second time the court was being asked to pass upon the widow's petition, and for the second time the court entered a ruling. Here is the relevant portion of that second ruling:

"....The application (for proper accounting) having been heard and is still under investigation, the widow had again come requesting court to grant her petition for admeasurement of dower. Said petition not having been resisted was already granted in the Will; it remains only for the record to show in a formal way.

For quite some time now investigations have been going on into the account of Yes Taxi Company. The Court is not yet informed as to when these investigations will be concluded, or whether the Yes Transport Company is insolvent or not. However, the Court is satisfied to an extent, having heard from both sides the facts and circumstances that led to the application for proper accounting, and is of the opinion that the widow, who has waived her right to take under the Will, and has elected to take under her dower right, which decision on her part has not been objected to by anyone, it is therefore her right to so take.

We therefore rule that the Will made by the testator bequeathing to his widow certain properties, as spelled out in the Will, be set aside, and that her petition for admeasurement be and the same is hereby granted, and that the executor and executrixes admeasure unto the widow at the proper time her shares as asked for in the petition. The clerk is ordered to prepare a decree to that effect. And it is hereby so ordered."

To this ruling the respondents took exception. The widow's counsel excepted to the ruling in April deferring decision on the admeasurement of dower until after proper accounting had been determined; and now counsel for the executor and other executrixes had taken exception to the second ruling granting the widow's petition before the application for proper accounting was decided. It would seem that the second ruling on the same subject matter was in contravention of the first; and it was at this stage that Myrtle **Reeves** and Thelma **Reeves, executrixes and Vivian Reeves**, executor, filed a petition in the Chambers of our distinguished colleague, Madam Justice Brooks-Randolph for the writ of certiorari.

The Justice in Chambers ordered that the alternative writ be issued, and the matter sent forward for the Full Bench to hear because of a constitutional issue raised in the petition. This is how this matter came before us for hearing and determination.

Before we proceed to pass upon the issues raised in this proceeding, we would like to observe that under our Decedents Estate Law and Probate Procedure Code, all estates in Liberia, whether testate or intestate, must be administered and closed within twelve months. Only in cases where there are foreign debts may the estate remain open for longer than twelve months. Nungbor v.

Fisk, 13 LLR 304, 308 (1958). This estate has been under administration for two years. There is no indication that the estate is in debt because there is no inventory filed to show that the estate owes anybody, either in Liberia or abroad. In the absence of the inventory required by statute, it is difficult to say whether the legacies mentioned in the Will are available for distribution to the legatees. Also, in the absence of the inventory and the appraisers' estimates, how is the value of the estate to be determined?

For several reasons it is necessary to know the value of the estate. The widow has asked for one third of all shares of stock; one third of all bank accounts; and one third of all of testator's personal property. The question is, upon what basis would the one third be calculated, in the absence of an inventory to show what is the total, one third of which she elects to be granted to her as widow's dower? How would the government tax fee, which is a percentage of the total value, be assessed at the close of the estate, without knowing what is the value of the estate? It was argued that estates have been administered and closed without inventory. Whilst this might be true in the case of other estates, that does not mean that the failure to do so in the past is an excuse for violating the law in this case, especially where the widow's petition for dower has focused the need for compliance with the statute requiring inventory and appraisement.

The first count of the respondents' returns asks for the dismissal of the petition because of petitioners' failure to pay accrued costs in the probate court, which is a stated requirement for the granting of certiorari. This requirement appears in the Civil Procedure Law, Rev. Code 1:16.23(3) and it reads, as follows:

"Payment of accrued costs, bonds. The petitioner shall pay all the accrued costs, and he may be required to give a bond, conditioned on paying the respondent such damages as he may sustain if the writ is dismissed".

Petitioner's counsel argued that accrued costs are only paid in cases where there is determination by judgment. He argued that certiorari is a remedy which must be sought before judgment and whilst the case is pending. He contended that before the case is determined there is no way of knowing what accrued costs will be, so that it would be impossible to know what should be the accrued costs to be paid.

In re Estate of Whisnant [1975] LRSC 24; 24 LLR 298 (1975) (26 June 1975)

In re THE ESTATE OF LLOYD K. WHISNANT, Deceased.
APPEAL FROM THE MONTHLY AND PROBATE
COURT, MONTSERRADO COUNTY.

Argued May 15, 1975. Decided June 26, 1975. 1. A conveyance to husband and wife creates a tenancy by
the entirety with the right of survivorship. 2. However, when an absolute divorce is obtained, the tenancy by the entirety is automatically converted to a tenancy in common, with no right of survivorship.

The former wife of decedant laid claim to the estate, maintaining
the property had been acquired by them before their divorce, resulting in a tenancy by the entirety and passing to her on the death
of her former spouse. The widow of deceased claimed the tenancy by the entirety had terminated upon the divorce and resulted in a
tenancy in common. The lower court ruled that the property at the time of death was a joint tenancy, passing to the former wife at
the time of decedent's death. An appeal was taken from the ruling. The Supreme Court ruled that a tenancy by the entirety after an
absolute divorce automatically converts to a tenancy in common without right of survivorship. The ruling was reversed.
Toye C. Barnard
for appellant. M. Fahnbulleh Jones

for appellee. MR. JUSTICE the Court.
WARDSWORTH

delivered the opinion of

This case emanates
from the Monthly and Probate Court of Montserrado County, based upon a letter written by the Morgan, Grimes and Harmon law firm to
Hon. Charles H. D. Simpson, in behalf of their clients, Mrs.

Veda Whisnant-Farrell and her mother,
Catherine Johnson. The letter is set forth. "February 19, 1971 "Hon. Charles H. D. Simpson Commissioner of Probate Montserrado County
Monthly & Probate Court Temple of Justice, Monrovia "May It Please Your Honor: "In the interest of our clients, Mrs. Veda WhisnantFarrell
and her mother, Mrs. Catherine Johnson, we have been instructed to submit the following facts and application for the favorable consideration
of this court, to wit: I. That during the marriage of Mrs. Catherine Johnson to the late Honorable Lloyd K. Whisnant they acquired
certain real and personal property; (some of which they held in joint tenancy has by operation of law come to Mrs. Johnson), however
some of the original deeds are still in possession of the Administrators of Honorable Whisnant's estate. Mrs. Johnson would like
to request the court to order the Administrators to deliver all such deeds to her. "z. Mrs. Veda Whisnant-Farrell is the daughter born unto the said Catherine

Johnson and Lloyd K. Whisnant and is one of the heirs of the said Lloyd K. Whisnant. Because Mrs. Farrell is at present out of Liberia she has authorized her mother, Mrs. Catherine Johnson, to represent her interest in all matters in Liberia and especially those relating to her share in her father's estate. This authority, therefore, makes it necessary that Mrs. Johnson be permitted to associate with the Administrators appointed by the Monthly & Probate Court to administer the estate of the said late Lloyd K. Whisnant, especially in respect to disposition of the properties of said estate. "We, therefore, on behalf of our clients, respect-

fully request that Mrs. Catherine Johnson be issued the necessary letters of Administration to associate with the other Administrators appointed by the court for the purposes stated supra. "Respectfully submitted : "MORGAN, GRIMES, & HARMON, Counsellors-at-law." In resisting the request of the letter, counsel for Mrs. Rosemarie Whisnant, the surviving widow of deceased, noted the following for the record on March 3o, 1971. "I. Counsel for Mrs. Whisnant respectfully submits that the letter dated February 19, 1971, over the signature of Counsellor Lawrence A. Morgan of the Morgan, Grimes and Harmon law firm, was sent to Mrs. Rosemarie Whisnant by this court. In view of this letter we wish to spread the following submission upon the records of this court. "2. With respect to count one of said letter in which Mrs. Catherine Johnson claims to have held certain real and personal property in joint tenancy with the late Lloyd K. Whisnant and therefore the said property comes to Mrs. Johnson by operation of law, we respectfully say that under the law properties held by husband and wife are held as tenants by the entirety, but this tenancy is destroyed when there is an absolute divorce between the husband and wife. If at all Mrs. Catherine Johnson and the late Lloyd K. Whisnant held any real property as tenants by the entirety then the fact that they were divorced prior to his death, the unity of husband and wife was destroyed and therefore Mrs. Catherine Johnson and the late Lloyd K. Whisnant could have been at most tenants in common and not joint tenants. "3. We further submit that the property which Mrs. Catherine Johnson claims to hold in joint tenancy with the late Lloyd K. Whisnant has not been

sufficiently identified or described so as to give this court notice to pass thereupon. CI 4. With respect to the second count in Counsellor Morgan's letter in which Mrs. Catherine Johnson says that she has been authorized by her daughter, Mrs. Veda Whisnant-Farrell, to represent her interest in the estate, said letter should have been accompanied by a copy of the letter of authorization or a power of attorney from Mrs. Veda Whisnant-Farrell, especially so, since Mrs. Farrell is

of mature age and capable of issuing a power of attorney to whomever she chooses. "5. We respectfully submit further that in keeping with the practice invoked before this court any party moving this court for letters of administration is under the law required to file a regular petition before this court which is supposed to be passed upon by this court and not a mere letter signed by the counsel of the petitioner unverified by a Justice of the Peace. "In view of the foregoing we respectfully pray this Honorable Court not to entertain the letter submitted by counsel from the Morgan, Grimes & Harmon law firm and to dismiss count one of said letter." In ruling on the letter of request and resistance in the concluding part of his said ruling the judge said : "In view of the premises, and in view of what is hereinabove expressed, it is the considered opinion of the court that the position taken and the legal contention raised by opposing counsel in this case is not sufficiently, coherently and strictly in accordance with the law controlling. Mrs. Catherine Johnson, former wife of the late Lloyd Kelly Whisnant, being the last survivor, becomes the sole and unqualified owner of the joint tenancy." To this ruling appellant noted an exception and announced an appeal to this Court.

The bill of exceptions is substantially similar to the above-quoted matter placed by counsel in the record. In summarizing the contentions advanced in the bill of exceptions, counsel for appellant argued : (a) that Mrs. Johnson and the late Lloyd K. Whisnant bought certain real and personal properties in joint tenancy. Therefore, by operation of law, her co-tenant having died, Mrs. Johnson is the sole owner of the fee under the doctrine of survivorship; (b) that counsel for the widow of the late Lloyd Whisnant resisted that, under the law, properties held by husband and wife are held as tenant by the entirety, but this tenancy is destroyed when there is an absolute divorce between the husband and wife ; (c) that Mrs. Johnson having been authorized by her daughter, Mrs. Veda Whisnant-Farrell, to represent her interest in the estate, said letter should have been accompanied by a copy of the letter of authorization or a power of attorney from Mrs. Veda Whisnant-Farrell, especially since Mrs. Farrell is of mature age; (d) that in keeping with the practice in vogue in the lower court any party moving the court for letters of administration is under the law required to file a regular petition before the court, which is supposed to be passed upon by the court. It should not take the form of a mere letter signed by counsel for petitioner and be unverified ; (e) objection to the ruling from which an appeal was taken. Carefully scrutinizing the complaints against the trial judge in this case, we have no alternative but to sustain the bill of exceptions in its entirety. As indicated, supra, we are in full agreement with appellant's contentions stated above. For though joint tenancy was once favored in England for reasons that were feudal in their character and influential in their nature, this has long ceased to operate. Whatever may have been the causes, modern trends show that joint tenancy has undeniably grown in disfavor both in England and America. Even in England, where a little favor is

still given to joint tenancy, whenever there are expressions in the conveyance which will import the slightest intention in favor of tenancy in common, such effect will be given both in law and equity. In accordance with this modern trend, many states in America have passed statutes limiting the existence of a joint tenancy so that in the absence of an express statement to the effect of joint tenancy, a conveyance or devise to two or more persons is presumed to create a tenancy in common. Our law is silent on this point, this being the modern trend of law in foreign jurisdictions. In the case at bar, we are to consider whether or not the property acquired by the late Lloyd K. Whisnant and his then wife, now Catherine Johnson, is an estate in joint tenancy as contended ; from all intents and purposes this is rather a unique situation of a conveyance to husband and wife as revealed by the record in this case. This issue is for the first time being raised to be resolved by this Court, and as such we have no alternative but to resort to authority. "An estate by the entireties is the estate created at common law by a conveyance or devise of property to husband and wife. Under such a conveyance or devise, the husband and wife, by reason of their legal unity by marriage, take the whole estate as a single person with the right of survivorship as an incident, so that if one dies the entire estate belongs to the other by virtue of the title originally vested. The estate conveyed, whether for life or for years, is held by them as a whole and not by moieties--per tout and not per my--with unities of time, title, interest, and possession. Except as the time of the estate may be limited by the instrument creating it, it is held by husband and wife together so long as both live, unless the marriage relation is dissolved by judicial decree." 41 Am. JUR., zd, Husband and Wife, § 55 (1968). The conveyance or devise in the case at bar being one

to husband and wife definitely created a tenancy by the entirety with the right of survivorship; however there having been a divorce a vinculo matrimonii (an absolute divorce), that tenancy by the entirety is automatically converted to a tenancy in common. We must note here that though courts are in conflict as to the effect of an absolute divorce on an estate by the entirety, it is generally held that such divorce destroys the unity of the spouses and consequently destroys the unity of seisin in estates by the entirety. We herein fully adhere to the general rule controlling estates by the entirety. Tenancy in common is thus the only tenancy which has the characteristics congruent to that created as the result of the absolute divorce of appellee and Lloyd K. Whisnant prior to his death. In his argument counsel for appellant contended that the estate in question was not purchased by Lloyd K. Whisnant

and Catherine Johnson-Whisnant as husband and wife; but that said property was purchased in their individual names, that is to say, Lloyd K. Whisnant and Catherine Johnson-Whisnant; therefore, the estate could not be considered as an estate in the entirety but instead as a joint tenancy. There is authority on the point raised. "An estate by the entireties arises from a conveyance or devise to husband and wife, though the deed, will, or other instrument does not describe them as husband and wife or refer to their marital relationship, and though, at the time of taking, they have no intention in fact as to what technical estate they are taking." Id., 858. Unlike joint tenancy or tenancy by entirety, there is no survivorship in tenancy in common and tenants in common are owners of undivided shares so that when one dies his share passes to his heirs or devisees. The essential unity which characterizes tenancy in common is that of possession or the right to possession of the corn-

mon property; if said unity exists there is tenancy in common irrespective of other unities. Therefore, in view of the foregoing, it is obvious that the ruling of the lower court is not supported by law; in that, by virtue of the absolute divorce between the late Lloyd K. Whisnant and Catherine Johnson, the real property acquired by them, by operation of law, could no longer be held as an estate by the entirety. The judgment of the lower court is hereby reversed and the property involved is to be held as a tenancy in common, appellee being entitled to one-half of all real property acquired by the late Lloyd K. Whisnant and herself as husband and wife in fee simple, and the estate of Lloyd K. Whisnant being entitled to the remaining half for the benefit of his widow and heirs. Costs disallowed. And it is hereby so ordered. Reversed.

Gibson v Tubman [1960] LRSC 29; 13 LRSC 610 (1960) (15 January 1960)

JAMES DOE GIBSON and his Wife, ETHEL R. GIBSON, Appellants, v. WILLIAM A. TUBMAN.
APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, MARYLAND COUNTY.

Argued November 2, 1959. Decided January 15, 1960. 1. In determining whether a contract is usurious, a court will look to the substance rather than the form of the transaction in question. 2. In the absence of special agreement the maximum permissible rate of interest is that permitted by the law of the place where the principal was advanced. 3. Interest in excess of ten percent per annum is usurious.

On appeal from a judgment in an action for foreclosure of a mortgage on real property, judgment
modified. appellants. Court. In this case brought up on a regular appeal from the Circuit Court of the Fourth Judicial Circuit, Maryland
County, one James Doe Gibson and Ethel R. Gibson, his wife, prepared and executed to William Alfred Tubman a warranty deed which
is hereunder recited word for word : "This indenture made and entered into this 8th day of November, 1955, by and between James Doe
Gibson and Ethel R. Gibson, his wife, of the City of Harper, County of Maryland, hereinafter called Parties of the First Part, and
William Alfred Tubman of the Township of Pleebo, Maryland County, hereinafter called Party of the Second Part, " W / T NE SSE TH:
"That the said Parties of the First Part, for and in consideration of the sum of $5,600 lawful money of the
D. Bartholemew Cooper
and 0. Natty B. Davis for Momolu S. Cooper for appellee.
MR. JUSTICE MITCHELL

delivered the opinion of the

Republic of Liberia, to the Parties of the First Part in hand paid by the party of the Second Part (the receipt whereof is
hereby acknowledged), the said Parties of the First Part have bargained, sold and conveyed, and by these presents do grant, bargain,
sell and convey unto the said Party of the Second Part, and unto his heirs and assigns forever, a certain portion and parcel of land
with a building thereon, being in the City of Harper, County of Maryland, Republic of Liberia, lying and situated on the North side
of Gregory Street: "COMMENCING 178 feet from the Northeast corner of Mecklin and Gregory Streets ; thence in a line South 83 degrees,
East 52 feet, to a point, thence in a line South 7 degrees, West mo feet, to a point, touching on the North side of said Gregory
Street, thence in a line with the said Gregory Street, North 83 degrees, West 52 feet, to the place of commencement, the whole to
constitute 5,20o square feet of land, or one and threetenths of a town lot, and no more; "Together with all and singular the hereditaments
and appurtenances thereto belonging, or in any wise appertaining to the said premises, unto the said Party of the Second Part, his
heirs and assigns forever, and the reversion or reversions, remainder or remainders, rents, issues and profits thereof, and all the
estate, right, title, claim and demands whatsoever of the said Parties of the First Part, either in law or equity, of the above granted
premises with the hereditaments and appurtenances, to have and to hold the above granted premises, with the appurtenances and every
part and parcel thereof, to the said Party of the Second Part, his heirs and assigns forever. And the said Parties of the First Part
do covenant, grant, bargain, promise and agree to and with the said Party of the Second Part, his heirs and assigns, to warrant and
defend the above-granted premises, and all and every part and parcel thereof in

being in the quiet possession
of the said Party of the Second Part, and against all and every other person, claiming or to claim said premises or any part thereof.
"In witness whereof the said Parties of the First Part have hereunto set their hands and seals the day and year first above written.
[Sgd.] JAMES DOE GIBSON ["] ETHEL R. GIBSON "Signed, sealed and delivered in the presence of : [Sgd.] CHARLES FREEMAN ["] SAMUEL KOFA." That is the text of the outright transfer deed executed to William Alfred Tubman by James Doe Gibson and Ethel R. Gibson, his wife. Concluding the terms of a mortgage thereon, the following document was subsequently tendered completing the deal by giving the property as a lien or security for the payment of the money received including interest:
"We the undersigned, having received from Mr. William Alfred Tubman of Pleebo, Maryland County, Republic of Liberia, the sum of five thousand six hundred dollars ($5,600) being principal and interest, we do hereby stipulate and agree to refund said amount, or any portion thereof, within eighteen months from the date of this stipulation. "We guarantee the payment of this amount over to Mr. Tubman within the time stipulated. We have executed in his favor warranty deed for our premises lying and situated on the north side of Gregory Street with a building thereon, and upon any failure or defalcation on our part to refund said amount, or any portion thereof, within the time stipulated, the said Mr. Tubman is authorized and empowered to offer to court the admission into probation and registration of said warranty deed without any objection from us.

The terms and conditions of this objection being fully complied with are to render same null
and void and of no legal effect. "In witness whereof we have subscribed our names this Loth day of November, 1955. [Sgd.] JAMES DOE GIBSON ["] ETHEL R. GIBSON." At the expiration of the time specified according to the terms and conditions stipulated by the appellants, they had failed either to comply in whole or in part. Appellee called attention to their default by letters, and it also appears from the records that appellee offered to have their property restored to them, even then, if they were prepared to make payment of the amount for which the mortgage was instituted. Regardless of this magnanimous and generous offer, they made no attempt whatever to settle the mortgage, and judging from the defense they set up in the court below after the institution of the suit in foreclosure, we get the impression that they relied upon the artifices employed by themselves which they felt could be accepted as legal blunders, and thereby deprive the petitioner of his rights in law. The petitioner, having no alternative, instituted an action in equity for the foreclosure of the mortgage transaction, and the appellants appeared and filed their answer denying his right to recover on the grounds that their consent to the transaction was obtained through means of meditated imposition which entrapped them, by the fraudulent acts of the appellee, and other legal technicalities. Such allegations on the part of the appellants savor, in our opinion, of dishonest

minds. The pleadings rested at the reply and amended answer of the appellants. The case was called and law issues disposed of by the court below on October 3o, 1957. The issues of fact laid in the bill and in Counts "to," "11," and "12" of appellants-respondents' answer were ruled to trial. For

the benefit of this opinion, we will quote these counts of appellants-respondents' answer below: "1o. And also because respondents deny the legal and equitable sufficiency of petitioner's bill and say, in further reference to Count '3' of said bill, that profert of the stipulation marked Exhibit 'B' cannot be considered as sufficient proof under the law as to the amount of $5,600. Respondents submit that said stipulation was also barely issued along with the warranty deed for the loan of $2,00o, and when the usurous and iniquitous interest of Ka monthly, or 120% per annum which aggregates $3,600 is added to the amount of $2,000, the total thereof is $5,600, as appears on said stipulation. Respondents therefore pray for the dismissal of petitioner's bill with costs. "1 i. And also because respondents further deny the legal and equitable sufficiency of Count '4' of petitioner's bill, and allege that said count avers that petitioner repeatedly demanded said amount of respondents in person and by medium of other persons, but respondents have failed to make payment. Respondents deny that the petitioner ever approached them in person or through the medium of other persons demanding the amount due him, but rather allege that the said petitioner insisted that the business between him and respondents was an outright sale, and that respondents should vacate and surrender their premises over to petitioner. Respondents therefore pray this Honorable Court not to countenance said count, but to dismiss petitioner's bill with costs against him. 12. And also because respondents deny the legal and equitable sufficiency of Count '5' of petitioner's bill of complaint, since said count alleges that respondents made faithful promise to pay

an amount of $5,600 which they never received at the time of the conclusion of their business deal; rather their consent was obtained through means of meditated imposition, and circumvention, and by entrapping respondents by fraudulent contrivances and cunning and deceitful management, and by purposely misleading respondents with the view of depriving them of their property and obtaining excessive and exorbitant interest on the loan of $z,000. It can clearly be seen that petitioner's stealth in probating said deed in the absence of respondent James Doe Gibson, while at Nyaake Webbo, before the expiration of the eighteen months covered by the loan, was in itself a base and selfish means to further this dastardly and wicked purpose, which is the essence of premeditated fraud. Respondents submit that, in courts of equity, it is an admitted principle

that, in cases of fraud the court may investigate questions growing out of the fraudulent transaction when properly presented. It is a general rule that fraud vitiates all acts into which it enters, and where a conveyance upon which a party relies to establish his claim is shown to have its inception in fraud and it is shown that he was a participant in such fraud, his claim may be decreed void. Respondents therefore pray for the dismissal of the petitioner's bill with costs against him." After hearing evidence in the case, the court below decreed that: "[T]he mortgage property be sold at public auction to the highest bidder after due and timely notice, and that from the proceeds of petitioner's loan, costs of court be paid, together with all accrued interest, and the surplus, if any, be paid over to the respondents herein. . . . The respondents are afforded six months

from the date of this decree and after the enforcement of the final decree to take advantage of their right of equity of redemption ; thereafter they are forever barred the right of so doing." It is from this final decree that respondents excepted and brought their appeal for review. We advert to the important issue raised by the respondents that the entire transaction is fraudulent and should not be considered by the court. We have wondered upon what principle of law they have predicated this erroneous contention. The respondents themselves prepared both the warranty deed and the stipulations in this case, and at no stage of the transaction, even up to the filing of petitioner's bill in equity, did they elect to raise the issue of fraud, as they have now alleged. The law on the question is unequivocal : "In Story's Equity Jurisprudence (vol. 2, sec. 1540) it is held that in cases of actual fraud, courts of equity feel great reluctance to interfere where the party complaining does not apply for redress at the earliest convenient moment, after the fraudulent character of the transaction comes to his knowledge. A party upon whose right or interest a fraud is attempted, should not be allowed, after the fact comes to his knowledge, to speculate upon the possible advantage to himself of confirming or repudiating the transaction." Page v. Jackson, [1912] LRSC 5; 2 L.L.R. 77, 79-80 (1912). In view of the settled principle of law cited, supra, we do not feel that the respondents could sustain this defense; but since the proceeding is in Chancery, where flexibility prevails, the final decree could have been milder under the controlling law, and we quote the following: "Whatever the form of a mortgage, it cannot be deprived of its essential attributes by any stipulations of the parties, however express and positive; and equity will take a broad view of the obligations of the mort-

gagor and lean against harsh remedies invoked against him." 59 C.J.S. 159 Mortgages § 113. Another point we wish to review before entering upon the details of the bill of exceptions is the contention raised

by appellants, respondents below, that the bill of complaint was insufficient because the warranty deed and stipulations upon which the bill was founded had not been registered and probated ; not knowing at the time of the filing of the original answer that the petitioner had taken the precaution to comply with these legal prerequisites. It does seem from this allegation that the respondents intended to commit fraud through their contemplated act of inserting into the stipulations that petitioner was not authorized to probate and register the deed in question until after the expiration of the eighteen months period for which the loan was given, knowing that the controlling statutes provide to the contrary. Such strategy is highly tainted with the essence of dishonesty, and we regard it as a reprehensible act, since any disclaimer of the bona fides of one's own act must be frowned upon by our courts.

When this case was called for hearing, counsel on both sides directed their attention especially to the question of the mortgage transaction and the interest computed on the principal in the deal. Very little argument was made on the several points raised in the bill of exceptions, since it embraces mainly exceptions to the rulings of the court on the law issues and on questions propounded to witnesses ; therefore, we do not feel it necessary to review the nineteen counts thereof, seriatim, in our effort to reach the crux of the case according to the records before us and the arguments made thereon. The appellants do not deny instituting the mortgage with the petitioner below, now appellee, nor do they disclaim responsibility for the payment of the sum of money loaned to them by the appellee for which their property was given as security for the payment thereof. They also

contend that they have not refused to make payment of the sum of money borrowed, but that the interest computed on the said sum was usurious, since it was computed at a rate in excess of that which the law provides, that is to say, at to percent per month and 120 percent per annum ; there was no medium left to them other than having a court sitting inChancery, where the flexible spirit and intent of the law is the predominant factor in the disposition of such matters, determine the legality or illegality thereof. And therefore they sought the opportunity to appeal their cause before this bar, for a review of the final decree of the lower court, for such judgment to be given as ought to have been given below. They cited in course of their argument our law on the question of hard, oppressive and exactive interest. Although this argument of appellants' counsel was far from the arguments advanced in the court below according to the records before us, however, since it is considered with the subject matter, we feel that it should claim our attention. Appellee's counsel, on the other hand, argued that both the warranty deed and the stipulations which consummated the mortgage deal show the sum of $5,600 to be the amount received, not specifying what portion thereof was the principal or what was interest; and that notwithstanding that the said total sum comprised both principal and interest, even if the interest computed was in excess, as the appellants alleged,

they having subscribed to both documents without coercion in any form, shape or fashion, the appellants had waived their right to protest against the legality thereof and therefore were estopped from disclaiming their voluntary commitments. Continuing however, he argued further that, being aware of the effect of our statutes and the common law deal on the question of legal interest to be computed in such a transaction, he conceded the argument of his opponent, and suggested that this Court, in disposing of the issues involved, might give the appellees the benefit which the law authorizes

according to good conscience, as is applicable in equity, considering the time involved, the default and the motives of the respondents now appellants. Referring to the records in the case before proceeding to reach a final conclusion on the principles involved, it is necessary to note a document which the respondents made profert in their pleadings. This document is a receipt for the sum of $2,000, purporting to be the full sum of money received from the petitioner below; and, very strangely, nowhere in the records is there any showing of any attempt on the part of the petitioner to show that this sum of money was the actual amount that he gave respondents below on loan in the transaction. We deem it necessary to quote this receipt: "Receipt. Received from Mr. William Alfred Tubman of Pleebo, the full amount of $2,00o.00 (two thousand dollars) account loan to be refunded within eighteen months in keeping with terms of understanding as per stipulation of agreements made and entered into. "Harper, Cape Palmas, November 8, 1957. Amount received in full [Sgd.] JAMES DOE GIBSON." When William Alfred Tubman, the petitioner, took the witness stand in the court below, the following question was put to him on cross-examination and his answer returned, as follows : "Q. I suggest that the whole transaction which you referred to in your statement in chief which embodied an amount of $5,600, being principal and interest to be paid within eighteen months was as follows : $2,000 principal and interest at io percent per month, or 120 percent per annum, aggregating $3,600, added to the principal amount of $2,000, totalling $5,600; am I correct? "A. I am not disposed to state as to whether your cal-

culation is correct or not; one thing I know, you issued a receipt in my favor covering $5,600, being principal and interest against which you issued a warranty deed." The obvious evasiveness of the above-quoted answer of the petitioner should have had some effect on the mind of the Judge below as trier of the facts, especially since, in such cases it is the province of a court of equity to relieve against the harsh rule of the law. "The cupidity of lenders and the willingness of borrowers to concede whatever may be demanded or promise whatever may be executed in order to obtain temporary relief from financial embarrassment resulted in a great variety of devices to evade the usury laws. To frustrate such evasions the

courts look beyond the form of transactions to their substance. The general rule is that a court in determining whether or not a contract or forbearance is usurious will disregard its form and look to the substance, condemning it when it finds the requisites of usury present, regardless of the disguises they may wear." 55 Am. JuR. 332 Usury § 14. In the light of the settled principles referred to, supra, the court below should have probed into the substance of the proceedings then pending before it and based its decree on the fundamental merits of the case. If this had been a suit in law, and not in equity, this Court would have found merit in appellee's argument to the effect that appellants were estopped from raising the question of usurious interest on the loan when they had voluntarily subscribed thereto by their consent at the institution of the mortgage. In previous instances this Court has enunciated and interpreted the law as it concerns rates of interest to be assessed, and in doing so, has said : "Ordinarily it is the law of the place of performance, or the place where money is invested, that deter-

mines the rate of interest, and ordinarily it is admitted that whoever advances money is entitled to interest by operation of law, but in the absence of special agreement no higher rate of interest than the law of the place of investment allows." McGill's Trustees v. Worrell, i L.L.R. 175, 177 (1884). Permissible interest rates are statutorily defined as follows :

"It shall be permissible by express agreement to charge any rate of interest not exceeding ten percent per year. When there is no express agreement as to the rate of interest to be charged in the case of open accounts, promissory notes, bills of exchange, other negotiable paper, or other debts or obligations, the creditor shall be allowed six percent per year and no more." 1956 Code, tit. 1 5, § soo· After close consideration of all the facts in evidence and the law controlling, we cannot feel ourselves justified in affirming the final decree of the court below. The interest assessed, although on special agreement, should not have exceeded the principal sum; nor should it have exceeded ro percent per annum; and the court sitting in equity should have recognized the usurious nature of the said agreement rendering such judgment as should have been rendered by the court below. We hereby order the reduction of the interest computed on the loan of $z,000 to the rate of io percent per annum, beginning from the date of the institution of the mortgage transaction, so as to aggregate a sum total of $2,833.34. The respondents, however, are granted a period of six calendar months from the date of this judgment in which to redeem the mortgage property with the same rate of interest, to be computed for the additional period ; and, upon their failure to do so on or before the expiration of the period so specified, they shall forfeit all right of equity redemption and be forever barred in both law and equity, and the court below shall resume jurisdiction and have the said prop-

erty sold at public auction, in keeping with law, by the Sheriff of Maryland County,
to the highest bidder, and the sum of $2,833.34 with additional interest which may have accrued at the time of the sale at the rate
of io percent per annum, shall be paid over to the appellee as mortgagee; and after deduction of such costs as may be due, the residue
if any, shall be paid over to the appellants as mortgagors. The appellants are hereby ruled to all costs. And it is so ordered.
Modified.

Weeks et al v Johns [1960] LRSC 13; 13 LRSC 498 (1960) (14 January 1960)

F. SAWIE **WEEKS** and PETER B. JALLAH, Assistant Stipendiary Magistrate, City of Monrovia, Appellants-Respondents, v. WILLIAM A. JOHNS, Appellee-Petitioner.
APPEAL FROM RULING IN CHAMBERS ON PETITION FOR WRIT OF CERTIORARI TO STIPENDIARY MAGISTRATE'S COURT, CITY OF
MONROVIA.

Argued October 14, 1959. Decided January 14, 1960. 1. Certiorari will lie to review and correct the proceedings of a Stipendiary
Magistrate's Court. 2. An inferior court may not properly entertain an action having the same subject matter as an appeal pending
before the Supreme Court.

Appellant-respondent **Weeks** instituted an' action of summary ejectment before the appellant-respondent
Stipendiary Magistrate involving rights to real property comprising the subject matter of an appeal pending before the Supreme Court.
Appellee-petitioner applied to the Justice presiding in Chambers for a writ of certiorari preventing the appellant-respondent Stipendiary
Magistrate from adjudicating the merits of the ejectment action. On appeal from a ruling of the Justice presiding in Chambers granting
certiorari, the ruling was affirmed, and counsel for appellants-respondents was fined for contempt.
E. N. Wollor for appellants-respondents.
0. Natty B. Davis for appellees-petitioners.

MR. JUSTICE WARDSWORTH delivered the opinion of the Court. This is a matter emanating
from the Chambers of His Honor, Dessaline T. Harris, Associate Justice presiding in Chambers, on appeal by respondents to the bench,
en
banc.

From a careful perusal of the records in this case it can readily be observed that the respondents have laid strong emphasis on the following three points : I. Since petitioners have an adequate remedy at law by means of appeal, certiorari does not lie. 2. Respondents deny the truthfulness of the homestead exemption notice as still pending on appeal in this Court. 3. Respondents further deny that the grounds alleged in Count "2" of petitioner's petition, subparagraphs "a," "b," "c" and "d," are meritorious or sustain petitioner's petition. In considering these three points which we regard as the kernel of the matter, we shall do so in reverse order, in that we shall take the last or fourth subparagraph, under "d" of petitioner's petition, which reads as follows : " (d) That the case : 'John Adolphus **Weeks**, Appellant, v. W. H. Ketter and P. D. Gurley, Administrators of the Estate of the late Juah **Weeks Wolo, in re the Matter of the Homestead Exemption Notice of the Dwelling House of the late Juah Weeks** Wolo' (being the same premises from which petitioner is sought to be ousted) , which matter was heard on motion to dismiss the appeal during the October, 1958, term, and ruled to trial upon its merits at the succeeding term, has not yet been taken up and disposed of, but is still pending before this Honorable Court, still to be decided, as same was not heard during the March, 1959, term of the Honorable Supreme Court, to warrant plaintiff, F. Sawie **Weeks**, to sue as owner of the premises, when the adopted son of Juah **Weeks** Wolo, Nyekan Cisco, is living." The opinion handed down by this Honorable Court at its October, 1958, term, disposing of the motion to dismiss the appeal, as referred to in the above-quoted excerpt from petitioner's petition as well as the·records of this Court, will support the citation of petitioner in these certiorari

proceedings that the matter of the homestead exemption notice of the dwelling house of the late Juah **Weeks** Wolo is still pending before, and undetermined by this Honorable Court. The certificate issued to respondents by the assistant clerk of this Court, Robert B. Anthony, which certificate is incorporated in the ruling of His Honor, Dessaline T. Harris, Justice presiding in Chambers, from which ruling has come this appeal ; same was improvidently issued by the said assistant clerk, and as such it has no legal bearing on the case at bar. In docketing causes for hearing during March, 1959, term of this Court, the matter of the contested homestead exemption notice of the dwelling house of the late j uah **Weeks** Wolo is still pending before this Court for final disposition. Therefore, it was inadvertently omitted by the clerk in the preparation of the Court's docket during the March term of the current year. From the above, it is obvious that respondents' contention based upon the above-mentioned certificate is without foundation or legal merit; and it is therefore not sustained. The foregoing applies to subparagraphs "b" and "c." We now come to subparagraph "a." The rules of this Court provide as follows : "Writ of certiorari--Where

an action or proceeding is pending in any court or before a judge thereof, the Supreme Court, or any justice thereof in vacation, may grant a writ of certiorari to any party who by verified petition may complain that the decision or act of any trial judge is illegal, or is materially prejudicial to his rights." R. Sup. Ct. IV, 4 (2 L.L.R. 664) . We have further, the following statutory definition : "Certiorari is a special proceeding to review and correct the proceedings of any administrative board or agency or of any court of record other than the Supreme Court." 1956 Code,tit.6,§ 1200.

Count "I" of respondents' returns admits the attempt of the Magistrate to dispose of the matter upon its merits ; we quote hereunder relevant portion thereof : Because respondents say that the petition is false and misleading in its entirety, in that His Honor the respondent Magistrate, on the 8th day of May, 1959, ruled upon the issues of law raised by petitioner in the court below, and having so done, ruled the case to trial upon its merits." It is manifestly illegal, if not arbitrary and contemptuous, for an inferior tribunal to entertain a suit in equity or an action at law when, as in the instant case, the subject matter thereof is involved in an appeal pending before this Court for final determination. The petitioner, being fully aware of the legal blunders made by the respondent Magistrate in his attempt to dispose of the case of summary ejectment instituted by F. Sawie Weeks as plaintiff against petitioner, despite the pendency of the appeal in the matter of the homestead exemption notice of the dwelling house of the late Juah Weeks Wolo, as aforesaid, which fact was duly brought to the attention of the respondent Magistrate by petitioner as alleged in Count "2" under sub-paragraph "a" of his petition to which he, the said respondent Magistrate paid no heed, thought it expedient to flee to the Chambers of His Honor, Dessaline T. Harris, Justice presiding in Chambers, as aforesaid, with an application for the issuance of a writ of certiorari, which writ was correctly ordered issued. More than this, the respondents' counsel appears to have adopted an arbitrary or hostile attitude in these proceedings. Although His Honor, Justice Harris, in his ruling now under review reaffirmed that the assistant clerk of the

court had mistakingly issued the certificate hereinabove referred to, respondents' counsel still persisted in bringing this fruitless and unmeritorious appeal before the full

bench, only to convince us that he is void of reason or the lack of proper understanding of what he is about with reference to this particular case. We cull

from the aforesaid ruling of His Honor, Justice Harris, of this appeal, the following: "From the said ruling of the Probate Commissioner, neither party took an appeal. During the October, 1958, term, of this Court, the case of John Adolphus **Weeks**, Appellant, v. William A. Johns, Appellee, Homestead Exemption, etc., appeared on the trial docket, and William A. Johns filed a motion as appellee to dismiss the said case. F. Sawie **Weeks, the son of Adolphus Weeks**, who had substituted for his father in the said case, his father having died, informed this Court that there existed no such case by reason of the fact that, in the matter between him and William A. Johns in the lower court neither of the parties took an appeal. Reference to the lower court verified this fact. Thereupon the Court, en banc, reprimanded the clerk and had that case stricken from the docket. The certificate given by the clerk does not refer to the case in which the validity of the homestead exemption certificate is being contested, and which is pending before this Court; and in which John Adolphus **Weeks, substituted by F. Sawie Weeks**, is appellant, and W. H. Ketter and P. D. Gurley, administrators pendente lite of the estate of the said Juah **Weeks** Wolo are the appellees. Appellate courts take judicial notice of their own records as well as records certified to them from lower courts ; but, although the circumstances existing in this case, as reiterated above, were explained to counsel for the respondent, yet he strenuously contended that the case, not being on the docket of the Supreme Court for the March, 1959, term of said Court, is not pending in the Court, and hence is not sub judice." From the foregoing excerpt from the ruling of His

Honor, Justice Harris, we can better understand the unyielding and contemptuous attitude of counsel for respondents.
In view of the foregoing, it is our considered opinion that the ruling of His Honor, Justice Harris, be and the same is, hereby affirmed ; and that Counsellor Wollor, for his contemptuous and unyielding attitude which has caused this unmeritorious and groundless appeal to occupy the time of the full Bench unnecessarily, be fined in the sum of $25 to be paid within three days from date hereof, or be suspended from the practice of law until said amount is paid and an official receipt therefor obtained by the marshal of this Court. And it is hereby so ordered.
Ruling affirmed.

Smith et al v Faulkner et al [1946] LRSC 5; 9 LLR 161 (1946) (10 May 1946)

JAMES S. SMITH, GABRIEL L. DENNIS, HENRY W. DENNIS, CHRISTIANA C. BURKE and FRANCES MOORE-GORDON, Appellants, v. THOMAS J. R. FAULKNER, Executor of the Will of the Late FREDERICK E. R. JOHNSON, Representing the Heirs and Legatees of Said Estate, L. T. JOHNSON, Widow

of the Late G. M. JOHNSON, RACHEL T. MASSAQUOI, JOSHUA A. PHILLIPS for his Wife COLONETTE JOHNSONPHILLIPS, SARAH KENNEDY for her Minor Daughter CATHERINE JOHNSON, and DANLETTE JOHNSON-TUCKER, Heirs of the Late G. M. JOHNSON, Appellees.
APPEAL FROM THE CIRCUIT
COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued April 3, 4, 1946. Decided May 10, 1946. 1. Wherever in the claim of a legal estate the remedy is barred in a court of law by the statute of limitations, the remedy for an equitable estate is equally barred in anologous cases. 2. In this country the Probate Court has sole jurisdiction of estates, whether intestate or testate, and a court sitting in equity ought not to interfere where there is an adequate remedy at law. 3. Persons who ordinarily should join as complainants, but who refuse their consent, may be joined as defendants. 4. Statutes of limitations are made to prevent undue advantage being taken of Parties by delaying action in a matter unreasonably long 5. In legal parlance lathes is not mere delay but delay that works a disadvantage to another. 6. A plea specially pleading the statute of limitations in bar to a suit involves a question purely of law to be determined by the court

Appellants filed a bill in equity to compel an accounting from appellees for rents and profits which, appellants alleged, appellants and appellees held as coparceners. The Supreme Court affirmed a dismissal of the bill by

the circuit court. **Smith v. Faulkner**, [1940] LRSC 1; 7 L.L.R. 53 (19.1.o). Appellants filed a bill in equity to discover the estate. On appeal to this Court from a decision denying said bill, judgment affirmed.
H. Lafayette Harmon for appellants. · and B. G. Freeman for appellees. A. B. Ricks

MR. JUSTICE BARCLAY delivered the opinion of the Court. Elijah Johnson, whose estate appellants in this bill seek to have discovered and administered, died in the city of Monrovia over eighty years ago. In answer to the bill, respondents raised several issues, among which are lack of jurisdiction, absence of remedy at law, non-joinder of parties, fiduciary relationships, statute of limitations, duplicity of causes of action, estoppel, and acknowledgment of title by Gabriel L. Dennis, one of the petitioners. The court required each side to condense its pleadings and it is from the ruling and final decree of the trial judge, His Honor Edward J. Summerville, presiding by assignment over the Circut Court for the Sixth Judicial Circuit at Monrovia, that appellants have appealed to this Court for a review. The bill of exceptions contains two counts as follows : "1) Because the several rulings and final decree of His Honour the trial judge on the law issues and facts in said case on the 22nd day of October A.D. 1945 are contrary to the law and equity of the case to which petitioner then

and there duly excepted. "2) And also because in equity proceedings the statute of limitations does not run against an intestate estate where said estate has not been administered and closed, to which petitioners then and there duly excepted."

We shall consider the above two counts of the bill of exceptions in reverse order. The records show no denial that the said Elijah Johnson died intestate, but as to whether there was or was not an administration of his estate and whether or not same was closed said records are silent. The point of difference, however, seems to be that appellees have set up that the bill is barred by the statute of limitations since it is asserted by appellees and not denied by appellants that the said Elijah Johnson died over eighty years ago. The proposition of appellants that the estate was not administered and closed appears to us to be diametrically in opposition to the maxim of equity which says, "equity considers that as done which ought to have been done." If, as contended by appellants, Elijah Johnson died intestate, why was it that his estate was not administered, especially when from their petition it is shown that he was a man of considerable property not only in Montserrado County but also in other parts of the Republic? And further, the petition shows that the said Elijah Johnson left several direct heirs. It states in count one: "That petitioners' line of descent and inheritance are as follows:-- (a) James S. Smith is the grandson [of] the late Charles Ray Johnson who was a son of the said Elijah Johnson; Gabriel L. Dennis and Henry W. Dennis are the grandsons, and Frances Moore-Gordon is the Granddaughter of the late Ellen Johnson who is a daughter of the said deceased Elijah Johnson; Christiana C. Burke is the only surviving granddaughter of the late Rebecca R. Russell who was a daughter of the said Elijah Johnson." Appellees in their answer attacked the petition for non-joinder of parties and brought out that William R. Davis, surviving heir of the late Lewis Johnson of Monrovia, Louise Dennis Scott, and the heirs of the late Levi R. Johnson of Grand Bassa County are co-heirs with the appellants of the late Elijah Johnson. Appellants in their

reply countered by stating that "the present litigation having been in progress during the last three years, respondents are not required at this stage to inform petitioners who the proper parties-petitioners are as all parties interested are before court." This plea in our opinion is evasive and is not a sufficient reply to the issue raised of non-joinder of parties-petitioners. Having omitted so many direct heirs, and in the face of the statute to prevent fraud in the management of intestate and other estates which we shall quote hereunder, which one of the several heirs would have ventured to have taken charge of the whole estate unless by regular

administration and authority of the Probate Court? The relevant portion of the statute reads: "No person or persons shall meddle, or interfere with the estate of any person dying intestate (except to take true and correct inventories of all the real and personal estate), unless authorized so to do by the Court of Probate, for the county wherein, such intestate resided; and any person so doing, shall thereby become liable for the payment of all the debts due by the deceased, and for the respective shares of all the natural or legal heirs to such estate. "When any person shall die intestate, it shall be the duty of the Probate Court, to appoint an administrator, or administrators who shall give bond and security in double the estimated value of said intestate's estate, for the faithful performance of all the duties connected therewith. . . ." Art. III, §§i 2 of the Judiciary Act, Old Blue Book, 118. The statute further provides in section three "that all estates on which letters of administration have been granted, shall be settled up, and the accounts closed . . [within] one year" and, when there are foreign claims, the time might be extended another six months. In the face of this statute and human nature are we expected to accept on its bare face the allegation made in the
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petition? But, for the sake of argument, suppose we accept as true that the estate was never administered and closed in accordance with the law just above cited, would not the application now made for a discovery of the estate, after a period of over eighty years from the death of the greatgrandfather of appellants, with a view as stated by appellants of thereafter applying to the Probate Court for administration, be affected by and barred by the statute of limitations? The longest period given by the statute of limitations in which one can successfully bring an action to recover possession of real property or assert title thereto is twenty years and that is by an action of ejectment. In this case in order to settle the question raised in count two of the bill of exceptions now under review, we shall bring forward the maxim in equity which says, "equity follows the law." Although courts of equity are not strictly within the statute of limitations, this is true in only one respect: they are not within the words of the statute, because the words apply to particular legal documents or remedies ; but they are within the spirit and meaning of the statute and have been always so considered. It may therefore be stated as a general rule that wherever in the claim of a legal estate the remedy is barred in a court of law by the statute of limitations, the remedy for an equitable estate in analogous cases will be equally barred. In the case Elnzendorf v. Taylor, 23 U.S. (to Wheat.) 752[1825] USSC 11; , 6 L. Ed. 289 (182s), Chief Justice Marshall speaking for the Court referred to a case in which a bill was filed in 7794 to set aside a conveyance made in 1726, alleged to have been fraudulently obtained. Said he, "There were some circumstances on which the plaintiff relied, as relieving his case from the laches justly imputable to him for permitting such a length of time to elapse; but they need not be noticed, because they were deemed insufficient by the Chancellor, and the

bill was dismissed. In discussing this point Lord Redesdale reviewed the cases which had been determined, and said, 'that it had been a fundamental law of state policy, in all countries, and at all times, that there should be some limitation of time, beyond which the question of title should not be agitated. In this country, the limitation has been fixed (except in writs of right, and writs depending on questions of mere title) at twenty years.' But it is said, that courts of equity are not within the statute of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered.' After reasoning for some time on this point, and citing several cases to show 'that whereever the legislature has limited a period for law proceedings, equity will, in analogous cases, consider the equitable rights as bound by the same limitation,' he says, 'a court of equity is not to impeach a transaction on the ground of fraud, where the fact of the alleged fraud was within the knowledge of the party sixty years before. On the contrary, I think the rule has been so laid down, that every right of action in equity, that accrues to the party, whatever it may be, must be acted upon, at the utmost, within twenty years.' " Id. at 173. We do not therefore support the views and contention of counsel for appellants with respect to count two of the bill of exceptions. Count one questions the legal correctness of the rulings on all issues covered in the decree of the trial judge. With reference thereto, after a careful study of the records and the case as presented to us, we find ourselves so entirely in accord with the decree handed down by His Honor Edward J. Summerville, the trial judge, that we have decided to reproduce in its entirety the said de-

cree with a few comments by way of amplification and elucidation on points covered therein. "DECREE: "This is a case in which the petitioners seek to discover from the respondents the estate of the late Elijah Johnson who died some ninety odd years ago, intestate, petitioners alleging that they with the respondents are heirs of the said Elijah Johnson, but the respondents have been withholding from petitioners their share of the property and money which have been accruing from the estate of the said Elijah Johnson. . . . So, for the purpose of having said estate administered and the property distributed among all of the heirs, they desire first to discover the assets of the estate. The written pleadings in this case are so voluminous that the Court required each party to condense his pleadings. They did this and each submitted his points of contention in a condensed form, and for the purpose of identification we have marked that submitted by petitioners with the letter 'A' and that which was submitted by the respondents with the letter 'B.' Among the requirements necessary to permit the discovery of any estate

in equity, may be named the following :" (I) Petitioners must be without adequate remedy at law. "(2) Discovery being in the nature of an ancillary suit, petitioners must have either first called or filed a suit at law or the bill must show clearly that petitioner contemplates doing so. 14. Cyc. p. 306 (a). "(3) All parties having a real interest in the property desired to be discovered must be included either as a party petitioner or party respondent. When a petitioner desires to file a bill of equity for discovery and any party having an interest therein refuses to join with pe-

titioner in the suit he must be made a party respondent, and when it is impossible to include an interested party in the suit, the Bill must show that he was at the time of the commencement of the action out of the jurisdiction or give such other legal reasons for omitting to include the party in the case. [Shipman, Equity Pleading 56 (1897).] "(4) It must be shown from the Bill that the respondents have the property in their possession, sought to be discovered. There are other requirements, but for the purposes of this ruling we mention only the above. "The first count in respondents' answer challenges the jurisdiction of the court. They premise that since the object of this case relates to an intestate estate, only the Monthly and Probate Court under our statutes has jurisdiction over such matters, and this court sitting in equity is without power to interfere. Counsel for respondents, in support of this contention, cited the second volunie of the Revised Statutes of Liberia, subsections 2 and 8 of section 1267. Subsection 8 of section 1267 provides that the Monthly and Probate Court shall have 'general charge, supervision and direction of the estates of deceased persons. . . .' The Old Blue Book is in agreement with the Revised Statutes on these provisions. Now, if a person dies intestate in Liberia, how does a party interested in his estate proceed to ascertain the assets and the administration of his estate? He makes application to the Probate Court which appoints appraisers to locate and value all of the property of the deceased person and to make and file an inventory of same. The Probate Court then proceeds to appoint administrators, who shall first pay all the debts, costs of administration, and thereafter, upon orders of the Probate Court, deliver the residue of the property over to the heirs.

Then the heirs themselves may partition the real estate among themselves, but if this should prove impossible, because of disagreement or otherwise, recourse may be had to the courts. In this case petitioners are seeking to discover the estate of Elijah Johnson. They want to see the deeds of all the property he left and the lease agreements of all the property leased ; they want to know how much money he left and the disposition of same with the rents. In our opinion appraisers appointed by the Probate Court may do this, rather it is their one and only duty, that is, to locate

all of the property of the deceased, value it, and report same to the Monthly and Probate Court. Appraisers also have the power to report to the Probate Court any person who might refuse to show property in his possession belonging to the deceased, or who has destroyed, cancelled, or appropriated the same ; and the Probate Court will summarily compel the production of such deeds or property, or, if the circumstances warrant, such persons may be chargeable for interfering with an intestate estate. In our opinion, therefore, if the object of the present case is to compel the respondents to produce the property of Elijah Johnson in order that same might be valued, accounted for, and administered, then under the statutes of this country the Probate Court has jurisdiction to order these done, and this Court sitting in equity ought not to interfere since petitioners have an ample, complete, and adequate remedy at law. "The next salient point to claim our attention is that of non-joinder as raised in count three of said Answer. The question then arises, why were they not joined in this action? If petitioners sought in vain to get them to join with them in instituting the suit, then petitioners should have joined them as respondents. The rule is stated as follows in Shipman, ' Equity Pleading:

'PERSONS UNITED IN INTEREST--All persons who are united in interest must join as complainants, except "'EXCEPTION--If the consent of any one who should have been joined as complainant cannot be obtained, he may be made a defendant, the reason thereof being stated in the bill.' (See Shipman Equity Pleading p. 49 [1897].) "'Persons who ordinarily should join as complainants, but who refuse their consent, may be joined as defendants.' [Id.] page 56. "If then any or all of them were out of the jurisdiction of the court, the bill should have so declared; or if there were other reasons why they should not be joined such reasons should have been fully set out in the bill. But why go to the common law when we have law in Liberia to the same effect, which has often been enunciated by the Honourable Supreme Court, as for example in the case: Melville H. Maurice and wife vs. W. S. Diggs, et al. The Supreme Court in that case laid down the principle under the Statute in Liberia that where parties in interest are not summoned to attend the time and place of trial, a judgment which affects their interest is void. ([1908] LRSC 2; [2 L.L.R. 3] See 1st Annual Series (Old) page 8 [1908].) "Now suppose we had jurisdiction to go into this case, should not the heirs who were not joined in this action be present in court to examine and inspect the deeds and account so as to be able to say whether the discovery were complete? We are afraid therefore that respondents' plea of non-joinder is well and correctly taken. "Another salient point in this case is the plea of limitations raised in the Answer. A lawyer in this court a few days ago whilst arguing a case said that only dishonest persons, to avoid just claims, take advantage of the plea of limitation. This may be true

as to some persons, but not of everybody. There are right and just reasons for the statute, and these reasons are explained by Bouvier as follows:-- "'Parties might, and often did, wait till witnesses were dead or papers destroyed, and then proceeded to enforce claims to which at an earlier date a successful defence might have been made. Titles were thus rendered uncertain, the tenure of property insecure, and litigation fostered. To prevent these evils, statutes were passed limiting the time within which a party having a cause of action should appeal to the courts for redress,--hence called statutes of limitation. . . .' See B.L.D. under Limitation. [2 Bouvier, Law Dictionary 1998 (Rawle's 3d rev. 1 9 1 4).] "Now Elijah Johnson has been dead about ninety odd years, yet petitioners are praying the court to compel his great-great-grandchildren to come into court and say how much property he left at his death and what has become of the property since his death ; to say how much of Elijah Johnson's property his children used and disposed of, how much these children left to F. W. R. Johnson and Gabriel L. Dennis, and how much these two gentlemen left to these great-great grandchildren, these happenings covering a period of about ninety odd years. If there are any cases in which the statute of limitations ought to apply, this in my opinion, is surely one. And in pleading same, we do not get the idea that it was from a standpoint of dishonesty; but because of the impossibility of the respondents to give the desired information. "In reading the petition carefully the petitioners made one submission, which if true, would legally offset the plea of limitation. In Court in count s of the petition it is alleged that H. R. W. Johnson during his lifetime by agreement among the heirs managed the estate of Elijah Johnson. If this were true then

the respondents who are the grandchildren of H. R. NV. Johnson would from the standpoint of equitable estoppel be barred from pleading limitation, for said count also avers that after the death of H. R. NV. Johnson the duties given under said agreement devolved on his son Gabriel Johnson who administered the estate of his father, in which was mixed the estate of Elijah Johnson, for and on behalf of the heirs. Now where is this agreement that the heirs of Elijah Johnson made among themselves by which H. R. W. Johnson one of their numbers was given the control and management of the estate for and on behalf of the others? If such an agreement exists, it surely must have been in writing as required by the Statute of Frauds, same relating to real property. Was an inventory of all the property made and attached to said agreement, which was surely necessary for the other heirs to know what property was being turned over to the management of H. R. W. Johnson. Who were the heirs who made this agreement? What were the terms, what was the life of the agreement; did the agreement provide who should take over the control of the property

after H. R. W. Johnson's death? In short, why was a copy of this agreement not filed with the petition so as to give notice to the respondents about what they would be expected to disprove at the trial? And next in the same count in the petition, petitioners aver that after the death of H. R. W. Johnson who controlled and managed the estate by agreement with the other heirs, said duties devolved on Gabriel Johnson who administered the estate of H. R. W. Johnson for and on behalf of the heirs. The words 'for and on behalf of the heirs' carry the idea of the said Gabriel Johnson acting with some colour of authority. In this connection, we ask who gave him this authority? Was it a court, or was it by agreement of the heirs? Surely he could not have proceeded to manage the

estate of his grandfather merely because he was administrator of his father's estate. And if he attempted to do so, why were no objections made by the heirs, some of whom at the time had reached their majority? And if it be contended that he acted with the consent and approval of the heirs, then where is this document which gave him this authority to control? For if it be true that the heirs did give him this authority any sane minded person would conclude that they kept some concrete evidence to show that they were giving to Gabriel Johnson authority to administer and for which he would be responsible. Neither the petitioners nor the reply pretend to give this information, although it was obvious that they should have proferted these agreements with the inventory of the property of Elijah Johnson which was first turned over to H. R. W. Johnson by the heirs and thereafter controlled by Gabriel Johnson for and on behalf of the heirs of H. R. W. Johnson. "Supposing we say that in the days of Elijah Johnson, families were not very particular about making written agreements between themselves, and the agreement between H. R. W. Johnson and the other heirs was made verbally; nor did they make a written inventory of all the property of Elijah Johnson. How now could the respondents show what the terms of this oral agreement were and the quantity and value of Elijah Johnson's property? Surely not by oral evidence because such a witness would have to show that he was old enough at the death of Elijah Johnson to properly understand all about the agreement and the property concerned, and if Elijah Johnson died some ninety years ago this witness would today be over one hundred years of age, an age at which the human mind and memory invariably will have begun to fail. And if the heirs cannot tell what H. R. W. Johnson took over from his father, and what he disposed of,

how could they correctly ascertain what part of the property came into possession of Gabriel Johnson, who took over from his father H. R. W. Johnson, who has been dead so years? I am afraid the whole proposition places

the respondents in a very difficult position, and in our opinion they rightly plead the statute of limitation. "It is to be observed that petitioners enumerated in count 3 of their petition real property alleged to be that of Elijah Johnson and gave in the attached schedule the numbers, descriptions and situation of same together with agreements for those leased and by which rents accruing therefrom may be ascertained. If they know this then this alleged part of Elijah Johnson's estate does not need to be discovered. "What we have said, however, on the subject of limitation relates to the whole estate of which Elijah Johnson was possessed at the time of his death 90 some odd years ago, which is the subject matter of this case as shown in count 3 of the petition, and not only to that portion shown on the schedule filed with the petition. "There are other very interesting points of law raised in the pleadings but from what we have already said herein there is hardly any need for us to consider them. "I should like to observe, however, that I do not think the statute of limitations ought to bar the right of Christiana Burke, one of the petitioners, because petitioners say that they have evidence to prove that Gabriel Johnson and Fred H. Johnson, respectively, who have not been dead 20 years acknowledged her to be one of the heirs of Elijah Johnson and alloted to her some of the property and money accruing from the rents. If this be true the respondents would he estopped from pleading the statute of limitations as against the right of the said Christiana Burke to con-

tinue to enjoy said estate as one of the heirs. This fact, however, would have to be proved by evidence, but since we have sustained certain pleas in bar to this action it is evident that we cannot hear any evidence in this connection, which if favourable to Mrs. Burke would enable us to make a decree in her favour, for same would be simply obiter dictum. "In view of the reasons given this action is therefore dismissed with cost against the petitioner ; AND IT Is SO ORDERED.

"Given this 22nd day of October A.D. 1946. [Sgd.] EDWARD SUMMERVILLE Judge presiding by assignment." Apart from the question raised of the statute of limitations barring the bill, the question of laches was also relied upon by respondents and referred to by the judge in his decree. There is a defense peculiar to courts of equity founded on lapse of time and staleness of claim where no statute of limitations directly governs the case. In such cases the courts often act upon their own inherent doctrine of discouraging for the peace of society antiquated demands by refusing to interfere where there has been gross laches in prosecuting rights or long acquiescence in the assertion of adverse rights. In this case it is unquestioned that Elijah Johnson died over eighty years ago; that appellants over twenty years ago reached their majority; that they were in full knowledge of the fact that the said Elijah Johnson was their ancestor; that the parents of respondents owned and controlled and enjoyed the tracts of land listed and made profert of by appellants in their petition; that

Gabriel Johnson, one of the appellants, was appointed as and acted as an administrator of the estate of the late Gabriel M. Johnson, the father of some of the respondents, and executed agreements of lease for properties as to which he with the other petitioners now apply for discovery;

and that no excuse or explanation has been set forth in the said petition for the gross delay in not desiring an administration of the estate of the late Elijah Johnson before this time, as a preliminary of which, appellants say, they have filed the bill in equity for discovery, the subject of these proceedings, although to all intents and purposes the property to be discovered or the greater portion thereof is already known to them. The doctrine of discouraging stale and antiquated suits referred to above often is founded principally on the equity maxims, "he who seeks equity must do equity," "he who comes into equity must come with clean hands," and "the laws serve the vigilant, and not those who sleep over their rights," and is based on considerations of public policy. In Ruling Case Law the principle is laid down that: "While statements are to be found in some of the cases intimating that unreasonable delay, and more lapse of time, independently of any statute of limitations, constitute , a defense in a court of equity, the generally accepted doctrine appears to be that laches is not like limitation a mere matter of time, but is principally a question of the inequity of permitting a claim to be enforced, this inequity being founded on some change in the condition or relations of the property or the parties. Since lapse of time has a tendency to obscure evidence, and often makes it impossible to discover the truth, it is, of course, one of the elements to be considered by the court in applying laches to stale claims, but it is only one, and while important, it is not ordinarily the controlling or most important one. Hence, it has been said, laches in legal significance, is not merely delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce

them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right. When a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief." 10 R.C.L. Equity § 143, at 396 (19is). The object of discouraging these suits is, "[T]o exact of the complainant fair dealing with his adversary, and the rule was adopted largely because after great lapse of time, from death of parties, loss of papers, death of witnesses, change

of title, intervention of equities, or other causes there is danger of doing injustice, and there can be no longer a safe determination of the controversy." Id. § 142. It is to be observed that the question of laches is addressed to the sound discretion of the court and each case must depend upon its own peculiar circumstances. The circumstances in any given case put forward to constitute laches are, of course, questions of fact, but the conclusion whether on the facts it would be inequitable to enforce the right, and whether the claimant is barred by lathes, involves questions of law. In the case at bar the circumstances constituting laches set out in the answer of respondents were not denied by petitioners and hence may be considered admitted. There was consequently no issue of fact to be proved. During the argument before this Court counsel for petitioners contended that the question of limitation was one of fact and that the judge erred in ruling thereupon. In reply to this we shall cite Page v. Harland, involving ejectment, in which this Court took the following position: "At the trial of the cause the court below overruled the demurrer and held that the plea of limitation raised by appellants in bar of the suit was a mixed

question, triable by a jury. The appellants excepted to this ruling of the lower court, and in their bill of exceptions addressed to the consideration of this tribunal have laid this point as their first exception. The nature and quality of a plea in bar, pleading the Statute of Limitations, is so distinctly understood in law, and the rules have been so uniformly and clearly laid down by this judicature, that it is difficult to understand how the court below could have mistaken the law controlling same. In the case of Thomas Cassell against Matilda Richardson, determined by this court in 1876, it was held that 'a plea specially pleading the Statute of Limitations in bar to a suit is a question purely of law, and under the statutes of this Republic could only be tried and determined by the court. . . " i L.L.R. 463 (1906). We do not consider it necessary to go any further as the issues so far decided are of sufficient importance and cogency to warrant us affirming the decree of the court below with costs against petitioners, now appellants; and it is hereby so ordered.
Afflrmed.

Jantzen v Williams [1935] LRSC 8; 4 LLR 280 (1935) (1 February 1935)

C. F. WILHELM JANTZEN, by and through his Agent, W. FRITZ, Appellants, v. FRANK N. WILLIAMS, Appellee.
APPEAL FROM CIRCUIT COURT,
FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued on the facts * January 21, 1935. Decided February 1, 1935. 1. All contracts conveying real estate must be probated and registered within four months from the date of execution or they are voidable. 2. But there is no such legal obligation upon a party to have probated a contract of employment. 3. Hence, section 1305 of the Revised Statutes is to be construed as permissive insofar as contracts other than conveyances of real estate are concerned, and not compulsory. 4. When a party shall have excepted to a verdict, and given notice that he would file the necessary papers, the trial judge should not enter final judgment until at least four days shall have elapsed.

On argument on the merits of appeal from judgment in action for damages for breach of contract, judgment reversed and case remanded for new trial. Barclay & Barclay for appellants. for appellee. Abayomi Karnga

MR. JUSTICE DIXON delivered the opinion of the Court. This case comes up to this Court from the Circuit Court of the First Judicial Circuit, Montserrado County, on a bill of exceptions containing seven counts. On the reading of the bill of exceptions it was discovered by this Court that counts one and seven thereof were of such great importance to the issue involved, that we could not properly proceed further with the hearing of the case without first passing on those two counts of the bill of exceptions.

*
See opinion on the motion to dismiss, p. 231, supra.

Count one reads as follows : "Because Your Honor sustained the objection made by the defense counsel to the admissibility of the document marked 'Exhibit A' on the ground that said document being the employment contract has never been probated and registered within four months in keeping with the law of 1862-3." During the argument at this bar counsel for appellee contended that concurrently with the law of 1862-63 should be read section 1305 of the Revised Statutes dealing with the duties of the Registrar; and so the Court has considered the arguments made on the two citations together. r. The law on probate and registration from the Acts of 1861, page 90, section i reads in part: (C . . . all persons purchasing Real Estate, or to whom Real Estate shall be mortgaged, shall, at the next ensuing meeting of the Probate Court, appear, either in person or by proxy, and then and there have said deed, mortgage or other conveyance publicly probated." And 2 Revised Statutes, section 1302, reads : "If any person shall fail to have any instrument relating to real estate * probated and registered, as herein provided, within four months after its execution, his title to such real property shall be null and void as against any party holding a subsequent instrument relating to such property, which is duly probated and registered." 2. The law dealing with the duties of the Registrar reads : "r. He shall record all instruments relating to real estate upon the probate of the same, and all other instruments under seal, such as assignments for the benefit of creditors, bills of sale, partnership deeds, articles of incorporation of domestic companies

and
· Italics added.

associations, and such other agreements between two
or more parties as they may
desire to have recorded. . . ."* 2 Rev. Stat. § 1305 (I) .

The first law thus quoted makes no mention of contracts of employment, but such contracts and conveyances only as relate to real property. This requirement of the law is in order that the public may have notice of the conveyance intended by the parties to the contract to be made, and that an opportunity may be afforded them for offering any objection to such transaction if they so desire. In the case of a contract where there is no conveyance of real property in question, the probation and registration of such a contract of employment is not intended to be included in the requirement of the law on probation and registration of contracts, conveyances, etc. When it comes to the effort of Mr. Karnga to read into the law governing conveyances, that in prescribing that "the Registrar shall record . . . such other agreements between two or more parties as they may desire to have recorded," we have to say that, that provision is not only not compulsory, but is permissive; and unlike the previous section requiring conveyances of real estate to be recorded, has no vindicatory clause such as in section 1302 of the Revised Statutes hereinbefore quoted, and the Act of 1861. West v. Republic, L.L.R. 410, 412 (19 3). 0 The appellants further contend in count seven of their bill of exceptions that : "Your Honour rendered final judgment in said case on the 12th day of July A.D. 1934 which was the second day after rendition of verdict; . . ." The record discloses that the plaintiffs excepted to the verdict, and gave notice that in due time they would file the necessary papers. In the face of such a notice by plaintiffs, this Court cannot support the court below in

* Italics were added by the
Court.

handing down its judgment within two days after the verdict. For : "Every motion for a New Trial must be made within four days after verdict, or if on the ground of the verdict's being against evidence, law, or instructions of the court or of a mistake in the amount of damages, within two days." Wherefore, in consequence of these errors committed by the court below, this Court says that the judgment should be reversed, the case remanded for a new trial; and the costs of the appeal proceedings to be paid by appellee, and the other costs to abide final judgment; and it is so ordered. Judgment reversed.

Johnson v Powell et al [1934] LRSC 32; 4 LLR 221 (1934) (21 December 1934)

JAMES E. JOHNSON, Plaintiff-in-Error, v. JOHN W. POWELL and His Honor MARTIN N. RUSSELL, Circuit Judge, Second Judicial Circuit, Grand Bassa County, Defendants-in-Error.
APPLICATION FOR WRIT OF ERROR TO CIRCUIT COURT OF SECOND JUDICIAL CIRCUIT, GRAND BASSA COUNTY.

Argued December 10, 1934. Decided December 21, 1934. 1. An action of injunction is not a possessory action, nor an action to recover money for damage done, nor to decide title to real property. 2. Its function is to afford preventive relief, and not redress for wrong already committed. 3. The Supreme Court is unable to reveiw the decisions of an inferior court, no matter how erroneous they may appear fo be, if the record does not show that an exception has been taken to the decision complained of at the time it was pronounced. 4. An exception is a protest against the ruling of a court upon a question of law, intended as a warning that said point would be submitted to the appellate court for review, so as to give the court an opportunity to reconsider its ruling, and opposing counsel the opportunity of consenting to a reversal thereof. 5. If the parties compromise and settle a judgment, an appeal or writ of error cannot thereafter be taken, and if taken, should be dismissed.

Application for writ of error to Circuit Court of Second Judicial Circuit, Grand Bassa County, to reverse judgment in injunction action and quash writ of execution. Application denied.
James E. Johnson
for plaintiff-in-error. Harmon for defendant-in-error. H. Lafayette

MR. JUSTICE DIXON delivered the opinion of the Court. This is an injunction proceeding instituted in the Circuit Court of the Second Judicial Circuit, Grand Bassa County, by James E. Johnson, petitioner, against John W. Powell, defendant, praying that the court would enjoin and restrain the said John W. Powell, the defendant in an action of injunction, now one of the defendants-in-

LAC v Hage et al [1995] LRSC 44; 38 LLR 259 (1995) (7 December 1995)

LIBERIA AGRICULTURAL COMPANY, Petitioner/Appellant, v. **ELIAS T. HAGE**, **ST. MICHAEL AGRICULTURAL COMPANY**, and the **JUDGE OF THE DEBT COURT FOR MONTSERRADO COMPANY**, and **THE SHERIFF OF THE DEBT COURT FOR MONTSERRADO CO.**, Respondents/Appellees.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE DENYING A PETITION FOR A WRIT OF PROHIBITION.

Heard: November 27, 1995. Decided: December 7,1995.

1. Irregularities in the service of the writ of the execution and an auction sale can only be reviewed by appeal or error and not by prohibition.

2. Prohibition cannot assume the function of an appeal to revoke a bill of sale that has been issued.

3. The purchaser of property sold by a sheriff pursuant to execution may recover the purchase price from the judgment creditor who receives the proceeds if the property is recovered from such purchaser in consequence of an irregularity in the sale or a ruling vacating, reversing, or setting aside of the judgment upon which the execution was based.

4. The issuance and delivery of a bill of sale to the highest bidder as well as the deed executed and delivered in pursuance thereof, does not preclude the judgment debtor from seeking a relief in the court from which the execution issued.

5. Where there are irregularities in the execution of a judgment, relief should be sought in the court from which the execution issued.

6. The fact that there is a valid judgment does not preclude an attack upon an execution sale held thereunder and the deed executed and delivered in pursuance thereof.

7. A court having jurisdiction to hear and determine civil cases has general supervisory control over the process of execution, and the power to determine every question of fact and law which may be involved.

8. A judgment debtor whose property is seized by an execution sale may either directly or collaterally attack the execution by a motion to vacate the sale or by the institution of an action to recover the possession of the property from the execution purchaser.

9. It is the duty of litigants, for their own interest, to so surround their causes with the safeguards of the law as to secure them against any serious miscarriage of justice and thereby pave the way to secure the great benefits which they seek to obtain under the law. Litigants must not expect the courts to do for them that which is their duty to do for themselves.

10. A writ of prohibition to a court of first instance will be issued only where the court exceeded its jurisdiction or proceeded in a novel or unheard of manner. It will not be issued merely to correct a party's neglect to act in his own interest.

11. Prohibition will be granted when the trial court is without, or exceeds its jurisdiction, or proceeds contrary to rules which ought to be observed at all times, or where a party litigant is not afforded due process of law.

12. Prohibition cannot revoke a bill of sale from an execution sale, where the petitioner failed to file either a motion to set aside the bill of sale or a complaint for the recovery of the property so seized.

These prohibition proceedings emanate from alleged irregularities in the service of the writ of execution, the auction of the goods, chattels, and lands of petitioner, and the transfer of title of petitioner's rubber plantation to respondent growing out of a final judgment of the Debt Court for Montserrado County. Petitioner contends that the service of the writ of execution was contrary to law; that its rubber plantation and the concession rights thereto granted by the government of Liberia should not have been included in the sale; and that the transfer of title to its rubber plantation pursuant to the said execution sale to respondent, was illegal.

The Chambers Justice denied the petition holding that in as much as there seem to have been some irregularities in the service of the writ of execution, the auction and the transfer of title, these irregularities can only be reviewed by appeal or error and not by prohibition. On appeal, the Supreme Court confirmed and affirmed the ruling of the Chambers Justice.

In affirming the ruling, the Supreme Court held that prohibition cannot lie to revoke the bill of sale or the transfer of title to respondent and that the procedure for petitioner to have followed was either to file a motion to set aside the sale or a complaint in the debt court for the recovery of the properties seized.

Wiefur Seyieh, in association with *H. Varney G. Sherman* appeared for the petitioner. *Clarence L. Simpson, Jr.,* and *Farmere G. Stubblefield* appeared for the respondents.

MR. JUSTICE SACKOR delivered the opinion of the Court.

This case is one that has caused quite a bit of media sensation in the country. We believed that the nature and scope of the property rights herein involved have given rise to such public attention. However, in our capacity as referees, we are duty bound to look solely at the facts as transcribed and properly transmitted to us in due course of appellate review, and ultimately take recourse to applicable law in adjudicating the principal issues presented.

The co-respondent in this prohibition proceeding, Elias T. Hage, instituted an action of debt on June 2, 1994 against the petitioner herein, the Liberian Agricultural Company(LAC), at the Debt Court for Montserrado County for the sum of US$218,584.00. The action was heard and final judgment entered on August 30, 1994 against the defendant company to pay the amount of US$ 218,584.00 plus interest. There was no appeal taken. The records before us disclose that the defendant company, upon rendition of final the judgment, filed a motion for a deferred payment. Notice of said motion was issued and acknowledged by counsels of both parties, but movant and his counsel did not appear on the day for hearing of the motion for deferred payment, as provided by statute on default on motion.

The defendant company filed a motion for the court to rescind its ruling dismissing the motion for deferred payment. This motion was resisted, heard and denied. Defendant company appealed from said ruling but failed and neglected to take any necessary jurisdictional steps to perfect the appeal. The trial court dismissed the appeal and proceeded to enforce its judgment. The clerk of the debt court was accordingly directed to prepare a writ of execution to be served on the defendant company for the collection of US$218,584.00 plus six percent interest per annum. The Debt Court Judge further directed that failure of defendant to pay this judgement, the clerk

should issue notices of sale of the personal property of defendant. The trial judge relied on the statute relating to the sale of personal property. Civil Procedure Law, Rev. Code 1:44. 41(1)(2).

On the 27th day of October, A. D. 1994, the clerk of the debt court issued a writ of execution commanding and authorizing the co-respondent sheriff to levy on the "goods, chattels and lands" of the judgment debtor and sell them at a public auction. The sheriff thereupon on the same date issued a notice of sale pursuant to the judgment, and a writ of execution to sell the subject properties to the highest bidder on the ground of defendant's premises on the 6t h day of November, A. D. 1994 at 10:00 in the morning to raise the amount of US$240,803.40 including principal, interest and other charges. On the 8th day of November, 1994, the corespondent sheriff, by a letter, informed the co-respondent judge of the form and manner of the sale indicating corespondent Elias T. Hage, as the highest bidder with the sum of US$255,000.00.

On the 10th Day of February A. D. 1995, the defendant company being dissatisfied with the form and manner of the sale of its premises, filed a petition for prohibition before Mr. Justice Frank W. Smith, then Chambers Justice presiding over the court at the time, requesting this court to order the respondent judge to revoke the bill of sale. The petition was resisted, argued and denied by the Chambers Justice. The Chambers Justice ruled as follows:

"As much as there seem to have been some irregularities in the service of the writ of the execution, the auction sale and the manner in which title to the LAC Rubber Plantation was acquired, such irregularities were taken against the court prior to the satisfaction of the judgment. Irregularities committed by the trial court may only be reviewed by appeal or error and not by prohibition. There remaining nothing further to be done by the court below in this matter, and the judgment which was not appealed from having being completely enforced and satisfied, we find no legal ground on which to grant the peremptory writ of prohibition. Prohibition will not assume the function of appeal to revoke the bill of sale that had been issued."

It is from this ruling that the petitioner, defendant company in the court below, appealed to this court *en bane,* for a review and final determination of this case. During the pendency of the appeal before this court, the Government of Liberia by and thru the Ministry of Justice, filed a motion to intervene in the prohibition proceedings along with a petition for prohibition to protect the equitable interest of the Liberian Government in the defendant company (LAC), and requested this Court to reverse the execution of the judgment debt and or set aside and vacate the execution sale. But the Government of Liberia by and thru the Minister of Justice, Counsellor Francis Y. S. Garlawulo, subsequently withdrew said motion and the petition without prejudice to the state.
The petitioner contended that the writ of execution was served on its corporate assets located in

Grand Bassa County which writ was endorsed by the purported debt court judge, Nathaniel K. Hodge, when in fact the Debt Court for Grand Bassa County had not been reactivated. Petitioner also argued that the writ of execution should have been served on any of its corporate officers as provided by law, and that the service of the execution was contrary to law.

Petitioner further contends that after service was made on the corporate assets of the defendant company, the sheriff did not make any schedule of the properties seized with an itemized appraised value; which properties included the rubber plantations valued at over Thirty million United States Dollars(US$30,000.000.00), together with the value of the stock or processed rubber which was also seized, valued about 1.5 Million United States Dollars, plus other personal properties. Petitioner contends that the value of the defendant's company's assets seized and exposed for sale are in excess of the amount of the US$240,803.40 awarded to the respondent by the debt court judge.

Petitioner strongly argues that the rubber plantations of the defendant and the concession rights granted by the Government of Liberia should not have been repealed, and that the auction sale was not conducted in Grand Bassa County where the properties are located and where they were levied upon; instead, the sale was done in the City of Monrovia, Montserrado County, and only those who were connected with Mr. Hage, the judgement creditor, and himself participated in the bid. Petitioner succinctly maintains that the auction was not public as required by law. He therefore prays that the Supreme Court grant the writ of prohibition ordering the co-respondent judge to revoke the bill of sale and any other rights acquired by any purchaser at the execution sale; that the petitioner be restored to the rights of its concession agreement and that the co-respondent judge may order the issuance of another writ of execution, if the petitioner does not satisfy the judgement debt upon the service of the writ of execution on petitioner's personal properties before its real property interest.

The respondents on the other hand contend that the debt action being closed and nothing left to prohibit, prohibition will not lie after three months and six days when the judgment was satisfied. Respondents also argued that the debt court judge had jurisdiction over the subject matter and the defendant company and that said trial judge did not exceed his jurisdiction nor did he proceed by any rule contrary to those which ought to be observed at all times. Respondents maintain that the alleged errors and irregularities complained of by the petitioner company can be reviewed and corrected either by writ of error, certiorari, or a regular appeal but not prohibition as requested by the petitioner.

Respondents strongly maintain that Article XI, Paragraph Three (3), of the concession agreement between the Government of Liberia and the defendant LAC provides for the transfer of the said

concession agreement and that the incorporeal assets of LAC are transferrable to any party(ies) and not restricted only to LAC' s subsidiaries. Respondents also argue that the incorporeal assets of LAC within the concession agreement with the Liberian Government, contain no real property, but such assets that are limited to the personal rights of LAC to operate the concession area, its accessory works, installations, produce and equipment used to operate within the concession area. Further, respondents contend that there is no transfer of realty as the realty in the concession area continues to be the property of the Liberian Government, except for the concession rights carved out of the fee leaving unto the government its reversionary interest.

Respondents argue that due to armed hostilities in LAC' s former concession area, and given that some of the properties auctioned, like the rights to operate the concession area, the Debt Court was given the right by the statute to auction such personal property(ies) of LAC without being in the view of those attending the sale. Respondents strongly maintain that the subsequent consent from the appropriate agencies of the Liberian Government (Ministries of Justice, Commerce, Agriculture and Foreign Affairs) granting the respondent company the right to operate the concession area legally, it acquired the property rights once held by LAC in the concession agreement of the Government of Liberia, and that respondents cannot be deprived of its property rights without a due process of law. Respondents therefore request this court to uphold the ruling of the Chambers Justice denying the issuance of the writ of prohibition.

The decisive issues relevant to the final determination of these prohibition proceedings are:

(1) Whether or not prohibition is the proper remedy to set aside a bill of sale of an alleged irregular and excessive execution sale in a regular trial?

(2) Whether or not the petitioner had other remedies available at the trial court to relief itself from the execution sale?

We shall firstly discuss what the petitioner asserts in Part II, Sub-sections 2.1 and 2.2, Page 3 of his amended brief as the purpose of and the basis for the writ of prohibition, so as to safeguard and confine ourselves to such purpose and basis for the determination of this prohibition proceeding. We shall hereunder quote word for word said purpose and basis of the petition for the benefit of this opinion.

"II. PURPOSE AND BASIS FOR THE PETITION FOR THE WRIT OF PROHIBITION.

2.1. It should be established here very clearly that at the time of the filing of the petition for the writ of prohibition, petitioner was not, and still is not questioning the trial and the judgment; petitioner is merely questioning the execution and the execution sale. It should also be established here that most of the irregularities complained of in the writ of prohibition are irregularities that petitioner could not have become aware of until subsequent to the execution sale and the issuance of a bill of sale to the highest bidder.

2.2. It is this bill of sale that petitioner seeks to have this honourable court revoked and declared null and void for substantive legal reasons. And petitioner believes that the only remedy available to it to undo that which has been illegally done by the trial court or court officials is the writ of prohibition."

It is clearly shown that the trial of the debt court was regular and the judgment was sound in law and not subject for review before this court, but that the form and manner of the execution sale was allegedly irregular, which irregularities petitioner alleges before this court that he was not aware of until subsequent to the execution sale and the issuance of a bill of sale to the highest bidder and judgment creditor, Elias T. Hage. Petitioner therefore requests this court of last resort to revoke the bill of sale and declare same null and void for substantive legal reasons. Petitioner relies on *Dweh v. Findley et al.[1964] LRSC 23;* , *15* LLR 638 (1964), in which this court held that where there is no statute or precedent to support an act of an inferior court, prohibition will lie if it can be shown that such acts adversely affects the rights of the petitioning party. In that case, the trial judge denied a motion to dissolve an injunction in an ejectment action wherein an appeal to this court was pending. This court granted prohibition against the execution of a judge's oral instruction to a sheriff which was contrary to the judges formal ruling on the same matter which this court felt was prejudicial to the petitioning party. In the instant case, the trial judge's instructions to the sheriff for the issuance of an execution is in conformity with his formal ruling and the trial judge never proceeded contrary to rules which ought to be observed at all times. There is also a statutory provision for the recovery of a purchase money from the judgment creditor for the property sold by the sheriff pursuant to execution.

Petitioner cites in support of his argument *Boye v. Nelson,* [1978] LRSC 33; 27 LLR 174 (1978) which says that "prohibition is a proper remedy not only to prohibit the doing of an unlawful act by a lower court but also for undoing what has already been unlawfully done under authority of the Court." In that case, the writ was against the enforcement of a void judgment against a stranger who was not a party to the action or brought under the jurisdiction of the court, thereby denying him his day in court and a due process of law. In this case, the defendant company was

brought under the jurisdiction of the lower court and had its day in court as well as satisfying with the judgment of the debt Court.

Petitioner also cited the *case Aminata Shipping Lines v. Hellenic Cruising Holidays,* 37 LLR 91 (1992), wherein Mr. Chief Justice Bull said, as follows:

"Further, in as much as the judge below attempted to proceed by rules different from those which ought to be followed and observed, prohibition will not only prohibit the doing of an unlawful act, but will undo what has been already been done. It is our holding therefore that the judgment dismissing the damage suit in this case is declared null and void and that the said damage suit remains as it was when it was originally filed." In the above cited case, the trial judge refused to recuse himself from hearing the motion to dismiss an action of damages and subsequently dismissed the action prior to ten (10) days before the opening of his court contrary to statute, and further attempted to enforce his final ruling dismissing the action in spite of an announcement of an appeal from the ruling This Court therefore granted prohibition for lack of jurisdiction, for proceeding by wrong rules contrary to statute, as well as for denying the petitioners right of appeal as provided for by the Constitution.

We shall now discuss the issue whether or not the petitioner had other remedies available at the trial court to relieve itself from the execution sale. Petitioner vehemently contends that the execution and the execution sale were irregular and should therefore be declared null and void in this prohibition proceedings because it does not have any other remedy to relieve itself from the execution sale. The petitioner avers that he became aware of the bill of sale after the execution sale before applying for the writ of prohibition. As stated earlier in this opinion, our statutes provide a remedy to recover from a purchaser in consequence of an irregularity in the sale pursuant to execution by a sheriff. The relevant statute is hereunder quoted for the benefit of this opinion:

"The purchaser of property sold by a sheriff pursuant to execution, may recover the purchase money from the judgment creditor who receives the proceeds if the property is recovered from such purchaser in consequence of an irregularity in the sale or vacating, reversal, or setting aside of the judgment upon which the execution was based." Civil Procedure Law, Rev. Code 1:44.45.

The issuance and delivery of the bill of sale to the highest bidder as well as the deed executed and delivered in pursuance thereof does not preclude the judgment debtor from seeking relief in the court from which the execution issued. It is a fundamental principle of law that:

"Generally, relief should be sought, if at all, in the court from which the execution issued. The fact that there is a valid judgment does not, of course, preclude an attack upon an execution sale held thereunder and the deed executed and delivered in pursuance thereof " 30 AM JUR 2d., *Executions, §* 607, pp. 788-789

The Supreme Court is a constitutional court whose jurisdiction is constitutionally restricted. The circuit court is created by statute and its jurisdiction is also prescribed by statute. The debt court has jurisdiction in civil cases for debt and therefore has a general supervisory control over its process of execution and execution sale. As such, it is clothed with authority to determine upon a complaint by either party, of any irregularity resulting from the issuance of an execution and execution sale, as in this instant case. It is
further held that:

"A court having jurisdiction to hear and determine civil cases, has general supervisory control over its process of execution, and that for all its purpose of preventing injustice, an execution is within the inherent, equitable control of the court. This power carries with it the right to determine, in a summary manner, and without the intervention of a jury, every question of fact and law which may be involved. The control of the Court continues until all orders concerning the property of the execution debtor have been obeyed. Moreover, writs of execution and proceedings thereunder only come under judicial supervision on complaint of either party." 30 AM. JUR. 2d., *Execution, §* 3, pp. 447. A judgment debtor whose property is so seized by an execution sale may either directly or collaterally attack the execution by a motion to vacate the sale by institution of an action to recover the possession of real estate from the execution purchaser. See 30 AM JUR 2d., *Execution, §* 622.

It was incumbent upon the aggrieved judgment debtor to have availed itself of the statutory provision in this jurisdiction as well as the fundamental laws, in conformity with our statute, to relieve itself from the execution sale. This Court has held that:
"It is the duty of litigants, for their own interest, to so surround their causes with the safeguards of the law as to secure them against any serious miscarriage and thereby pave the way to securing of the great benefits which they seek to obtain under the law. Litigants must not expect the courts to do for them that which is their duty to do for themselves." *Bryant et al. v. Harmon and Oost Afrikaansche Compagnie,* 12 LLR 405, 409 (1957) This Court is mindful of its constitutional obligations to render a fair and impartial judgement in causes over which it has both original and appellate jurisdiction to enhance a smooth operation of a good government, but it cannot render such judgment where it does not have jurisdiction over such causes as may be brought before this court, as in the instant case. Further, we wonder why lawyers practicing before this court are hiding their negligence and carelessness in handling the interest of their

clients who are injured and expected to deserve a fair and transparent judgment by failing to avail themselves of remedies available to their clients' interests and expect the court to usurp the jurisdictional functions of the lower courts as in this case.

We shall now discuss the issues whether or not prohibition is the proper remedy to set aside a bill of sale of an alleged irregular and execution sale in a regular trial. Petitioner in this prohibition proceedings basically requests this court to declare null and void the execution sale and revoke the bill of sale issued in pursuance thereof for alleged irregularities with respect to the issuance and service of the writ of execution and the auctioning of the judgment debtor's properties in excess of the judgment amount awarded.

This Court has held that:

"A writ of prohibition to a court of first instance will be issued only where the court exceeded its jurisdiction or proceeded in a novel or unheard of manner. It will not be issued merely to correct a party's neglect to act in his own interest." *Francis v. Pynches et al.[1963] LRSC 6;* , 15 LLR 224, 226 (1963).

The Supreme Court of Liberia by virtue of its statutory and constitutional appellate jurisdiction over remedial writs, will not hesitate in granting such writs, especially prohibition, when the trial court is without, or exceeds its jurisdiction or proceeds contrary to rule which ought to be observed at all times; and where a party litigant is not afforded a due process of law. *See Boye v. Nelson,* [1978] LRSC 33; 27 LLR 174 (1978); *Ayad v. Dennis,* [1974] LRSC 42; 23 LLR 165 (1974), *Aminata Shipping Lines v. Hellenic Cruising Holidays;* 37 LLR 91 (1992). Prohibition cannot revoke the bill of sale as requested by counsel for petitioner as said counsel neglected to act in the interest of his client by filing either a motion to set aside the bill of sale or a complaint at the debt court which supervises the execution sale for the recovery of the property(ies) so seized.

The debt court having jurisdiction over the subject matter and the defendant company, and the trial being regular, without denial of petitioner's right of due process of law, this Court is reluctant to disturb the sound ruling of the Chambers Justice; but to deny this petition for want of jurisdiction and the availability of other remedies for the petitioner to relieve itself from the execution sale at the debt court in accordance with the statute. Civil Procedure Law, Rev. Code 1:44.45.

Wherefore and in view of all we have said herein above, the ruling of the Chambers Justice appealed from, is hereby confirmed and affirmed. The alternative writ is hereby quashed and the petition is hereby denied with costs against the petitioner. The Clerk of this Court is hereby ordered, absent any revocation of the bill of sale, to notify the respondent to take possession of the properties so seized by the execution sale and to further notify the court below by sending a copy of this opinion for its files. And it is hereby so ordered.

Petition denied.

Vaswani v Atlantic Marketing Co. [1990] LRSC 13; 36 LLR 768 (1990) (9 January 1990)

P. H. VASWANI, Appellant, v**. ATLANTIC MARKETING COMPANY (ATMARK),** Appellee.

MOTION TO DISMISS APPEAL FROM THE NATIONAL LABOUR COURT, MONTSERRADO COUNTY.

Heard: December 11, 1989. Decided: January 9, 1990.

1. Any piece of property offered as security on bond must be unencumbered.

2. Under our laws, procedure and practice, a bond is required for any appeal emanating from the National Labour Court to the Supreme Court.

3. Exceptions deemed by the court to have been taken unnecessarily, or for vexation or delay may, upon notice, be set aside with cost.

4. Where there is no returns on the back of the notice of completion of appeal by the sheriff, it will be presumed that the notice of completion of appeal was not returned.

5. Where an appeal bond contains no indemnification clause, such omission is a material defect.

6. An appeal bond is totally defective when it fails to fix the monetary penalty for which the indemnification clause will bind both the principal and sureties, thereby holding them answerable to comply with their obligation.

Appellant instituted an action of wrongful dismissal against the appellee at the Ministry of Labour and judgment was rendered in appellant's favor. Appellee excepted and appealed to the National Labor Court. The National Labour Court, after hearing the appeal, reversed the judgment of the hearing officer, and the appellant appealed to the Supreme Court.

While the appeal was pending before the Supreme Court, the appellee filed a motion to dismiss the appeal for reason that the appeal bond was legally deficient. After hearing the motion and the resistance thereto, the Supreme Court sustained the motion, *dismissed* the appeal, and ordered the enforcement of the judgment of the labour court.

Elijah Garnett, Sr. appeared for the appellant/respondent. *Charles Walker Brumskine* appeared for the appellee/movant.

MR. JUSTICE BELLEH delivered the opinion of the Court.

This case has its origin from the Ministry of Labour where a ruling was rendered against appellee by the hearing officer. Appellee excepted to said ruling and appealed to the National Labour Court for a judicial review of the hearing officer's ruling. The National Labour Court, after hearing arguments from both sides, ruled against appellant herein, and thereby reversed the ruling of the hearing officer of the Ministry of Labour. Appellant being dissatisfied with the decision of the National Labour Court, excepted to it and announced an appeal to the Supreme Court of Liberia, which appeal was granted. The case was therefore brought before us for our review and final determination.

At the call of the case, this Court was informed that a motion to dismiss the appeal had been filed in the office of the Clerk of this Court. We hereunder quote the relevant portion of said motion for the benefit of this opinion:

"MOTION TO DISMISS APPEAL"

1. That the appeal bond is insufficient and defective in that the security for the bond, the real property offered by the surety Bernice N. Williams is encumbered for an amount of $55,000.00 as an injunction bond in a motion of injunction before the Seventh Judicial Circuit as is more fully shown by copies of the sheriffs certificate and Clerk's Certificate, as well as the injunction bond hereto attached and marked exhibits "A", "B" and "C" respectively. Appellee, therefore, prays that the appeal be dismissed. Sections 51.8, 63.1(b) and 63.2(2)of the Civil Procedure Law.

2. That the condition of the bond, that the appellant will appear before the Supreme Court at the call of the case to prosecute same, is contrary to the statutes controlling. Copy of the appeal bond is hereto attached as exhibit "D". Appellee submits that appellant is obliged to give an appeal bond to the effect that he will indemnify the appellee from all costs or injury arising from the appeal, if unsuccessful, and that he will comply with the judgment of the appellate court or any other court to which the case is removed. Appellee therefore prays that the appeal be dismissed. Section 51.8, Civil Procedure Law."

To the above motion to dismiss, the appellant filed the following resistance:

"AMENDED RESISTANCE TO MOTION TO DISMISS APPEAL"

1. As to count 1 of appellee's motion, appellant says that same should be ignored as the law on appeals with regard to bond only requires that the bond should be sufficient and approved by the court. Nothing is mentioned as to whether the property applied as security to the bond should be properly encumbered or unencumbered. Section 51.8, Civil Procedure Law Rev. Code 1.

2. Further to count 1 of the motion, appellant says that the filing of a bond by an appellant in the Supreme Court is not a statutory requirement in labor cases and therefore, the bond so filed by the appellant, as a matter of law and fact, is just a surplusage. *Kobina et al. v Abraham[1964] LRSC 2;* , 15 LLR 502 (1964); Labour Practices Law; INA decree no. 21 Decree Establishing the National Labour Court.

3. Also as to count 1 of the motion, appellant says that same is legally impotent since two sureties signed the bond and the appellee did not challenge the ability of the Cosurety Sophia Wleh to satisfy the costs of court and comply with its judgment. One would wonder what injury will accrue to the appellee if it obtains judgment in its favour other than cost of court. *Dennis and Dennis v. Holder et al.[1950] LRSC 4; , 10* LLR 301(1950); *Van EE v. Gabbidon, [1951] LRSC 17; 11* LLR 65 (1951).

4. Appellant also says that the decree setting up the National Labour Court did not provide for bond on appeal.

5. Further as to count 2 of movant's motion, respondent says same should be dismissed as a legal nullity for the movant has manifestly waived his right to except to the sureties on the bond within three days as required by statute. Instead the notice of completion of appeal was issued on the 9th day of October 1987 and a copy served on the movant. Yet, he waited six months thereafter to except to the sureties on the bond, to be exact, on the 1 8THday of April 1988, when the bond had already been approved by the judge. Failure of the appellee to except in the court below to the financial sufficiency of the sureties to an appeal bond within three days after receipt of notice of the filing of the bond constitutes a waiver of his objection and warrants denial of a motion to dismiss the appeal. The object of an appeal bond is to secure to the appellee his costs and to assured the court of compliance with the judgment. The intention of the Legislature in passing an act stating the grounds for dismissal of an appeal was to discourage the dismissal of appeals on technical grounds and to give to appellants an opportunity to have their cases heard by the .Supreme Court on the merits. Section 63.5, Civil Procedure Law; *Kerpai v Kpene,* [1977] LRSC 4; 25 LLR 422 (1977).

6. Under the statute, an appeal bond is only defective when it is not accompanied by an affidavit of sureties from the Bureau of Revenue indicating that the sureties own the properties offered as security on the bond. *Kamara and Kabbah v. Khalill Niam Bros.* [1973] LRSC 2; 21 LLR 402, 404 (1973).

7. Also, the Civil Procedure Law, which the labor law follows, forbids more than 10 (ten) days for filing a bill of exceptions or more than (60) sixty days for filing the appeal bonds or notice of completion of appeal. *Standard Motor Corp. v. Pratt,* 21LLR 381, 387 (1972).

In resisting appellee's motion to dismiss, appellant contended in count one of its resistance that there is no law which requires that property offered as security for a bond be unencumbered. Taking recourse to section 63.1 of the Civil Procedure Law, Rev. Code 1, with respect to "security for bonds," we observe that "except otherwise provided by statute, any bond given under this title shall be secured by one or more of the following:

(a) cash to the value of the bond or cash deposited in the bank to the value of the bond as evidenced by a bank certificate;

(b) unencumbered real property on which taxes have been paid and which is held in fee by the person furnishing the bond,

(c) valuables to the amount of the bond which are easily converted into cash; or

(d) sureties who meet the requirements of section 63.2."

Subparagraph (b) as quoted above, requires that any piece of property offered as security on a bond be unencumbered. Count one of the resistance is therefore overruled.

In count two of the resistance, appellant also contended that the filing of a bond by an appellant in the Supreme Court is not a statutory requirement in labor cases. We disagree with appellant on this point, in that, in section 23.2 of the 1986 statute amending the Labor Practices Law of Liberia and decree no. 21 of the INA relative to the "jurisdiction and procedure" in the National Labour Court, it is stated therein that "the procedure and enforcement by the National Labour Court shall be the same as in the debt courts except as modified herein."

Under this law and in keeping with our practices and procedure, a bond is required for any appeal emanating from the debt court to the Supreme Court. Hence, the contention of appellant is untenable. Count two of the resistance is therefore overruled.

In count three of the resistance, appellant further contended that "since two sureties signed the appeal bond in this case and appellee did not challenge the ability of Co-surety Sophia Wleh to satisfy the costs of court and comply with its judgment, one would wonder what injury will accrue to appellee if he obtains judgment other than costs of court?"

Taking recourse to Section 63.5 of the Civil Procedure Law, we observe that it is provided that "a party may except to the sufficiency of a surety by written notice of exceptions served upon the adverse party within three days after receipt of the notice of filing of the bond. Exceptions deemed by the court to have been taken unnecessarily, or for vexation or delay may, upon notice, be set aside with costs."

A careful perusal of the record in this case shows that appellant's appeal bond was filed on the 9th day of October 1987. The notice of completion of appeal was also filed on March 10, 1988 at 2:30 p.m. Moreover, there is no indication as to when the said notice of completion of appeal was served on appellee, since there was no returns made at the back of said notice of completion of appeal by the sheriff of the National Labour Court.

Hence, it must be presumed that the notice of completion of appeal was never returned because returns of the sheriff of any precept is indeed considered evidence that such precept was served. Under these circumstances, the contention of appellant that appellee did not timely challenge the sufficiency of appellant's appeal bond after being served three days cannot be sustained. Had the sheriff returned the notice of completion of appeal and indicated the date of service thereon, we are of the opinion that appellee would have been in the position to except to the sureties within statutory time and challenge their ability to comply with the judgment if appellee so desired. Therefore, count three of the resistance is also overruled.

The appeal bond submitted by appellant and transmitted to this Court on appeal reads thus:

"APPELLANT'S APPEAL BOND " KNOW ALL MEN BY THESE PRESENTS: That we, P.E. Vaswani, principal/appellant, of the City of Monrovia, Liberia and Bernice Williams and Sophia Wleh, sureties, all of the City of Monrovia, Montserrado County and Republic aforesaid, being freeholders within the Republic of Liberia, do hereby bind ourselves firmly by these presents that the said P. E. Vaswani, principal/ appellant will well and truly follow up their appeal in the Supreme Court of the Republic of Liberia, or any other court to which said cause may be removed, for the payment of the sum of $50,000.00 in the judgment rendered against appellant in an action: petition for judicial review."

The condition of this bond (appeal) is that P. H . Vaswani, principal/appellant will appear before the Supreme Court for October Term A. D. 1987 at the call of the case to prosecute the case in an action of wrongful dismissal. Then and there these presents shall become null and void. Otherwise to remain in full force and effect." "The penalty of this bond is $50,000.00."

A careful perusal of the appellant's appeal bond reveals that the appeal bond contains no indemnification clause, an omission, which in our opinion, is a material defect. The statute controlling appeal from lower courts to the Supreme Court of Liberia positively prescribes the manner in which an appeal before this Court may be entertained and the omission of any essential requisites renders said appeal bond null and void.

The appeal bond filed by appellant is totally defective in that said appeal bond failed to fix any monetary penalty for which the indemnification clause will bind both the principal and the sureties, thereby holding them answerable to comply with their obligation. The omission of such an indispensable prerequisite in said appeal bond makes it totally defective and renders the appeal dismissible.

Generally the object of an appeal bond with qualified sureties is to assure to the appellee his costs and to assure the court of compliance with its judgment. Nowhere in the bond filed by appellant does he obligate himself to indemnify the appellee from all costs and injury arising from the appeal and that he will comply with the judgment of the court to which the cause may be removed. Therefore, counts one and two of the motion are sustained.

In count four of the resistance, appellant contended that "the decree setting up the National Labour Court did not provide for bond on appeal." This issue having been raised in count two of the resistance and thus passed upon previously in this opinion, we are of the opinion that further comment on the same issue is unnecessary and, therefore, count four is overruled.

Count five of the resistance relates to appellant's failure to have excepted to the sureties within statutory period after the service of the notice of completion of appeal. This issue having also been discussed in count three of the resistance further comment is equally not necessary. Hence, said count five of the resistance is overruled.

In count six of the resistance, appellant contended that "under the statute an appeal bond is only defective when it is not accompanied by an affidavit of sureties from the Bureau of Revenue indicating that the sureties own the properties offered as security." In count one of the resistance, the question of what constitutes a sufficient bond under our law having been dealt with by us in this opinion, we also feel that further comment is unnecessary. Hence, count six is overruled. Count seven of the resistance not being material to the issue, same is hereby overruled.

In view of the authorities cited, coupled with the circumstances surrounding this case, the motion to dismiss the appeal being sound in law, the same is hereby granted and the appeal dismissed. The Clerk of this Court is hereby ordered to send a mandate to the trial court to resume jurisdiction and enforce its judgment. Costs ruled against appellant. And it is so ordered.

Motion granted; appeal dismissed.

Simpson v Obeidi et al [1968] LRSC 12; 18 LLR 273 (1968) (18 January 1968)

C. L. SIMPSON and T. EDWIN LOMAX, legal guardians of CHRISTIAN C. MOORT, Appellants, v. GEORGE OBEIDI, and all persons acting directly or indirectly under him in the construction of a building at designated premises, Appellees;
APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued October 26, 1967. Decided January 18, 1968. 1. To warrant the issuance of the writ of injunction it must clearly be shown that some act has been done, or is threatened, which will produce irreparable injury to the party seeking the injunction. 2. An injunction will not be issued to allay the fears and apprehensions of parties. It must be shown that the acts against which protection is sought are not only threatened, but will in all probability be committed, to their injury. 3. An injury to be irreparable, under the requirement for issuance of a writ of injunction, must appear to be so from its own nature, as when the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard, or that the party who must respond in damages is incapable of it.
4. Where the facts or the law on which the right to injunctive relief is based are in doubt, equity will not grant a writ of injunction, but will first require determination thereof in a court of law.

During the life of a leasehold on real property entered into between the defendant and the plaintiffs' predecessors in interest, fire destroyed the leased buildings, which defendant was in the course

of replacing when a temporary writ of injunction was obtained by plaintiffs against defendant, who moved to dissolve the injunction.
The motion was granted by the lower court. On appeal, the ruling of the lower court was affirmed. C. L. Simpson, Sr. and M. F. Jones
for appellant. Joseph W. Garbor for appellees. MR. Court.
JUSTICE MITCHELL

delivered the opinion of the
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C. L. Simpson and T. Edwin Lomax, legal guardians of Christian C. Moort, all of Monrovia, appellants herein, sued on an
action of injunction against George Obeidi and all persons acting directly under him in the construction of a building situated and
being on the corner of Gurley and Broad Streets, in the City of Monrovia, County of Montserrado, and bearing the number '123. The
action was brought in the Circuit Court of the Sixth Judicial Circuit, sitting in its Equity Division, December 1965 Term. The facts
are as follows : Sarah Jean Moort, widow of the late Isaac Moort, and Rev. J. D. K. Baker, trustee for Christian C. Moort, instituted
a lease agreement for the lease of lot number 123 in Monrovia, with George Obeidi, for a certain number of years. The building located
on these premises was destroyed by fire in the month of December 1964, during the life of the leasehold, which incident was not traced
to any act of the defendant. When George Obeidi began construction work on the premises to build a more improved building, plaintiffs
forbade his doing so unless he entered into another agreement, regardless of the fact that the life of his agreement had not expired.
They claimed he was operating under an agreement that was of no legal effect, since Sarah Moort, one of the lessors, had no right
to execute a lease for the property because she did not own title thereto, and Rev. J. D. K. Baker was only clothed with legal authority
to protect and preserve the real and personal properties of the said Christian C. Moort, who suffers from some disability. The defendant
appeared and answered, and we quote herein counts four, five, six, and seven of his answer : "4. And also because defendant says
that plaintiffs, as guardians for Christian C. Moort, have through their present counsel, the Simpson law firm, recognized the validity
of the lease agreement which they now inconsistently seek to impeach and repudiate, for

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they, in a letter
dated June r, 1965, in their capacity as guardians for Christian C. Moort, directed defendant George Obeidi to pay to one Melinda SimpsonGrass the monthly
rental for the premises which he had paid to the late Sarah Jean Moort, a copy of which is marked exhibit 'A,' and made profert herewith

as a part of this answer. iC 5. And also because defendant says that plaintiffs, though admitting in count 2 of their complaint that Sarah Jean Moort and J. D. K. Baker, as trustee for Christian C. Moort, did execute the lease agreement in question, alleged that J. D. K. Baker, as trustee, had no authority to lease this property, should have made profert of a copy of the document appointing J. D. K. Baker as trustee for Christian C. Moort, from which plaintiffs concluded that J. D. K. Baker as trustee had no authority to dispose of the said property in the manner done in order to notify both the defendant and the court what they intended to prove in this connection. "6. And also because defendant denies that Sarah Jean Moort, who according to law had a life interest in the property together with J. D. K. Baker as trustee of Christian C. Moort had no legal authority to deal with defendant as they did.
"7. And also because defendant denies that destruction of the building by fire extinguished his leasehold rights as is indirectly suggested in count 3 of the complaint." Subsequent to the filing of this answer, the defendant filed a ten-count motion to dismiss the suit for an injunction, which the plaintiffs opposed. Hon. Joseph P. Findley, then presiding over the Sixth Judicial Circuit, heard the motion and made the following ruling on November io, 1965: "By virtue of 32 AM. JURIS. § 216, the lessor has a right to protect his property after its destruction, by

fire or otherwise, against the lessee who seeks to enter upon the premises and build. In this instant, the court does not grant ordinary injunctive relief. It goes further, in the nature of specific performance, that is to get the parties to some understanding whereby the lessee might enjoy the balance of his leasehold right, if the same has not yet terminated, as in this instant case. For the destruction of the building upon the devised premises, does not of itself terminate the lease. (See relevant portion of Section 828.) So we called in the parties and they agreed to certain terms as our minutes show, and as the document marked by court `CI' will show, in connection with the injunction, which was mainly to stop the defendant from carrying on the work of the building. It is elementary to state these stipulations are binding on the parties with respect to the stopping of the work on the building. The court, however, in its disposition to discourage a multiplicity of suits, made it clear that if they were agreed, then all the other actions should be withdrawn. This morning, one of the parties, counsellor C. L. Simpson, also of counsel for plaintiffs, brought up another matter. Sarah Jean Moort, by and through her attorney, C. L. Simpson, plaintiff, v. George Obeidi and Lloyd Insurance Company of London, to pay the $25,000.00 subject to counsellor Simpson's submission, and counsel held that unless this payment is made to plaintiffs they will not sign the stipulations; well, it is a different matter altogether, and the court sitting in chancery, may compel parties to perform acts which they have stipulated to perform, the statute of frauds notwithstanding. (See Pennoh v. Pennoh, 13 L.L.R. 48o (1960).) Moreover, the court will not require plaintiffs' counsel to withdraw his suit for injunction upon receipt of this $25,000.00,

and/or other matters that he may have filed, in keep ing with our last order with respect to the stipulations,

for the matter of withdrawal is only permissive and not mandatory, but this court will surely have the parties sign under the terms which they have agreed upon. This court therefore, rules that the injunction filed on October 29, 1965, be and the same is hereby dissolved and that defendant be and he is hereby further required to continue the construction of this building, as the said stipulations show that the parties to the lease and occupancy of this property are satisfied, notwithstanding the matter of the $25,000.00, which is open to judicial determination at any time. "We have already said that examining the matter from all aspects of both law and equity, except for this $25,000.00, which is a distinct matter altogether, the interests of both parties, that is to say, the lessor and lessee, in our modest opinion are very well satisfied and so they may sign the stipulation. Costs of these proceedings to be borne by the parties. And it is hereby so ordered." To this ruling plaintiffs noted exceptions and brought their appeal before this Court on a bill of exception, tantamount to appellant's complaint, consisting of one count, which reads as follows : "The appellees filed their answer and motion to dissolve said injunction and appellants filed their opposition accordingly on November 3, 1965. The court adjourned the hearing to meet both parties, and thereafter the court adjourned the hearing to meet on Friday, November io, 1965. When the court resumed hearing on the matter it delivered its ruling dissolving said injunction, which ruling appellants considered materially prejudicial to their interest and then and there excepted to said ruling and gave notice of appeal to the Supreme Court of Liberia, March 1966 Term." Notwithstanding that this bill of exception presents no traversable issues, but rather attacks the ruling of the

court below itself, yet we have endeavored to give it full consideration. Before undertaking to determine the appeal, we will set forth the contents of a letter written to George Obeidi, defendant in this case, by one Mr. Fahnbulleh Jones, counsellor at law for the Simpson law firm, dated January 1, and prior to the institution of these injunction proceedings. "Dear Mr. Obeidi : "On behalf of our clients, C. L. Simpson and Mr. T. Edwin Lomax, legal guardians of Christian C. Moort, we are requesting that the amount of $200.00 dollars paid monthly to the late Sarah Jean Moort as per agreement, be now paid to Mrs. Malinda SimpsonGrass, who is now responsible for taking care of Mr. Christian C. Moort. We expect that you will confirm this request without any hindrance or delay." This letter is found in the record of this case and forms a part thereof. It is self-explanatory and acknowledges the genuineness of the lease right of the defendant to the tract of land bearing number 123. It also acknowledges the right vested

in Sarah Jean Moort and Rev. J. D. K. Baker to lease the said property. Yet thereafter the identical guardians undertook to institute this action in chancery, predicated upon the fact that the lessors were without legal authority to lease the premises in question, which is contradictory to the first position. A further probe into the record shows that when this case was called in the lower court for ruling, counsellor C. L. Simpson, speaking for the plaintiffs, made the following statement prior to the entering of the court's ruling: "The plaintiffs appreciate the position taken by the court in this matter, which we think is very excellent in behalf of the plaintiffs and the defendant. However, my attention has been called to the fact by some of my colleagues, as well as members of the Moort

family, to the effect that though they are in agreement substantially with the other points agreed to, nevertheless, a case of injunction was filed in January of this year and in addition to that we communicated with lawyers of the defendant, which will be found as exhibits `G' and 'H' in the cancellation proceedings. The said communications are dated October I, 1965, and October 5, 1965, relating to the sum of $25,000.00, for which the house owned by the Moorts was insured with Lloyd Insurance Company, Monrovia. Inasmuch as the defendant is entitled to the sum of $8o, 000.00 covering his personal effects, the plaintiffs are entitled to the sum of $25,000.00 on behalf of the Moorts, which represents the sum for which the building was insured. "If the defendant is prepared to take care of this item, we shall be prepared to withdraw all of the cases filed in these proceedings, that is to say, the injunction filed in January last year, the ejectment proceedings. As soon as this point is settled, we shall be prepared to sign up." Now that we have opened and examined all of the record brought on appeal, we feel ourselves competent to proceed into the merits thereof. In the first place, we would like to make it plain and clear that an injunction suit is ancillary to some main suit because it does not determine title. Again, the law dictates that where an adequate remedy is available at law, the court may dissolve an injunction suit at any stage, even independently of a motion made by defendant for the purpose. This is a case in which an appeal has been brought against the ruling of the trial judge for dissolving the injunction. The wording, of course, of the ruling of the court from which the appeal has been brought is involved, but we shall reach this point later in this opinion. The injunction was sued out to prevent the defendant from

constructing a building on the premises for which he held a leasehold right from the lessors, and if, as alleged by plaintiffs below in their complaint, the lessors were incompetent to lease the said premises, this was purely and simply a question to be determined by law and not in equity, or in equity by cancellation.

In Cooper v. Macintosh, [1944] LRSC 27; 8 L.L.R. 400 (1944), at p. 404, Mr. Justice Barclay, speaking for this Court, said, and I quote : "Where the right of a party is doubtful, an injunction will not in general be granted to prevent an interference therewith until the right is established at law. Nothing is better settled as a rule of equity procedure than that the complainant is not entitled to a preliminary injunction to protect a right which depends on a disputed question of law, and which question has never been adjudged in his favor by a court of law. When the principles of law on which rights are disputed will admit of doubt, a court of equity, although satisfied as to what is the correct conclusion of law upon the facts, will not, without a decision of the courts at law establishing such principles, grant an injunction. So if the facts on which the right to the injunction is based are in dispute the injunction will not be granted. . . ." The Court continued at pp. 404, 405 "To warrant the allowance of the writ of injunction it must clearly appear that some act has been done, or is threatened, which will produce irreparable injury to the party asking for injunction. Unless this be made to appear, an injunction should be denied. If, however, the injury threatened be irreparable, either from its own nature, as when the party injured cannot be adequately compensated therefor in damages or when the damages which may result therefrom cannot be measured by any certain pecuniary standard. . . ." In this case, defendant George Obeidi held a leasehold right in the property for a certain term of years. Before

the expiration of this right, the building on the aforesaid lot number 123 was burnt by fire. He started to construct a more durable and modern building on the aforesaid premises, which involved no irreparable injury to the property. Plaintiffs brought suit for an injunction to restrain him and all persons working directly or indirectly on the construction, though it promised improvement to the value of the property, and no injury to it could have resulted from the construction. This fact the law cannot be blind against. If, in the opinion of the plaintiffs, the lessors did not have the right to lease the property, they should have gone to law and there sought their rights, for chancery cannot and will not restore rights which are without its province to do. "Injunctive relief is granted to protect some property or other right of the complaining party, from actual or impending injury that is otherwise irremediable." 28. AM. JUR., Injunction, § 282. Considering the ruling of the court below on which the bill of exceptions was brought, there was no necessity for the trial judge to have explored the rights of landlords and tenants or lessors because this was exclusively the duty of a court of law, and dissolving the injunction was in harmony with the law and equity and must be affirmed. The bill of exceptions is, therefore, not sustained, because of the adequate and complete remedy available at law to the appellants. Therefore, the ruling of the court below is hereby affirmed, with costs against appellants. And it is hereby so ordered.

Meridien Biao Bank Ltd v Maha Industries [2001] LRSC 36; 40 LLR 772 (2001) (20 December 2001)

MERIDIEN BIAO BANK LIBERIA LIMITED, a Financial Institution organized and operating under the laws of Liberia, by and thru its Acting President and CEO, V. V. VAIDYANAATHAN, and Credit and Marketing Manager, LETITIA BROWN, and other Authorized representatives, Appellant, v. MAHA INDUSTRIES INCORPORATED, by and thru its General Manager, FARID HYKAL, 1st Appellee, FARID HYKAL, Shareholder, MAHA INDUSTRIES INCORPORATED, 2nd Appellee, JOSEPH KASHOUH, Shareholder, MAHA INDUSTRIES INCORPORATED, 3rd Appellee, and WAHIB KASHOUH, Shareholder, MAHA INDUSTRIES INCORPORATED, 4th Appellee.

MOTION TO DISMISS APPEAL FROM THE DEBT COURT FOR MONTSERRADO COUNTY.

Heard: November 14, 2001. Decided: December 20, 2001.

1. The amount of an appeal bond shall be fixed by the trial judge with two or more sureties, and shall be to the effect that the appellant will indemnify the appellee from all costs and damages arising from the appeal and that the appellant will comply with the judgment of the appeal court or any other court to which the appeal is removed.

2. Unless the court orders otherwise, the surety on a bond shall be either two or more natural persons who fulfill the requirements of the appeal statute, or an insurance company authorized to execute surety bonds within the Republic.

3. The Supreme Court has the constitutional and statutory responsibility to interpret the laws and not to legislate.

The appellant's action of debt brought against the appellees was dismissed by the Debt Court for Montserrado County on the ground that the failure of the appellees to pay the debt owed the appellant was due to force majeure. From this judgment the appellant announced an appeal to the Supreme Court. Thereafter, the appellees filed a motion to dismiss the appeal, alleging that the appellant had served a notice of completion of its appeal on them without first serving them with

a copy of the appeal bond for their inspection and challenge, that the appeal bond was defective in that it had only one surety rather than two sureties as prescribed by law, and that the affidavit of sureties that accompanied the appeal bond was not sufficiently identifiable to create a lieu on the amount of the bond.

The Supreme Court rejected the appellees contentions, noting that the primary question for determination was whether the insurance company which stood surety for the appellant was authorized to execute surety bonds within the Republic. The Court held that under the laws of Liberia, an appellant could secure two sureties to its bond, being natural persons who owned unencumbered real property in Liberia, or that alternatively an insurance company authorized to execute surety bonds can in fact serve as surety to an appeal bond. In the instant case, the Court said, the articles of incorporation of the insurance company which stood the appellant's bond authorized the insurance company to execute appeal bonds, and that therefore it was statutorily a legally qualified surety. Hence, the Court denied the motion to dismiss and ordered the case reassigned for disposition on the merits.

Isaac E. Wonasue, Sie-A-Nyene Yuoh, and Frederick D. Cherue appeared for the appellant while Farmere C. Stubblefield of the Stubblefield and Associates Law Firm appeared for the appellees.

MR. JUSTICE SACKOR delivered the opinion of the Court.

The records in this case show that on April 21, 1995, the appellant herein, Meridian BIAO Bank Liberia Limited, instituted an action of debt against the appellees in the Debt Court for Montserrado County, claiming the sum of US$1,220,444.31 and L$8,624.84. The trial judge, upon conclusion of the evidence, rendered his final on the 8th day of December, A. D. 1995, dismissing appellant's cause of action due to force majeure. The appellant excepted to the ruling and announced an appeal to this Court for appellate review. The appeal was granted and subsequently perfected as required by law.

At the call of the case for hearing, the appellees informed this Court that they had filed a motion to dismiss the appellant's appeal, alleging, among other things, the following:

1. That the appellant had served the appellees with a notice of completion of the appeal without previously serving them with a copy of its appeal bond so as to provide them with the opportunity to inspect the said bond and to properly determine its effectiveness and sufficiency.

2. That the appellant's appeal bond was defective and insufficient, in that it was filed with only one surety instead of two sureties as prescribed by section 51.8 of the Civil Procedure Law; and

3. That the affidavit of sureties that accompanied the appeal bond in the amount of 1.9 million dollars was not sufficiently identifiable to establish a lien on said amount, in that it was not accompanied by a bank certificate to the value of the bond.

The appellant filed its resistance to the motion to dismiss, contending as follows:

1. That the appellees were not deprived of the opportunity to inspect the bond and determine its effectiveness and sufficiency and that the appellees did indeed inspect the said bond prior to the filing of their motion.

2. That a surety on an appeal bond may be either two natural persons or an insurance company, and that the bond posted by the appellant and secured by Madison Insurance Company as surety satisfies the requirement provided for under sections 51.8 and 63.2 of the Civil Procedure Law.

3. That a bond secured under section 63.2 of the Civil Procedure Law does not require a bank certificate to the value of the bond to be given to the sheriff.

The decisive issue for the determination of this case is whether or not the appeal bond posted by the appellant, with only Madison Insurance Company as surety thereon, renders the said bond defective and insufficient.

Section 51.8 of the Civil Procedure Law provides that the trial judge shall fix the amount of an appeal bond given by every appellant, with two or more legally qualified sureties, to the effect that the appellant will indemnify the appellee from all costs and damages arising from the appeal and that the appellant will comply with the judgment of this Court or any other court to which the case is removed. Section 63.2(1) also defines legal sureties. We hereunder quote the relevant statutory provision for the benefit of this opinion.

"Who may be sureties: Unless the court orders otherwise, a surety on a bond shall be either two natural persons who fulfill the requirements of this section, or an insurance company authorized to execute surety bonds within the Republic"

The question that comes to the mind of this Court is whether or not appellant's surety, Madison Insurance Company, is authorized by law to execute surety bonds in Liberia? Article II, section 9 of the articles of incorporation of the aforesaid company provides, inter alia:

"To become surety and to execute any bail bond or guarantee in lieu of bail or other bond or guarantee for whatever purpose the same may be required. To execute fidelity and surety bonds within the Republic of Liberia in accordance with the Civil Procedure Law, Liberian Code of Laws Revised, title 1, chapter 63, bonds and security, section 63.2, pages 255 to 267, 'Legally qualified sureties: to serve as surety in attachment cases or to serve as surety in garnishment or assets belonging to borrowers."

We observed from the above quoted provisions of the articles of incorporation that the appellant surety, Madison Insurance Company, is statutorily authorized to execute surety bonds within this Republic. The appellees, however, contended that appellant's appeal bond has only one surety and that a bond which has only one surety instead of two or more sureties, pursuant to section 51.8, is defective, inadequate, and insufficient. They therefore requested this Court to dismiss the

appeal. We disagree with the contention of the appellees that because the appellant's appeal bond has only one surety it is insufficient. The controlling statutory provision states that an insurance company can be authorized to execute surety bonds within this Republic. The language of section 51.8 of the Civil Procedure Law is clear; it states that an appeal bond may be secured by either two or more sureties or an insurance company authorized to execute such bonds in Liberia.

This Court is mindful of its constitutional and statutory duties and responsibilities to interpret the laws and not to legislate. The intent of the lawmakers is to afford a party appealing to this Court the opportunity to secure an appeal bond with either two or more natural persons as sureties or an insurance company which is authorized by law to execute surety bonds as in the instant case. Indeed, this Court recently held that the legislative intent of the provision of section 51.8 of the Civil Procedure Law is that an appeal bond may be secured by either two natural persons as legally qualified sureties who are owners of unencumbered real properties or an insurance company authorized by law to serve as surety. The Intestate Estate of the Late Willie J. M. Bowier v. Williams et al.[2000] LRSC 9; , 40 LLR 84 (2000), decided on May 12, 2000 at the March Term, A. D. 2000 of this Court; Freeman and Wesseh v. Lewis et al.[2000] LRSC 11; , 40 LLR 103 (2000), decided on July 21, 2000 at the March Term, A. D. 2000 of this Court.

Wherefore, and in view of the foregoing, it is the holding of this Court that the motion to dismiss should be and the same is hereby denied. The Clerk of this Court is hereby ordered to redocket this case for hearing on its merits. Costs are to abide the final determination of the case. And it is hereby so ordered.

Motion denied.

Moore et al v Woods [1965] LRSC 32; 17 LLR 64 (1965) (18 June 1965)

SYDNEY N. **MOORE and THOMAS N. MOORE, Grandchildren and Heirs of THOMAS MEDLEY MOORE**, Deceased, Appellants, v. E. TYSON WOODS, Appellee.
APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, GRAND BASSA COUNTY.

Argued March 11, 1965. Decided June 18, 1965.
1. A hypothetical question is a combination of assumed or proved facts or circumstances, stated in such form as to constitute a coherent and specific situation or state of facts upon which the opinion of an expert is asked by way of evidence in a trial. 2. The basis of judicial determination of relevancy of testimony is generally the same on cross-examination as on direction examination ; but on crossexamination as to credibility, the issue to which the testimony must be relevant is not a primary issue raised in the pleadings but a collateral issue of the credibility of the testimony. 3. A trial court may exclude testimony which lacks probative value by reason of repetitiveness. 4. Lack of notice of the probation of an executor's deed cannot be asserted against the deed by heirs of

the testator in an ejectment action after the deed has been duly admitted to probate.

Appellants instituted an ejectment action against appellee in the circuit court, alleging that the executor and executrix of their grandfather's will had illegally sold and conveyed certain real property to appellee for admeasurement of dower on behalf of the testator's widow who was also executrix. After the circuit court had rendered a judgment by default in favor of the appellants, the appellee was granted an alternative writ of error by the Justice presiding in Chambers and the writ was subsequently made absolute. Thereafter the cause was remanded for new trial and judgment was rendered on a jury verdict in favor of appellee. On appeal to the Supreme Court the judgment was affirmed.
0. Natty B. Davis for appellants. Laurence 41. Morgan and Jacob H. Willis for appellee.
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delivered the opinion of the

Court. Thomas Medley **Moore**, late of the City of Edina in Grand Bassa County, died testate in the year 1940, leaving as executor and executrix Urias A. Potter and Rose A. **Moore**. Appellants herein, the grandchildren and surviving heirs of the testator, who were plaintiffs in the court below, filed an action of ejectment in the law division of the Circuit Court of the Second Judicial Circuit, Grand Bassa County, against E. Tyson Woods, defendant therein and appellee before this Honorable Court, wherein it was alleged that appellee was unlawfully and illegally detaining Lot No. 28 and Lot No. 29 of Buchanan, Grand Bassa County, from appellants. Their complaint further alleged that said illegal detention had been occasioned by an unlawful sale of Thomas N. **Moore**'s property by his named executor and executrix. In the complaint, which to say the least was unskillfully drafted, appellants also alleged that the properties, subject of the instant litigation, were sold to appellee for the admeasurement of dower in behalf of the executrix who was the testator's wife. After pleadings were rested and an exchange of argument had by the parties in the court below, His Honor James A. A. Pierre, then assigned circuit judge presiding over the Circuit Court of the Second Judicial Circuit, Grand Bassa County, on the loth day of August, 1953, ruled the case to trial on two issues of fact relating primarily to the factual circumstances entitling either of the parties adversary to legal possession of the property in question. Pursuant to the determination of the court, the case was assigned for trial. The record transmitted to us shows that trial was had and judgment by default entered against appellee herein on March 3, 1955. Thereafter, a writ of error was sued out in the Chambers of Mr. Justice

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Harris, the Justice presiding in Chambers. It appears that the application for the writ of error was granted and the alternative writ subsequently made absolute. Thereafter the case was remanded and a new trial had during the August 1962 term of the Circuit Court of the Second Judicial Circuit, Grand Bassa County, His Honor Joseph Findley, resident circuit judge, presiding. On September 24, 1962, the jury entered a judgment against appellants which was subsequently confirmed and on October 9, 1962, exactly io years from its date of incipiency, the cause was concluded on the trial level. From this final judgment as rendered, an appeal was prayed for and had by appellants in order that this Court of last resort might be able to pass upon the legal authentictiy of the final judgment as concluded against appellants. Appellants' bill of exceptions contained eight counts, most of which had to do with points of evidence on which the trial judge ruled against appellants. We have carefully examined all the counts as laid in the bill of exceptions and, in our opinion, Counts 3, 4, 6, and 8 are not of sufficient legal import in the circumstances to be dealt with individually. Suffice it to say that this matter may be judicially resolved by us without having to pass upon them. Count i of the bill of exceptions deals with the following question put to witness E. Tyson Woods by counsel for appellants : "Mr. Witness please explain, McIntosh being the higher bidder, and from your own statement you being absent from the county at the time, how came you to be awarded an executor's deed instead of McIntosh who was the higher bidder, or your wife for whom McIntosh was a proxy?" The record shows that appellee objected to the question as not being the best evidence and also due to the fact that it was irrelevant. The trial court overruled the objections but disallowed the question on the ground that it was hypothetical.

It is immediately apparent that the learned trial judge misconceived the legal import of the word hypothetical as same relates to a query posed during the trial of a cause. A hypothetical question is defined as : "A combination of assumed or proved facts and circumstances, stated in such form as to constitute a coherent and specific situation or state of facts, upon which the opinion of an expert is asked, by way of evidence in a trial." BLACK'S LAW DICTIONARY (3rd ed. 1933). The hypothetical question has evolved and gained legal cognizance in virtue of the admissibility of expert testimony and opinion formulated thereon in instances wherein the particular expert deponent is not possessed of sufficient knowledgeable information as regards the case in point, and therefore an assumed set of facts has to be combined with a group of proven facts, and upon the aggregate facts an opinion is solicited and given. Clearly the above question as put to appellee in the court below was not a hypothetical question. In the premises, was it reversible error on the part of the judge to have disallowed the question? In objecting to the question it had been said that same was violative of the best evidence rule and was irrelevant. It is immediately apparent that the best evidence rule will not obtain here. Ergo, we must examine the issue of relevancy that had been raised by appellee

but overruled by the trial judge. To commence with, there is a standard of relevancy as applied to cross-examination that varies from relevancy on the direct. There are three main functions of crossexamination, namely ( ) to expose to close scrutiny the issue of credibility as regards direct testimony of a particular deponent; (2) to bring out additional facts related to those elicited on direct examination ; and (3) to bring to the open any additional facts which tend to further explain any issue in the case. Obviously the first function was absent in the present case. Let us therefore turn to

the second and third. However, in so doing we should remember another rule of the law of evidence to the effect that, as to credibility, the test of relevancy is not whether the answer sought will elucidate any new issues but whether there is a digression from the main issues for a determination of the probative value of the particular direct testimony adduced. Moving to the other two functions we find it an accepted principle that the usual standard of relevancy as applied to testimony offered on direct examination is also applicable on cross-examination. 58 AM. JuR. 345 Witnesses § 623 fn. 12; 70 C.J. 682-687,802-804 Witnesses §§ 837, ioo8. Realizing further that the allowance or disallowance of the particular question is directed to the sound discretion of the trial judge, yet when the nonexercise of discretion is predicated upon the improper application of the germane rules of law, our failure to uphold the trial judge may not then be said to have been based upon an abuse of discretion, but instead, upon his failure to invoke discretion for application in the particular instance. Therefore we must hold that his disallowance of the question should have been upon the ground of irrelevancy, especially since Count 4. of defendant's rejoinder averred that Charles McIntosh was the representative of appellee at the auction sale. For the reasons cited in respect of Count r, it is our opinion that the objection to Count 2 should have also been sustained. Therein the question put to witness E. Tyson Woods on the cross-examination was : "Mr. Witness, did you bid for the property?" Both the pleadings and testimony previously adduced showed that appellee had not bid in person but rather through an agent. Therefore, the answer to the question was unnecessary, for same would constitute nothing more than cumulative evidence since similar testimony had been previously adduced at the same trial by the same deponent.

Count s of the bill of exceptions is rather incoherent and argumentative ; however, in endeavoring to ascertain therefrom the errors complained of, we turn to Count 6 of the brief submitted by appellants wherein it is stated that although the executor and executrix sold the property in accordance with an order of sale issued by Judge Summerville, they were never given the original deed and therefore the sale was illegal. They further stated in the

selfsame count that they had no knowledge of the probation of the executor's deed. The Court feels that both of these points are
so fundamentally elementary that the least possible comment is needed to show that they are legally unmeritorious. In the first place,
the probate court is the guardian and conservator of all estates, be they testate or intestate. In the instant case, whilst engaged
in a lawful adjudication of an issue within its jurisdiction as conferred by statute and in conformity with the applicable rules,
the court ordered offered for sale certain properties of the testator to settle his debts. The record further shows that this order
was issued in accordance with a petition duly filed on May 3o, 1941. Therefore the contention of illegality of acquisition cannot
be readily sustained. The fact that appellants had no knowledge of the probation of the executor's deed can legally avail them naught
since there is no showing that the probation was illegally obtained. In the legal premises, it is the opinion of this Court that
the judgment of the lower court be and the same is hereby affirmed. And the clerk of this Court is hereby ordered to send a mandate
to the lower court to enforce its final judgment. All costs of these proceedings are ruled against appellants. And it is hereby so
ordered.
Judgment affirmed.

Sherman v Philips et al [1900] LRSC 2; 1 LLR 351 (1900) (1 January 1900)

ROBERT T. SHERMAN, Appellant, vs. **JOSHUA PHILIPS**, **A. B. STUBBLEFIELD** and **R. H. HILL**, Trustees of Providence Baptist Church, Monrovia, Appellees.

[January Term, A. D. 1900.]

Appeal from the Court of Quarter Sessions and Common Pleas, Montserrado County.

Ejectment.

This suit was brought by appellees as trustees of the Baptist Church to recover possession of property devised by Robert R. Johnson to said Church. The first paragraph of the will relating to the property, devised the estate to said Church subject to the provision that should the wife of the testator, who was made sole executrix, have need to dispose of the estate during her lifetime for her support, etc., she was at liberty to do so.

Another paragraph in the will gave the wife the right to sell without mentioning the happening of the contingency mentioned in the previous paragraph, and also to lease or give the property to any person or persons around her that she might deem fit.

Held, that the first paragraph devised a contingent legacy to the wife liable to the enjoyment of a fee title, should her need, the contingency, happen; that in case the contingency did not arise during the lifetime of the wife, the fee vested in the said Baptist Church to whom was devised in said will a contingent remainder in said estate.

It was also held that where the language of a will is ambiguous and its provisions conflicting, the real intention of the testator is to be ascertained and the will construed so as to admit of what was really meant by the testator.

This court has so often enunciated the principles of law governing actions of ejectment, which is but an action to try and determine the ownership of real property that it would only be repeating itself to indulge in anything like amplification.

The claims of the adverse claimants to lot No. 65 in the city of Monrovia, being found in the wills and testaments of the late Robert R. Johnson and that of Mrs. I. B. Johnson, the widow of the said R. R. Johnson, both of whom executed their wills and testaments handed in as evidence, have had the special attention of this court. The will of the late Robert R. Johnson contains several legacies and to several legatees. But that which concerns us at present is the devise of the testator to the Providence Baptist Church, Monrovia, and that part of said will which refers to the late I. B. Johnson, sole executrix of the will of her husband and trustee of his real estate.

The following is the language employed by the testator: "I give and bequeath to my beloved wife, I. B. Johnson, all my real and personal estate that I have after my demise, except such part as I may dispose of in my lifetime; and after the death of my wife, I. B. Johnson, I bequeath my dwelling house in the city of Monrovia (providing that she doesn't have need to sell it in her lifetime) ; it is to go to the Providence Baptist Church; it is not to be sold after her death, but to be leased or rented out by the church for the benefit of the said church, and one third of the proceeds of the rent is to be kept for repairs of said house, and the other two thirds is to go for the benefit of the said Baptist Church."

The above is the paragraph in said will referring to the Providence Baptist Church, Monrovia, the appellee before this court. We now quote that part of the will referring to the rights of Mrs. I. B. Johnson, legatee and sole executrix of the testator R. R. Johdson. The language here employed is as follows: "I appoint my wife I. B. Johnson's advisers, R. T. Sherman and M. T. Worrell. Notwithstanding the above decree, my wife I. B. Johnson is at liberty to sell, lease, or rent any part or parcel of the whole of my estate for her own use, to give to any person or persons around her that she may see fit."

To harmonize these two provisions of the will we have had no little trouble in finding out the intention of the divisor, and to accomplish this we have been compelled to set aside the ambiguous and superfluous words.

This court says, a will being considered as an instrument made at a time when the testator, perhaps, could not secure the assistance of persons skilled in the law, courts have always held that it should not be construed strictly like a deed, but that the intention of the testator, though not expressed in proper, clear, legal, and formal words, should, notwithstanding, be ascertained and carried into effect. In construing a will, therefore, three questions arise; first, what the testator's intention is as it is to be collected from the words of the will; second, whether he has used words which in legal construction can carry such intent into effect; third, what effect must be given to every word in the will tending to point out the intent of the testator. To this end expressions admitting of two interpretations should receive that force which will best harmonize with other parts of the will; and this right is recognized in the Statute Laws of Liberia (Book I, p. 39, sec. 27), which says: "It shall be the right of the court to expound all written evidence."

From the will we gather the following facts : First, that the testator Robert R. Johnson, intended a vested fee interest in lot No. 65, in the city of Monrovia, to be employed by said Church after the death of his wife, I. B. Johnson, in case her need did not compel her to sell it during her lifetime. This grant or devise constituted a contingent legacy, liable to the enjoyment of a fee title, should the contingency (her need) happen. Second, that there is no evidence that such a contingency happened during the lifetime of the wife, I. B. Johnson. This court further says, nothing in the will in question supports the idea that it was the intention of the testator R. R. Johnson that said property should be devised and passed to others after the death of his wife, I. B. Johnson. Therefore the Providence Baptist Church is entitled to a vested fee interest in lot No. 65, in the city of Monrovia.

This court adjudges that the judgment and rulings of the court below are in accordance with the law and evidence in the case, and therefore affirms said judgment; appellant to pay all lawful

costs. The clerk of this court is hereby ordered to issue a mandate to the court below, informing it of this judgment.

Cole v Williams [1950] LRSC 11; 10 LLR 370 (1950) (9 June 1950)

FANNY B. COLE, Appellant, v. ELIZA A. WILLIAMS, Appellee.
BILL IN EQUITY TO QUIET TITLE.

Argued April 11, 1950. Decided June 9,
1950. 1. Under Liberian law a collateral relative is a brother or sister or his or her descendants. 2. The aunt of an intestate cannot,
in the absence of lineal descendants or collateral relatives, take intestate property in preference to the parent of an intestate.

On appeal from decree in equity quieting title, judgment affirmed. Momolu S. Cooper for appellant. for appellee. Court. The records
certified to us reveal the following facts in this case: William B. Taylor, Sr., of Monrovia, possessed a portion of lot number 45
in Monrovia on which he erected a building. Initially, he was married to Eliza A. Williams, appellee, and out of this union was born
one child, William B. Taylor, Jr. This marriage lasted two years, and then appellee divorced William B. Taylor. About ten years after
this divorce William B. Taylor, Sr., married Angie Scott-Taylor. They lived together until William B. Taylor, Sr., died, leaving
a widow and one heir, William B. Taylor, Jr. Both the widow and son have since died, the son predeceasing the widow. Fanny B. Cole,
appellant, was the sister of William B. Taylor, Sr. Appellant questioned and challenged the right of appellee to the property and
attempted to oust William A. Johns

MR. JUSTICE SHANNON delivered the opinion of the

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appellee therefrom
after appellee had entered same and taken possession on the death of her son, William B. Taylor, Jr., the only child of William B.
Taylor, Sr. Upon concession of the facts stated above by both parties, we conclude that the only legal issue before us is which of
the contending parties is entitled to the property after the death of both father and son, the mother of the latter owner or the
sister of the former. This brings us to a study of the statutes controlling descent. We find the following from the act of the Legislature
passed and approved January 27, 1904, entitled "An Act amending the Law on Descent" : "That after the passage of this Act, any citizen
of Liberia dying intestate, and without heirs, direct or collateral; and leaving property, real or personal or both, said property
shall go to the parents of the deceased in equal proportion, and from them to the heirs of the parent from whom the owner of the

property descended, and in case of the death of the parent before the death of the intestate said property shall vest in the heirs of said parents in his or her stead." L. 1903-04, 23 (2d) § The text of this act does not seem to be self-explanatory. Perhaps it became a source of confusion and therefore the Legislature revised it as follows : "The property of every person, who shall die without devising the same, shall descend in manner following: r. To lineal descendants in equal parts, and if any such descendant die before the intestate and leave children, the children shall be entitled to the share of the person so dying. "2. In the event of leaving no lineal descendants, then to collateral relatives in equal parts; and if any collateral relative should die before the intestate leaving heirs, then such heirs shall take in equal shares the part of the collateral relative so dying.
"

"3. If any person die intestate without leaving heirs direct or collateral, his property shall go to his parents in equal proportion, and from them to the heirs of the parents from whom the owner of the property descended; and if the parents should die before the intestate the property shall be inherited by the heirs of said parents." 2 Rev. Stat. § 1303. Since this law does not appear to be in conflict with the act of 1903-04, it must be accepted as an explanation and elaboration of said act. For many years these two statutes controlled the law on descent and inheritance in Liberia. Since their terms seem to be the source of confusion between the contending parties it is necessary for, and incumbent upon, the courts to interpret same by reading herein the intention of the Legislature. According to these two statutes the property of every person dying intestate shall go to the lineal descendants and, if any such descendant dies before the intestate and leaves children, the children shall be entitled to the share of such person dying. In this case, it is necessary to emphasize that William B. Taylor, Jr., is the intestate who acquired the property from his father, William B. Taylor, Sr., as the sole heir. Therefore, he, and not his father, must be the basis of reckoning. He died intestate, leaving neither descendants nor descendants' children. According to the law, "2. In the event of leaving no lineal descendants then . . . [the property shall go to the intestate's] collateral relatives . . . if any collateral relative . . . die before the intestate leaving heirs, then such heirs shall take in equal shares the part of the collateral relative so dying." 2 Rev. Stat. § 1303 (2). This brings us to the consideration of who is a collateral relative under the law to whom in such an eventuality the intestate's property shall go. According to Bouvier, collateral is "that which is by the side, and not the direct

line. That which is additional to or beyond a thing."

Bouvier, Law Dictionary Collateral 519 (Rawle's 3rd rev. 1914). In an effort to distinguish a lineal descendant from a collateral descendant we quote the following: "A lineal descent is one in the direct line of the intestate as, for example, from father or grandfather to son or grandson, or from son or grandson to father or grandfather. Collateral descent is to collateral relatives, as from brother to brother. . . ." 16 Am. Jur. 8o5 (1938). It is obvious from the text of the statute of 1904 as well as § 1303 (2) of the Revised Statutes that the intent of the Legislature in the use of the word collateral was to limit the degrees to brOthers and sisters of the intestate or their descendants. To take a different view would render the meaning of these laws confusing since if the word collateral as so used were to include every collateral relative of the intestate it would also include such persons who are heirs of the parents from whom the owner of the property descended, which heirs according to the act of, 1904 can again be heirs in case of the death of the parent before the death of the intestate. We have no alternative but to accept this restricted interpretation of the word collateral, and our position is supported by the laws quoted above. We conclude that the Legislature, in its enactment of the laws of descent and inheritance, did not intend the definition of collateral in subsection z of section 1303 of the Revised Statutes to include an aunt. Therefore an aunt, even if she were a collateral relative under some definition, is not within the definition of those who take possession of intestate property in preference to a parent of the intestate. The intention of the Legislature can be still better interpreted and understood when we consider the following subsequent revision of the laws of descent and inheritance in

1946, prior to the death of the intestate in March, 1947. "Section r. That from and immediately after the passage of this Act Chapter LXIV, section 1303 of the Revised Statutes of Liberia relating to real and personal property be and the same is hereby amended to read as follows : "Section 1303. Inheritance of--The property of every person, who shall die without devising the same, shall descend [sic] in manner following : 1. To lineal descendants in equal parts, and should any such descendant die before the intestate and leave children, the children shall share equally of the person dying. 2. In the event of an intestate dying, leaving no heirs of his body, said property shall ascend to his parents or stirps in fee, in equal proportion; and if the parents die without conveying said property, then it shall descend to the heirs of the parents from whom the owner of the property descended ; and if the parents should die before the intestate the property shall be inherited by the heirs of said parents. 3. If there should be no surviving parent or direct heirs of said parents, then said property shall descend to the collateral relatives of the intestate." L. 194647, ch. IX. This act was approved for immediate effect some time before the death of the intestate. However, appellant contended that the statute was not published before the death of the intestate, and therefore should not be allowed to take effect against her claim, which would be

invalid under the said statute. In view of what has been stated herein in our effort to interpret the intent of the Legislature,
we reaffirm our conclusion that the aunt of an intestate cannot, in the absence of lineal descendants or collateral relatives in
the restricted sense used herein, legally come into possession of real property in connection with said intestate in pref-

erence to, or prior to, the parents or parent of an intestate. Consequently the decree of the lower court quieting
title to said property as prayed is hereby affirmed with costs against appellant; and it is hereby so ordered.
Affirmed.

Dlyon v Lambert et al [1884] LRSC 4; 1 LLR 178 (1884) (1 January 1884)

MARY E. DLYON, Appellant, vs. **PRECILLA LAMBERT**, and **JOHN LAMBERT**, her husband, Appellees.

[January Term, A. D. 1884.]

Appeal from the Court of Quarter Sessions and Common Pleas, Montserrado County.

Ejectment.

Where a party entitled to draw lands under the Immigrant Allotment Act draws his allotment and fulfils all the conditions that entitle him to a deed, but with a fraudulent design fails to procure his deed, though he cannot convey his imperfect title therein, yet it will not be exempt from the writ of his creditors.

Under the Constitution, a femme couverte may convey property she is possessed of otherwise than through her husband and this fact admits the inference that she may also bargain and buy property independent of her husband.

This case comes up from the Court of Quarter Sessions, Montserrado County, upon a bill of exceptions, under the statute regulating appeals. The appellant claims ownership to one half acre

of land and appurtenances thereto belonging, situated in the settlement of Careysburg, Montserrado County, bearing the authentic records of said settlement, number eighty-four, by virtue of a sheriff's deed bearing date March 3d, 1883, based upon a writ of execution issued against the lands, goods, chattels and credits of one John Micky.

The appellees in defence of their possession set up the plea that John Micky never, up to the time of his death, acquired such title to said land as to subject it to an attachment and execution for the payment of any debt he may have contracted.

It appears from the record of the trial below, that on his arrival to this Republic John Micky did draw, under the act pertaining to the apportionment and improvements of lands, the property in dispute; and did make the necessary improvements thereon to entitle him to a fee simple deed from the Government under the provision of said statute.

It is the opinion of this court that whenever any settler is entitled to draw lands under the provisions of the act above referred to, and complies with the conditions of said act so as to entitle him or her to a deed in fee simple, and who for an unreasonable length of time thereafter willfully neglects to procure a deed in fee simple for the same, his or her neglect in such a case in the eye of the law must be regarded as a fraudulent resort for its security against his or her creditors. Hence the law will not give aid to a plea under such circumstances, that the original drawer did not procure from the Government a deed for said drawn and improved lands, and thereby defeat the sheriff's sale of it under execution, as illegal for want of such fee simple deed.

This court says that as soon as the drawer under the aforementioned statute has made the lawful improvements required by said statute, his or her right to the land drawn is thereby made complete, but not transferable by him or her. But as we have before said, if a delay or neglect to procure a deed for such improved lands appears to be for the purpose of defrauding creditors out of their just claims, the law will allow such lands to be sold under execution. Hence a sheriff would be legally authorized to procure the deed for the land so taken under execution, all the rights of the original drawer having passed from him or her by the writ of execution to the sheriff, in trust for the creditors.

There are many points of minor consideration raised in this trial, yet the case presents some very important points the settling of which must settle the case. We will therefore review those questions which must unmistakably settle the rights of the parties. From the record we find that it

is maintained by the appellees that the appellant in this case, being a femme couverte, could not legally contract or buy the land in dispute.

It is hardly necessary for this court to say, the Constitution of Liberia provides that a femme couverte may convey property she is possessed of otherwise than through her husband ; which term includes both personal and real property, and that by sale, devise or otherwise. This court is of opinion that she being allowed to bargain and sell under such circumstances, is also allowed to bargain and buy more especially by her husband's assent. Hence the court below erred in instructing the jury that appellantbeing a femme couverte,could not buy the lands in question, especially when the testimony of A. H. McFarland proved that he bid in the land in question for appellant by request of her husband.

It further appears to this court that the court below erred in not granting the new trial prayed for in the appellant's motion, for the following reasons: The original deed from the Government being admitted as evidence without objection (see record) was prima facie evidence, an oral testimony could not legally be allowed to prove the terms and parties thereto contrary to those expressed in the recital of said deed.

Again, it further appears from the record that appellees by and through their attorney made, during the trial below, admission as follows: That John Lambert did call M. E. Dlyon, appellant, before the January term of the Monthly and Probate Court, Montserrado County, to prove that the property in dispute was bid in on the day of the sale by A. H. McFarland,—evidently referring to the sale of the sheriff under the execution above referred to. Now if this admission, which is evidence, be linked with the testimony of A. H. McFarland, as found in the record, it will be at once discovered that A. H. McFarland did bid in the property now in litigation, by request of Mr. J. W. Good, for the appellant. These facts united with the sheriff's deed, admitted also as evidence in this case, clearly show a lawful sale from the foregoing opinion of this court. Hence the verdict was contrary to the evidence and law governing the case, and a new trial should have been granted. This court is therefore of opinion that the appellant has bona fide title to the land mentioned in the complaint and proceeds to render the judgment the court below ought to have rendered.

This court adjudges that the judgment of the court below is reversed, and that the appellant recover from the appellees the land mentioned in the complaint, and the costs in this action.

Arnold et al v Logan [1937] LRSC 15; 6 LLR 18 (1937) (30 April 1937)

ARNOLD, HENRICHSEN, Agent for WEST AND COMPANY, LTD., Foreign Merchants of Hamburg, Germany, transacting Mercantile Business in Grand Bassa County, Appellants, v. JACOB H. LOGAN, Appellee.
APPEAL FROM THE CIRCUIT COURT.

Argued April 26, 27, 1937. Decided April 30, 1937. 1. All actions save ejectment, enforcement, violation of written contracts and damages for personal injuries should be commenced within three years from the time such cause of action occurred. 2. The statute of limitations is not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against false demands after the true state of the transaction may have been forgotten, or be incapable of explanation because of the death or removal of witnesses. 3. There may, however, be a new promise either oral, written or factual which will remove the bar, and throw the burden of proving that it related to a different claim upon the defendant. 4. Hence, a cause of action barred by limitations may be revived by (1) an unconditional promise to pay ; (2) an acknowledgment of the debt from which a promise to pay may be inferred; and (3) a conditional promise to pay the debt accompanied by a sufficient showing that the condition upon which the promise was made to depend has been performed.

In an action of debt brought in the Circuit Court, judgment was rendered for the defendant. On appeal to this Court, reversed.
William E. Dennis for appellant.
No appearance for

appellee. MR. CHIEF JUSTICE GRIMES delivered the opinion of the Court. There is but one important question to be settled by this appeal; namely, whether or not at the time appellant, plaintiff in the court below, commenced this action it had been irrevocably barred by the statute of limitations. According to the current account filed with the corn-

plaint, and made a part thereof, the last item but one (to which one item we shall have occasion to refer later) therein entered was one hundred cups of rice given carriers on October 6th, 1929, and in said statement debited appellee. Inasmuch as suit was not entered until July 5th, 1935, and our statute provides that with the exception of ejectment, enforcement, violation of written contracts, and personal injuries, for each of which a different period of limitation is prescribed, "all other actions" must be commenced "within three years after the cause of action shall have accrued" (Lib. Statute, Old Blue Book, ch. I, p. 32, § 18; Rev. Stat. 418, § 263), the contention of appellee raised in the first plea of his answer would seem to have been superficially correct. Appellants, however,

in counts three, four and five of their reply contended : (1) .That there had been a subsequent transaction and agreement on part of appellee to have his account on May 4th, 1933, credited with one truck tire and one inner tube therefor, which appellant had previously borrowed from appellee; (2) That the defendant, now appellee, had otherwise acknowledged the genuineness of the debt. These were the two issues submitted by the parties to His Honor Judge Summerville. Said Judge heard evidence on the question whether the contract of borrowing and lending (the tire and the tube) had subsequently been so altered as to enable appellant with propriety to credit same to appellee's account; and then decided substantially that inasmuch as there was but ope witness on each side, the one testifying that appellee had agreed to allow the tire and tube to be so credited to his account, and the other testifying in contradiction thereto, there was not that preponderance of evidence produced by plaintiff which alone would entitle him to have a decision in his favor. In our opinion that decision of the trial judge appears to us to be fair enough so far as it related to counts three

and four of the reply; but it apparently overlooked the contention advanced in count five thereof, the evidence given in support of which count having been contained in two letters from appellee which are hereafter set out as follows : The first was a letter numbered "3" by the court below dated May 12, 1933, which reads : "GRAND BASSA COUNTY,
May 12, "J. W. WEST AND COMPANY,
GRAND BASSA COUNTY. "SIR:

1933.

"I am ready to use my truck, and ask that you return the tire and tube borrowed, and I will come down and arrange to haul your produce placing always half of this amount against my credit, until I am able to do better. "I am,
Yours truly, [Sgd.] JACOB H. LOGAN." The second letter marked by the trial court "6" dated May 16, 1933, was in answer to one from Counsellor Morgan, attorney for appellants, marked by the court No. "5" dated May 13, 1933, as follows: "LAW OFFICE, LOWER BUCHANAN,
13th May 1933.
"THE HONOURABLE JACOB H. LOGAN, NEW CESS. "SIR :

"Upon my approaching you re your account with Messrs. West & Company you referred to the hard times and said that the trouble was what to find to give them. You said that you had lent them a tire and was wondering if they would take it on account. told you that I think they would as it was necessary that something be paid against the account before they would consent to wait longer. You said you would give the tire and anyway I would hear from

you. I did not, and spoke with you again at the Superintendent's Department. "You said that you had decided to give
them the tire and we there arranged the price to be credited you. I promptly told them and they credited you some time ago. That
is I think the very day we spoke. I do not understand the letter you wrote to them which they referred to me. "Yours truly, [Sgd.]
EDWIN A. MORGAN,
Counsellor at Law."
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The answer to which, marked No. "6," reads as follows : "NEW CESS, GRAND BASSA COUNTY,
May
ioth,1933.

"E. A. MORGAN, ESQR., COUNSELLOR AT LAW, FOR WEST & CO., "SIR: "Yours of the uth inst., to hand, I do not agree to place
the tire and tube to the amount because I am ready to use my truck. I will come down next week to see you, and the firm's Agent towards
an arrangement to see what terms we can come to on doing their transport, to have a portion to go to the account, or against the
account. I shall be down next week Friday D. V. "Yours truly, [Sgd.] JACOB H. LOGAN." The rule of law which appears to us to be
pertinent to this case, and which the trial court obviously overlooked, is the following : "It is to be observed, that the statute
of limitations is regarded by the courts as a wise and beneficial law, not designed merely to raise a presumption of payment of a
just debt, from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been
forgotten, or be incapable of explanation, by reason of the death or removal of wit-

nesses. Wherever,
therefore, the bar of the statute is sought to be removed by proof of a new promise, the promise, as a new cause of action, ought
to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate." 2 Greenleaf, Evidence § 440. "Upon
this general doctrine, which, after much conflict of opinion, is now well established, it has been held, that the acknowledgment
must not only go to the original justice of the claim, but it must admit that it is still due. No set form of words is requisite;
it may be inferred even from facts, without words. . . . And where the plaintiff proves a general acknowledgment of indebtment, the
burden of proof is on the defendant to show that it related to a different demand from the one in controversy." Id. at § 441. According
to another author : "The earlier decisions with regard to the English statute of limitations held that a mere acknowledgment of the

debt, without a promise to pay,. would not affect its operation. It was next determined that an acknowledgment of a debt was evidence from which a jury might infer a promise to pay, but would not, if specially found, warrant the court to give judgment for plaintiff. And then the decisions going further held that the slightest acknowledgment, whether by word or in writing, would take a case out of the statute. Under the modern doctrine, however, that statutes of limitations are statutes of repose, the general rule in the United States and England is that a particular case may be removed from the bar of the statute by, and for such purpose there must be, either : ( ) An unconditional promise to pay the debt; (2) an acknowledgement of the debt from which a promise to pay is to be implied ; or (3) a conditional promise to pay the debt, which is accompanied by a sufficient showing that the condition upon which the promise is made to

depend has been performed. In some jurisdictions by statute, however, it is provided that a mere acknowlment of the debt is sufficient to remove the bar, and under such statutes it is unnecessary that the acknowledgment be such as to raise an implied promise to pay. A cause of action may be revived by a new promise or acknowledgment, although the statute contains no provision therefor ; and a statute providing for the revival of causes of action founded upon contract by an admission that the debt is unpaid, as well as by a new promise to pay the same, amounts simply to a declaration of the common-law rule." 25 Cyc. 1325-1327. In a note thereunder the following is observed : "The original general statute of limitations, 21 Jac. 1, c. 16, made no provision for the revival of a cause of action barred by its terms, but in recognition of the moral obligation to pay debts without regard to the efflux of time the courts declared that notwithstanding the statute if a debtor acknowledged his debt as an existing liability or promised to pay it it was revived and continued as a binding and enforceable obligation." Note 94. Continuing, the same author says : "The general rule is that a new promise, whether made before or after the bar is complete, will avoid the operation of the statute of limitations." Id., at 1328. In view of the foregoing we are of opinion that the decision of His Honor Judge Summerville, having ignored the principles above expounded, should be reversed ; and that the case should be remanded to the court below for such further proceedings as may not be incompatible with this opinion; that appellee should pay the costs of this appeal, and the other costs should abide final judgment; and it is hereby so ordered.

Reversed.

MOSES TISDELL, Appellant,
v. ZEONVONYON, Appellee.
APPEAL FROM PROVISIONAL MONTHLY AND PROBATE COURT OF THE TERRITORY OF MARSHALL.

Argued April 22, 1937.
Decided April 30, 1937. 1. One of the essential prerequisites to the taking of an appeal is the payment of all costs ; and should appellant have neglected this legal requirement the appeal will not be heard. 2. Nor will this Court hear an appeal where it appears that the appeal bond has not had the proper revenue stamp affixed.

In an action for trespass, judgment was rendered in the Provisional Monthly and Probate Court of the Territory of Marshall for plaintiff. On appeal to this Court on a bill of exceptions, appeal dismissed.
No appearance for appellant. pellee.
MR. JUSTICE DOSSEN

T. G. Collins for ap-

delivered the opinion of the Court. At the July term, 1936, of the Provisional Monthly and Probate Court of Marshall Territory, in its Law Division, appellee, plaintiff below, instituted an action against appellant for trespass vi et armis upon real property. Said cause came on for trial before His Honor William H. Blaine, Judge presiding, who, after hearing the evidence pro et con and the law, rendered a final judgment against said appellant. He, the said appellant, being dissatisfied with the several rulings and final judgment of the trial judge, excepted and appealed to this Court upon a bill of exceptions for review. At the call of the case, appellee, through his counsel, tendered a motion to the Court praying that the said appeal be dismissed, appellee discharged, and appellant ruled to pay all legal costs, for reasons the relevant portion of which reads as follows, to wit:

`t i . Because said appellant has failed and neglected to pay the costs accruing in the court below. "2. And also because the appeal bond filed in this case is defective, in that it is not stamped as required by law." This Court has repeatedly held that the payment of costs is one of the prerequisites to be observed in taking an appeal to this Court, and that when the costs are not paid the appeal will be dismissed. The amendatory Judicial Act of 1894 (L. 1893-94, 10, par.) in reference to how appeals are to be taken to this Court, says inter alia that the appeal must be taken within sixty days after the rendition of final judgment and payment of costs. By a very careful inspection of the records filed in this case we find that the prerequisites of the law have not been complied with in that the costs of the trial court were not paid within the time prescribed by law nor indeed were they paid at all ; hence the purported appeal is not legally before this Court. Count one of appellee's motion being in perfect harmony with the law and previous rulings of this Court should

receive the favorable consideration of this Court. Farphiny v. McCarey, [1911] LRSC 8; 2 L.L.R. 50 1911). In the year 1906 the Legislature of Liberia, for the purpose of increasing the revenue, passed a statute entitled a "Stamp
Act," which provides that certain documents shall be subjected to a stamp duty to be thereon affixed as per schedule then prescribed;
among which are bonds etc. Said act was supplemented and enlarged by a subsequent stamp act approved January 24, 1923, which included
appeal bonds etc., and provided that no document of the nature of those mentioned therein, issued after the thirtieth day of June,
1906, should be deemed valid, or be received as evidence in courts of justice unless it should have been properly stamped in accordance
with the schedule above mentioned in said Act. Upon

careful examination of the records filed, we find
that the bond filed in the cause was not stamped according to law, and is, therefore, void and of no legal effect. Acts of the Legislature,
1906, pp. 42-3; Acts of 1923, ch. VI, p. 12. Therefore, in view of the said defects appearing upon the records in this case as are
set forth and contained in appellee's motion to dismiss the appeal, this Court is of the opinion that said appeal should be dismissed
and the trial court given permission to resume jurisdiction and execute its judgment; and appellant be ruled to pay all legal costs;
and it is so ordered. Appeal dismissed.

Fofana v Cooper [1981] LRSC 20; 29 LLR 213 (1981) (30 July 1981)

ABRAHAM FOFANA, Petitioner, v. **HIS HONOUR SAM PAYNE COOPER**, Debt Court Judge, Montserrado County, and the Superintendent of Monrovia Prisons, Respondents.

APPEAL FROM THE RULING OF THE JUSTICE IN CHAMBERS DENYING THE ISSUANCE OF THE WRIT OF PROHIBITION.

Heard: May 11, 1981. Decided: July 30, 1981.

1. A person shall not be arrested or imprisoned for disobedience of any money judgment or order requiring the payment of money except for those money judgment enforceable by imprisonment for contempt under section 44.71(3) and by imprisonment under section 44.71(2) if execution is not satisfied.

2. A judgment may be enforceable by imprisonment where execution is not satisfied, but only in the following cases: (a) adultery; (b) seduction of wife or child; (c) illegally taking away or harboring a wife or child or ward under twenty-one years of age; (d) enticing an incompetent

away from his legally appointed trustee or guardian; or (e) injury to the reputation when the words spoken or written are actionable *per se.*

3. Any of the following money judgements may be enforced by contempt proceedings: (a) against a trustee or a person acting in a fiduciary relationship for the payment of a sum of money for a default or dereliction of his duty; or (b) for the support of a wife, child, or other dependent.

4. At the option of the mortgagee, and in lieu of foreclosure proceedings, a suit may be brought upon the indebtedness, evidenced by the mortgage, and the judgment recovered therefrom, if any, satisfied by the sale or execution of the mortgage property, which shall continue, until so sold, subject to the lien of the mortgage. The deficiency, if any after such sale, may be execution levied upon the sale of other property of the debtor.

5. Where a judgment debtor is arrested and imprisoned for money judgment not enforceable by imprisonment under section 44.71(2) and 44.71(3), the remedy available to the aggrieved party, under the circumstances, is prohibition.

An action of debt was instituted in the Debt Court for Montserrado County against appellant. Upon failure to file an answer or to appear for the trial, a default judgment was rendered against him. Appellant made part payment of the judgment amount, but because of his failure to make complete settlement, a writ of execution was served on him, and thereafter he was arrested and imprisoned because of his failure to show property to be seized. As he considered his imprisonment illegal, appellant applied to the Justice in Chambers for a writ of prohibition. When the writ was denied, the appellant appealed to the full bench of the Supreme Court, contending among other things that a judgment in an action of debt is not enforceable by arrest and imprisonment, and therefore his arrest and imprisonment were illegal and unconstitutional.

Appellee resisted the application contending that prohibition will not lie, in that the trial court had neither exceeded its jurisdiction nor proceeded by the wrong rules, and that nothing was remaining to fully satisfy the judgement.

The Supreme Court held that the arrest and imprisonment of the appellant was illegal; that the procedure authorized by law for the enforcement of the payment of the balance due is execution of the mortgaged property that was pledged as collateral for the loan, or foreclosure proceedings in lieu thereof. Accordingly, the Supreme Court *reversed* the ruling of the Chambers Justice, and granted the writ.

M M Perry appeared for appellant. *Joseph N. Williamson* appeared for the appellees.

MR. JUSTICE YANGBE delivered the opinion of the Court.

Appellant was sued by the Liberian Bank For Development And Investment in an action of debt, in the Debt Court for Montserrado County. Appellant was summoned but he failed to file an answer, or appear. Consequently, the trial court rendered a default judgment against him. Appellant made part payment against the principal amount awarded, leaving a balance, and upon failure to make complete settlement, a writ of execution was issued and served on him. When

appellant refused to show the property to be seized, he was arrested and imprisoned until the judgment was fully satisfied. Appellant, believing that his imprisonment was illegal, petitioned for a writ of prohibition before His Honour, Mr. Justice S. Raymond Horace, Sr., then Justice presiding in Chambers, and the petition was heard by His Honour, Mr. Justice Roland Barnes, then Justice presiding in Chambers, who denied the petition, and quashed the alternative writ, from which ruling this appeal has been taken for final decision.

Appellant contended in his petition, among other things, that a judgment in an action of debt is not enforceable by arrest and imprisonment; that the arrest and imprisonment of appellant was therefore illegal and unconstitutional. In the returns, appellees contended substantially that: (a) appellant is *estopped* from prohibiting payment against the principal amount awarded; (b) the trial court neither exceeded its jurisdiction nor proceeded by the wrong rules; and (c) that nothing remained to fully satisfy the judgment of the trial court, therefore prohibition will not lie.

The contentions contained in the returns and summarized hereinabove, are impertinent to the vital legal issues raised in the petition. However, there is no denial expressed or implied to the averments in the petition; hence, same are deemed admitted. Civil Procedure Law, Rev. Code 1: 9.8 (3).

Appellant cited in support of his contentions, *Ibid.*, 44.1, which reads as follows:

"A person shall not be arrested or imprisoned for disobedience of any money judgment or order requiring the payment of money except for those money judgment enforceable by imprisonment for contempt under section 44.71(3) by imprisonment under section 44.71(2) if execution is not satisfied.

Judgment enforceable by imprisonment, if execution is not satisfied, are in the following cases, namely:

(a) Adultery;

(b) Seduction of wife or child; "

(c) Illegally taking away or harboring a wife or child or ward under twenty-one years of age;

(d) Enticing an incompetent away from his legally appointed trustee or guardian; or

(e) Injury to the reputation, when the words spoken or written are actionable *per se.*

3. *Money judgments enforceable by contempt.* Any of the following money judgments may be enforced by contempt proceedings:

(a) Against a trustee or a person acting in a fiduciary relationship for the payment of a sum of money for a default or dereliction of his duty; or

(b) For the support of a wife, child, or other dependent.

4. *Other judgments.* Any interlocutory or final judgment or order, or any part thereof, not enforceable under section 44.21 or paragraph 1, 2, or 3 of this section may be enforced by one of the following methods:

(a) Directing the act to be done at the cost of the disobedient party by the ministerial officer of the court or by some other person appointed by the court; and the act, when so done, shall have the same effect as if done by the disobedient party; or

(b) On application of the party entitled to performance, appointment of a receiver of property of the disobedient party under section 44.72 to compel compliance with the judgment; or

(c) On judgment of a court of record, if real property is within the country, entering a judgment divesting the title of any party, and vesting it in another person in lieu of directing a conveyance thereof; and such judgment, when probated in the office of the Registrar of Deeds, shall have the effect of a conveyance executed in due form of law; or

(d) Adjudging the disobedient party in contempt and punishing him as provided in section 44.73.

Section 44.73, which is also referred to above, has reference to only the commission of an offence to be established by an affidavit in which case the court may enforce the judgment through contempt proceeding and imprisonment of the accused.

In our opinion, this section is not applicable to cases of debt, which do not fall within the category of the actions enumerated, *supra.*

Appellant has asserted in his answering affidavit, and argued in his brief, with emphasis, that the loan out of which the action of debt grew was covered by property, personal and real, as security. There is no denial of this averment, but appellee contended that he did not predicate the suit upon the mortgage, or no reference was made thereto in the complaint. As we have stated earlier in this opinion, whatever is alleged, whether in point of law or fact, which is not denied by implication or expressly in the responsive pleading, is deemed admitted.

However, subsequently in May 1972, an Act of the Legislature to give legal effect to and validate the Civil Procedure Law, replacing the entire Title Six of Civil Procedure Law of 1955, was passed and published in hand bill. The Act approved August 12, 1964 is referred to in the new Civil Procedure Law, Rev. Code, as prior legislation on page 243 of the Liberian Code of Laws Revised, already referred to above.

Courts of justice must act according to existing laws; otherwise their acts are considered as an infringement upon the rights of litigants.

During the argument before this court, counsel for appellees conceded that the arrest and imprisonment of appellant was illegal, but he argued that the trial court should have sent for appellant, and ordered him to make settlement of the amount due and upon his failure so to do, the trial court should have ordered his arrest and imprisonment for contempt of court for disobedience.

Earlier in this opinion, we dealt with the circumstances under which a judgment debtor may be imprisoned if he fails to satisfy a judgment; hence, there is no need to reiterate them here.

The learned former Chambers Justice agreed in principle, in his ruling, that according to the Civil Procedure Law, Rev. Code 1: 44.71(3) and 44.71(2), quoted *supra*, the arrest and imprisonment of the appellant was illegal, but he held that appellant should have appeared and contested the debt and if he felt dissatisfied with the final judgment, he had the right to appeal; therefore he denied the petition and quashed the alternative writ.

The contention of the appellant, and what the prohibition seeks to restrain or undo, are the arrest and imprisonment of appellant, but appellant does not deny his indebtedness to the judgment creditor in the court below, now one of the appellees. Therefore, even if appellant had appeared in the trial court, he could not have appealed from the final judgment because appellant only questioned the method of the enforcement of the judgment, which of course, is not appealable.

Appellees had ample opportunity to file a replying affidavit and traverse or refute the statement in the oral argument before this Court, but they have elected not to do either. Therefore, in the absence of any denial or traverse of the factual allegation with respect to the mortgage property as security for the loan, said statement is considered admitted.

Consequently, the question that presents itself now for our consideration is: what is the procedure authorized by law for the enforcement of the payment of the balance due, according to the judgment of the lower court?

In a similar case, this Court decided that: "At the option of the mortgagee, and in lieu of the foreclosure proceedings herein authorized, suit may be brought upon the indebtedness evidenced by the mortgage and the judgment recovered therefrom, if any, satisfied by the sale or execution of the mortgaged property, which shall continue, until so sold, subject to the lien of the mortgage. The deficiency, if any, after such sale may be execution levied upon and sale of other property of the debtor." *Rasamny Brothers v. Emma Butler-Jackson*, 15 LLR 248 (1963).

Therefore, in our opinion, the trial court proceeded irregularly in arresting and imprisoning appellant for the satisfaction of a judgment in the action of debt instead of seizing and exposing to sale the mortgaged property that was pledged as a security for the loan.

In order to re-emphasize our position in this opinion, it is necessary to mention that on the 12th of August 1964, an Act of the Legislature was published in hand bill, known as "An Act to Amend the Civil Procedure Law with Respect to Actions of Debt", which authorizes the arrest and imprisonment of judgment debtor in actions of debt. If a writ of execution is returned not satisfied, the judgment creditor was required to pay $1.00 *per diem* for subsistence of the judgment debtor as long as the defendant remains in custody and until the amount involved, as well as costs, was fully paid.

Therefore, in our judgment, the only remedy available to appellant, under the circumstances, was prohibition. *Parker v. Worrell*, [1925] LRSC 9; 2 LLR 525, 526 (1925).

In the light of the facts, circumstances and the law cited above, the ruling of the Chambers Justice is hereby reversed, the peremptory writ is ordered issued, and the Clerk of this Court is instructed to send a mandate to the court of origin to resume jurisdiction over the case and to enforce the judgment by the sale of or writ of execution of the mortgaged property that was pledged as security for the loan, which shall continue until sold. The deficiency, if any, after such sale should be satisfied by execution levied upon any sale of other properties of the appellant, until the judgment is fully satisfied.

Costs are ruled against the appellees. And it is so ordered

Prohibition granted; ruling reversed.

Dixon v Munah [1976] LRSC 75; 25 LLR 362 (1976) (19 November 1976)

WREH DIXON, Petitioner, v. J. N. T. KANDAKAI, Assigned Circuit Judge, Sixth Judicial Circuit Court, Montserrado County, and BARTEE
WREH and WREH MUNAH, Respondents.
APPEAL FROM JUSTICE IN CHAMBERS DENYING A WRIT OF CERTIORARI TO THE CIRCUIT COURT, SIXTH JUDICIAL
CIRCUIT, MONTSERRADO COUNTY.

Argued November 8, 9, 1976. Decided November 19, 1976.* 1. The petitioner for a writ of certiorari
is required to pay all accrued costs as a prerequisite to issuance of the writ.

Pending the hearing of a contest of a will in the
Circuit Court, an information was filed against the objector to the probate alleging that he was interfering with administration
of the estate by disposing of the property of the testator. The judge of the Civil Law Court ordered that the rents of the estate
should be collected by the sheriff and held in escrow pending determination of the contest over the will. The objector petitioned
for a writ of certiorari in order to gain relief from the ruling of the lower court, alleging that it had been issued without proper
notice to him or his counsel. The certiorari proceedings were heard by a Justice in chambers, who denied the petition for the writ
and ordered that jurisdiction be resumed by the judge in the court below to arrive at a final determination. This was an appeal from
that ruling to the court en banc. The Supreme Court affirmed the ruling of the Justice in chambers denying the writ of certiorari.
Moses K. Yangbe for petitioner. for respondents.
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Edward N. Wollor

· Mr. Chief Justice Pierre did not participate in this decision.

MR. JUSTICE HORACE delivered the opinion of the

Court. Upon the death of one Doris B. Williams, a purported last will and testament of the decedent was offered for probate by Bartee Wreh and Wreh Munah, respondents in these proceedings. The probation and registration of said will was objected to by Wreh Dixon, petitioner. Under our statute when a will is contested it must be sent forward to the Circuit Court for the trial of facts by a jury. This was done, but during the pendency of the case in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, respondents in these certiorari proceedings filed information both with the Monthly and Probate Court and the Civil Law Court that petitioner Wreh Dixon was interfering with the estate by disposing of personal and real properties of the testator. The information was taken up by the judge of the Civil Law Court who ruled that petitioner should desist from collecting the rents accruing to the estate and that the sheriff should collect said rents and hold same in escrow by depositing the money in a reputable bank pending final determination of the estate case now pending in the courts. Petitioner alleged that he had no knowledge of the ruling of the judge of the lower court because neither he nor his counsel was present, and so, in order to get relief from what he considered an arbitrary and oppressive ruling, he filed a petition for a writ of certiorari in the chambers of Mr. Justice Wardsworth on August 13, 1975. The alternative writ was issued and respondents filed their returns on August 19, 1975. The certiorari proceedings came up for hearing before Mr. Justice Henries, who after hearing arguments pro et con, issued an opinion which recited the facts as hereinabove set forth, and went on to state : "The petition for the writ contained the following:

"That on August 4, 1975, a notice of assignment was served on counsel for petitioner, Counsellor Joseph F. Dennis, and he appeared in court and informed the judge of his illness and offered to submit a medical certificate, and the judge granted postponement. Notwithstanding, without any issuance of a notice of assignment, the respondent judge undertook on August 8 to render a ruling against petitioner whereby the ministerial officer of court undertook partly to enforce the ruling of the respondent judge by repairing to the premises in question and informed the tenants of the judge's ruling.. . . " 'That the ruling of the judge is ,prejudicial and that co-respondents did not file any bond to indemnify the petitioner. Consequently, petitioner had no security whereby he could recover against co-respondent if the court finally decided that the rent should not be held in escrow. " 'As to count 6 of the petition, respondents say that there is no legal provision requiring an indemnity bond from informants before their bill of information can

be heard by the court. Petitioner sustained no irreparable damage by the effect of the respondent judge's interlocutory ruling. The fears of the petitioner that a bond is needed to indemnify him for eventual damages suffered as a result of the said ruling, are baseless and should not be entertained by the court.' "Let us look at the law governing certiorari to see whether the failure to pay accrued costs alone would be sufficient to deny the writ. There was no statutory provision in our early laws on ,certiorari requiring the payment of accrued costs by the petitioner, except the 1915 Revised Rules of this Court where provision was made that the petitioner in certiorari shall be required by the Justice granting the writ to pay all accrued costs ; . . . 2 LLR 664 (196o). Subsequent

legislation on certiorari carried this provision up to 1972 when the new Civil Procedure Law was enacted. Under the existing law, the payment of accrued costs, the demand for which had been heretofore lodged with the Court or a Justice thereof, is a responsibility placed upon the petitioner himself to meet. II Rev. Stat. 1388. Rev. Code 1 :16.23 (3). Where a party applying to this Court for a writ of certiorari has failed to meet any one of the mandatory requirements, the petition shall be denied. "In addition, we do not find the court's ruling to be prejudicial, but rather it is in pursuance of the need to preserve the estate from unlawful interference and waste. Nor do we find that the ruling deprives any party of his property, since the property is in the custody of the court and will be available upon determination of the case. "While it was improper for the judge to give his ruling on a date when the petitioner had not been notified, we do not find this issue sufficient to grant certiorari. If need be, this decision together with the ruling could be reviewed on appeal. "In view of the foregoing, the petition is hereby denied, and the alternative writ quashed ; and the Clerk of this Court is hereby ordered to send a mandate to the court below commanding the presiding judge to assume jurisdiction and proceed to determine this matter. Costs to abide final determination of this matter. And it is hereby so ordered." From the above ruling of our distinguished colleague, petitioner has appealed to the bench en banc. In arguing before us, petitioner stressed the points that he did not have his day in court and that the judge's ruling was prejudicial to him. He also argued that unlike a writ of error where payment of accrued costs is a statutory prerequisite to the issuance of the writ, in certiorari it is merely stated that petitioner "shall pay all the

accrued costs." Rev. Code 1 :16.23 (3). The Justice in chambers has ably handled this phase of the matter, and we would like to add that although the statute on certiorari does not state that the payment of accrued costs is a prerequisite to the issuance of the writ, yet the language

of the statute leaves no doubt that there must be some showing that accrued costs have been paid before the writ will issue. Being in complete agreement with the ruling of our distinguished colleague, the Justice in chambers, we hereby affirm that ruling. The Clerk of this Court is hereby directed to send a mandate to the court below to assume jurisdiction and enforce the ruling of the Justice in chambers. Costs against petitioner. And it is hereby so ordered. Ruling affirmed.

Lloyd v Rolland [1974] LRSC 70; 23 LLR 421 (1974) (24 May 1974)

J. EDWIN LLOYD, et al., Petitioners, v. A. B. ROLLAND, et al., Respondents. PETITION FOR A WRIT OF PROHIBITION TO THE COMMISSIONER OF PROBATE, MONSERRADO COUNTY.

Decided May 24, 1974. 1. An appeal from a judgment is a supersedeas and stays further proceedings in the case until the appeal· has been decided. 2. A curator performs his duties only when there is no eligible administrator or when a person eligible to serve as administrator declines to serve. 3. But a court may find it in the best interest of an estate to request the curator to conserve, but not administer, the estate, pending disposition of a case on appeal and is free to do so because of the delay in granting letters of administration.

Petitioners administering the estate of an intestate were challenged by other kin of the deceased and asked to serve in the capacity instead. The lower court denied the application and an appeal was taken from the ruling, which authorized the curator to administer the estate pending outcome of the appeal. Petitioners then applied for a writ of prohibition to the Justice in chambers. The Justice granted the petition and aside from delineating the functions of a Curator, he pointed out that the automatic stay of a judgment pending appeal would be nullified by permitting others to act in place of the petitioners who would have no estate left to administer. HENRIES,

J.,

presiding in chambers.

These proceedings for a writ of prohibition resulted from a bill of information for unlawful interference with the intestate estate of Nathaniel Rolland brought in the Monthly and Probate Court of Montserrado County, presided over by Hon. H. Victor Stryker, Commissioner of Probate.
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According to the record before us the petitioners were given letters of administration to administer
the estate of Nathaniel Rolland ; later they filed a bill of information for interference with the estate against A. B. Rolland.
Subsequently a petition from persons claiming to be the real next of kin, in which they requested that they be appointed to administer
the estate and that the letters of Administration given to petitioners be revoked, whereupon the petitioners excepted to and took
an appeal from the ruling. The court in granting the appeal noted for the record: "Until the appeal is finally determined in the
Supreme Court of Liberia, the Curator for Montserrado County shall administer the intestate estate. And it is hereby so ordered."
The petitioners in their application for a writ of prohibition contend that the court is attempting to proceed by wrong rules because,
despite the' appeal taken from his judgment, he is attempting to enforce the same judgment by having the Curator replace the petitioners
in the management of the estate. The respondent contends that the court was correct in ordering the Curator to take control of and
manage the estate pending the appeal in order to prevent devastation and waste. According to the Decedents Estate Law, "A curator
is authorized to and shall perform all the duties of an administrator and shall take possession of, manage and collect the rents
of real property and shall take care of, secure and collect the earnings on personal property with respect to the following estates
of intestates: " (a) Whenever any person not known to have left him surviving a person eligible to receive letters shall die intestate
either within this Republic or elsewhere leaving any real or personal property within the county, territory or district for which
the curator is appointed and whenever any personal property of such intestate shall arrive therein after his death; and "(b) Whenever
a court having jurisdiction grants

administration of the estate of an intestate to the curator upon
the application for such administration by the persons eligible to have letters issued to them." Rev. Code 8 :112.2. Our understanding
of this statute is that a curator performs his duties only in cases where there is no eligible administrator or when persons eligible to serve as administrators are unwilling to serve and,
therefore, petition the court to permit the curator to administer the estate. See also 31 AM. JUR., 2d, Executors & Administrators,
§ 643. Neither situation exists in the case at bar; in fact, objections have been interposed to the appointment of the petitioners
as administrators, an issue which is presently on appeal before the Supreme Court. It is our opinion, however, that in cases of delay
in the granting of letters the court may find it in the best interests of the estate to appoint a temporary administrator or request
the curator to conserve the estate pending the disposition of the case on appeal. The law applicable to such circumstances is also

in the Decedents Estate Law. "When temporary administration may be granted. Temporary administration may be granted if the court finds it is in the best interests of the estate, when, for any cause, delay occurs in the grant of letters on the estate of a decedent or a person alleged to be deceased or in the probate of his will." Rev. Code 8 :1 Da 1. "Standard administration. Letters of temporary administration shall confer upon the person named therein all the powers and authority with respect to taking into his possession, securing and preserving all the personal property of a decedent and subject him to all the duties and liabilities of an administrator with respect thereto." Rev. Code 8 :110.3 (1). There is a difference in meaning between "administer" and "conserve"; the former means to take charge of busi-

ness ; to manage affairs; to settle and distribute the estate of a decedent. BLACK'S LAW DICTIONARY. The latter means to save from loss. In the first case the curator could proceed to administer and leave nothing to be done when letters of administration are finally issued. In the second case, the curator merely keeps the estate together for administration by the administrators whenever the appeal is determined and letters are issued. This is what the lower court should have ordered to be done by the curator. To permit the curator to administer the estate at this juncture, when the case is pending on appeal, would be to defeat the purpose of the appeal and would be contrary to opinions of this Court which hold that an appeal from a judgment shall operate as a supersedeas and a stay of any further proceedings in the case. Schilling & Co. v. Tirait, [1965] LRSC 3; 16 LLR 164 (1965) ; Wanney v. Massaquoi, m LLR 241 949). In view of the foregoing, the peremptory writ is hereby ordered issued requiring the lower court to desist from proceeding further in this matter, that is to say, permitting the curator to administer the estate. Costs to abide final determination. It is so ordered. Petition granted.
(1

Levin v Juvico Supermarket [1974] LRSC 46; 23 LLR 201 (1974) (15 November 1974)

A. B. J. K. LEVIN, of Sweden, Appellant, v. JUVICO SUPERMARKET, Appellee. MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued October 22, 1974. Decided November 15, 1974. 1. When the appeal bond and the property valuation statement both contain the assessed value of the property pledged, the failure to set forth property valuation in the affidavit of the sureties will not be considered such a defect as to warrant dismissal of the appeal. 2 Mere technicalities which do not affect

the merits of the case are not favored by the Supreme Court as a basis for deciding cases on appeal.

The evaluation of property pledged by appellant was not set forth in the affidavit of sureties appended to the appeal bond, but it was contained in the bond and in the certificate of valuation, also appended to the bond. The appellee moved to dismiss the appeal on the basis of the aforesaid omission. The Supreme Court stated that the basis for the motion to dismiss was predicated on a mere technicality, since the valuation could clearly be established by reference to the other documents. The motion to dismiss the appeal was denied. E. H. Pelham for appellant. H. Victor Stryker for appellee. MR. JUSTICE the Court. WARDSWORTH

S. B. Dunbar and

delivered the opinion of

This case involves a motion for the dismissal of an appeal. For the benefit of this opinion we deem it expedient to give a synopsis of the relevant facts and circumstances which led to the institution of the action now on appeal.

A perusal of the case reveals that on May 9, 1974, Juvico Supermarket, by and through its Manager, H. Victor Stryker, instituted an action for damages against A. B. J. K. Levin, of Sweden, by and through its representative, Nesstra, represented by its Manager, Carl Hermolin. The action was based on the facts set forth below. On September 4, 1972, the plaintiff, who is the appellee, placed an order with Nesstra for the importation of one Levin LM 13 Integral four-deck screens cooling cabinet, the purpose of which was the refrigeration of foodstuffs. $1,223.00 was the purchase price of the cooler, $827.00 being paid for the cooler itself, $230.00 being paid for freight charges, and $166.00 being paid as duty on the cooler. A dispute arose between the parties as to the electrical cycle the cooler was to be built for. The plaintiff contended that it had emphasized to Nesstra that since the local electrical system was equipped with 6o-cycle power, the motor of the cooler should be made equipped for a 60-cycle electrical system. Nesstra, on the other hand, contended that no such information had been communicated to it by the plaintiff. In any event, the cooler sent to and installed at the Juvico Supermarket contained a motor equipped for a 50-cycle electrical system. The result was that in August, 1973, eight months after it was installed, the cooler broke down. Thereafter, several communications were exchanged between the plaintiff and the defendant, through its agent, Nesstra, with the result that the plaintiff was told to take the cooler to the Modern Refrigeration Shop, where repairs would be made to the cooler and parts supplied therefor. It turned out, however, that the Modern Refrigeration Shop had no

spare parts available that fit the motor of the cooler. Hence, no repairs could be made. Upon being informed that no spare parts were available, the plaintiff again communicated with the defen-

dant through its agent and subsequently complained to the Ministry of Commerce, Industry and Transportation. The Ministry of Commerce, Industry and Transportation then communicated with the defendant through Nesstra, the essence of which was to demand that repairs be done to the cooler or the plaintiff be reimbursed a sum equivalent to the value of the cooler, plus expenses. After sev eral communications between the plaintiff, defendant, and the Ministry of Commerce, Industry and Transportation and after an investigation conducted by the Ministry, the plaintiff received reimbursement in the amount of $1,193.00, in accordance with the ruling of the Ministry of Commerce, Industry and Transportation. The plaintiff, however, feeling itself to have been damaged by the breakdown of the cooler, brought an action for damages. The complaint alleged that as a result of the breakdown of the cooler, the plaintiff was unable to satisfy the needs of its customers; that it could no longer provide supplies to its customers as it had done in the past; that as a result its customers were forced to abandon their patronage, the immediate effect of which was a reduction in the volume of business, a defamation of its reputation, good name, and fame hereinbefore untarnished and victimizing it financially. The action for damages was based on a breach of warranty by the defendant. According to the complaint, the plaintiff had been given a warranty by the defendant, guaranteeing that the cooler would be in good condition for a period of sixteen months, but within eight months the cooler broke down. The plaintiff, therefore, sought damages in the amount of $54,000.00. The defendant filed an answer denying that the plaintiff had any right of recovery against it. Subsequently a reply was filed, the issues of law were ruled upon and the case ordered to trial. The jury returned a verdict in favor of the plaintiff, awarding it damages in the amount of $54,000.00. The defendant excepted to the verdict.

Thereafter, a motion for a new trial was filed, resisted and denied. It was upon the denial of the defendant's motion for a new trial and the rendition of final judgment that an appeal was taken to this Court. Upon the appeal reaching this Court, the appellee filed a motion to dismiss it. In its motion, which contains two counts, the appellee argued that the appeal be dismissed for the reason that the steps prescribed by statute to perfect the appeal had not been followed; the defects being that the appeal bond had not been approved by the trial court judge and that the affidavit of the sureties did not certify the value of the property of the sureties. It is this motion which we shall deal with in this opinion. As to point one enumerated above, we find it to be without any foundation,

since an examination of the appeal bond reveals that it was in fact approved by the judge of the trial court as required by law.
That count is, therefore, dismissed. Count two presents a more complicated situation. In that count appellee argues that since the affidavit of the sureties fails to certify the amount or value of the property of the sureties, the affidavit is defective, warranting dismissal of the appeal. The Civil Procedure Law which is relevant to this argument states that an appeal bond should be accompanied by an affidavit of sureties containing specified information. "(a) A statement that one of them is the owner or that both combined are the owners of the real property offered as security; "(b) A description of the property, sufficiently identified to establish the lien of the bond; "(c) A statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered; and "(d) A statement of the assessed value of each property offered." Rev. Code 1:63.3.

It is the fourth point which is being argued herein. Point four in the affidavit of the sureties filed by the appellant states: "That the combined value of the said properties is $ dollars." It is the contention of the appellee that the failure of the appellant to insert the value of the property in the space provided renders the affidavit defective, warranting dismissal of the appeal. We agree with the appellee that the affidavit was made defective by the appellant's failure to insert the value of the property as required.
We feel, however, that the defect was cured by the bond and property valuation statement to which the affidavit was attached. The affidavit of sureties is an oath affirming and confirming that the statements and amounts contained in the appeal bond and statement of property valuation are true and correct. Therefore, since both the appeal bond and the statement of property valuation contained the assessed value of the property, the failure of the affidavit of sureties to set it forth is not such a defect as to warrant dismissal of the appeal. We have repeatedly stated that mere technicalities which do not affect the merits of the case are not favored by this Court. Deady v. Republic, [1944] LRSC 12; 8 LLR 256 (1944) ; Kobina v. ilbraham[1964] LRSC 2; , 15 LLR 502 (1964) ; Mitchell v. Fawaz, [1964] LRSC 8; 15 LLR 541 (1964). We are not prepared to change this holding which we feel is a necessity in the administration of justice. Further, this omission in stating the assessed value of the property in the affidavit of sureties would not impair the enforcement of the bond should it become necessary to be enforced. Considering the bond as a whole the appellant did subscribe an oath as to the combined value of the properties involved as reflected in the statement of property valuation attached to and forming a part of the bond. The purpose of a bond is to indemnify the opposing party. In the instant case, the appeal bond and the state-

ment
of property valuation carried an amount sufficient to indemnify the appellee. The affidavit was simply a sworn statement to the effect
that all that was contained in the appeal bond and the statement of property valuation were true. Had the appeal bond and the statement
of property valuation failed to carry the assessed value of the properties we would have been persuaded to decide otherwise, because
then the affidavit of sureties would be a sworn statement to properties whose assessed value was unknown and uncertain. In the instant
case, however, whatever defect was contained in the affidavit of sureties as regards the omission of the assessed value of the properties,
was cured by being carried in the appeal bond and the statement of property valuation, as aforesaid. Therefore, in view of the foregoing,
the motion to dismiss the appeal in this case is hereby denied, the appeal to be heard on its merits. Costs disallowed. It is so
ordered. Motion to dismiss appeal denied.

Togba v Slehwerron [1973] LRSC 82; 22 LLR 334 (1973) (23 November 1973)

ANTHONY TOGBA, Appellant, v. MOMBO SLEHWERRON, Appellee.
APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued November 12, 1973. Decided November 23, 1973. 1. In an action of ejectment, where the trial court proceeds with the trial
of the action in the absence of defendant and his counsel who have walked out after counsel's dispute with the trial judge during
jury selection, a judgment against defendant will be reversed and the case ordered retried. 2. Where it appears to the Supreme Court
that a trial was not conductd according to law, the Court will order a new trial.

An action of ejectment was instituted against
appellant. During the selection of a jury an altercation arose between the trial judge and defendant's counsel. Defendant and defendant's
counsel thereafter walked out of court. Thereupon, the judge announced the case would be resumed next day. It appears that the trial
was conducted before a jury in the absence of defendant and counsel. A judgment was rendered for plaintiff, and defendant appealed
therefrom. The Supreme Court emphasized the incorrect procedure of the trial judge, noting his failure to have a notice of assignment
served. The substantial impairment of defendant's rights was also pointed out, and in consequence judgment was reversed and the case
remanded for retrial. 0. Natty B. Davis for appellant. for appellee. Moses K. Yangbe

MR. JUSTICE WARDSWORTH delivered the opinion
of the Court.

The above entitled cause of action of ejectment was entered in the Sixth Judicial Circuit Court, Montserrado

County, in the August 1971 Term. It would appear that the complaint was withdrawn and an amended complaint
filed during the December 1971 Term of court. Defendant appeared and filed an answer, asking that the action of ejectment be dismissed
for reasons set forth in said answer. Plaintiff filed his reply, concluding the pleadings. The court ruled the issues of fact to
trial by jury and observed that where a suit in the nature of ejectment is joined with an action for the cancellation of a deed for
the same property, the issues of facts involved are properly triable by a jury, and also noted therein that equitable defenses are
admissible in actions in ejectment though no authority was cited. Appellant's counsel, in argument, alluded to an altercation between
the trial judge and appellant's trial counsel, which does not appear in the record, as a result of which counsel and his client walked
out of court, after which the court proceeded with the trial of the case in the absence of defendant and his counsel. The trial judge
should not have proceeded with the trial of the case in the absence of the appellant·and his counsel, especially since written pleadings
had been exchanged. The trial judge should have disciplined counsel, suspended the trial of the case, and granted appellant an opportunity
to secure other counsel to protect his legal interest. By the action of the trial judge in this case the interests of the appellant
have been made to suffer, for the appellant was not given an opportunity to exercise his right of challenge in the selection of the
jury, and the witnesses who testified for the appellee could not be cross-examined, a right granted a party for the purpose of testing
the motives, inclinations, and other attitudes of the witnesses who testify against him. In actions of ejectment where the title
to real property

is contested, the rights of a party should be especially safeguarded so as not to deprive
him of his property without legal justification. Counsel for appellee contends that appellant's bill of exceptions should not be
considered because there was no exception noted by appellant against the verdict of the jury. Appellant's counsel explained that
the reason why no exceptions were taken is that he took no part in the case and at the time the verdict was returned by the jury
he was not counsel. Be that as it may, we are of the considered opinion that appellant was not given a fair opportunity to prosecute his interests in this case in the lower court, for the reason that when the case was suspended on April 1o, after appellant and counsel walked out of court,
the judge announced the case would be resumed the following day. A regular notice of assignment should have been issued for the appellant

to appear and protect his legal interests in person, or to give him an opportunity to retain the services of another lawyer. The trial judge erred in proceeding with the case as he did. In Bey-Solow v. Gordon, [1913] LRSC 4; 2 LLR 95 (1913) , the Supreme Court held that when a cause comes to an appellate court for review, and it is discovered upon the face of the records that such cause was not conducted according to law, the appellate court will grant a new trial. Therefore, in view of the foregoing, it is hereby adjudged that the final judgment in this case should be and is reversed and the case remanded to the trial court for a new trial, with costs against appellee. It is so ordered. Reversed and remanded.

Ross v Roberts et al [1931] LRSC 8; 3 LLR 266 (1931) (1 January 1931)

WILLIAM ROSS (The Father), Plaintiff-in-Error, v. LEWIS BURKE ROBERTS (Grantee), and JOSEPH W. BROWN, Judge of the Monthly and Probate Court, Sinoe County, Defendants-in-Error.
WRIT OF ERROR TO THE MONTHLY AND PROBATE COURT OF SINGE COUNTY.

[Undated.] 1. Any person who meddles or interferes with the estate of an intestate without authorization of the Monthly and Probate Court thereby becomes liable for the payment of all debts owed by the deceased. 2. It is the duty of an administrator to make known to the court any property found in the estate of the intestate which belongs to other persons. 3. The administrator of an estate cannot purchase for himself property forming part of the estate, as it is he who must execute the deed of administration. 4. The rule allowing a person objecting to probate of a deed ten days to complete his objections was merely intended to fix a time limit and not to be construed as a bar to objectors completing their objections forthwith. 5. It is error for a court to refuse to grant a motion for continuance based on the absence of material witnesses.

Plaintiff objected in the Monthly and Probate Court of Sinoe County to the probate of a deed from his daughter Ellen R. Ross to the defendant. The objections were overruled, and the case has been removed to this Court by writ of error. Counsel for both parties have filed stipulations that the case be remanded to the court below to ascertain the facts. Stipulations of counsel confirmed and case remanded.
E. Emmons Dixon for plaintiff-in-error. Brownell for defendant-in-error. N. H. Sie

MR. JUSTICE GRIGSBY delivered the opinion of the Court. This case comes from the Monthly and Probate Court, County of Sinoe, to this Judicature by a writ of error in

which William Ross, the father of Ellen R. Ross, plaintiff, claims ownership to
Lot No. 405 situated in the City of Greenville, County and Republic of Liberia aforesaid. It appears from an inspection of the records
that the lot under consideration was bought by Isaac Roberts, previous to his demise, from Mrs. Marshall on behalf of his late wife
Mrs. W. E. Roberts. This property the decedent, Isaac Roberts, held during his lifetime and erected a dwelling house thereon in which
he lived up to the time of his death, August 27, 1929. The deed for said premises was kept by Mr. Roberts and was not delivered to
his wife W. E. Roberts nor her daughter Ellen R. Ross, but remained in his possession up to his death. William Ross, the father,
objected to the probation of the transfer deed for lot number 405 in the City of Greenville and County of Sinoe from Ellen R. Ross
to Lewis Burke Roberts for the following legal reasons : 1. Because he says that the deed offered for probation from his daughter
Ellen R. Ross to Lewis Burke Roberts is fraudulently and fictitiously gotten in that the said Lewis Burke Roberts told Ellen R. Ross
that he intended procuring a room in which to reside in the premises--lot number 405--and that he would - write up stipulations to
bind both of them, but she had no knowledge that she was signing a warranty deed in favor of Lewis Burke Roberts. 2. He further objects
on the grounds that from the granting of the letter of administration to Lewis Burke Roberts up to the signing and offering of the
deed for probation it is not twenty days in keeping with the statutory laws of the Republic controlling sale of realty by administrators,,:and
further that the administrator had not complied with other requisites in the handling of the estate; and that this disregard of the
statute has a tendency to create corruption in the management of the estate. 3. The objector contends further that the said Lewis

Burke Roberts to whom the deed is being transferred is one of the administrators of the intestate estate
of the late Isaac Roberts and as such cannot purchase this property, which is under direct control of the aforesaid Lewis Burke Roberts,
who is thus attempting to do what the intestate failed to accomplish during his lifetime. 4. The probation was further objected to because
the intestate Isaac Roberts had a collateral warranty claim over lot number 405 so that Lewis Burke Roberts, one of the administrators
of the estate, cannot, prior to the rendition of their closing report, take possession of or purchase said premises from Ellen R.
Ross. The objections being overruled by the judge of the Probate Court of Monthly Sessions, plaintiff-in-error applied for a removal
of his cause before this Tribunal by a writ of error and strongly contends that : "(a) His Honour the Judge of the Probate Court,
one of the defendants in error, in his ruling, opinion and decision rendered on the 9th day of October, A. D. 1929, erred in that
no evidence written or oral was offered by the grantee to overrule the objections set up against the probation of the deed by the

plaintiff-in-error. "(b) His Honour, one of the defendants in error, further denied plaintiff in error's written motion for continuance until the next term of court on account of material witnesses being absent and who could not be had within the two days--i.e. from the 7th October to the 9th day thereof-- given Plaintiff-in-error for the hearing of the objections ; but forced plaintiff-in-error to take the matter on the 3rd day of the session of the court; and notwithstanding plaintiff-in-error applied for a subpoena and the subpoena was returned with witnesses in part available; and notwithstanding the law offered in support of ob-

jections, the hearing of the evidence was denied and the court ruled against plaintiff-in-error. "(c) It is further contended that it was shown to the court below that grantee clandestinely, deceitfully and illegally obtained his purported transfer deed and presented same to the court for probation and registration without procuring written or oral testimony of the grantor to verify or prove the validity of the purported transfer deed showing that the objections were false and that the transfer as well as his acts were valid." The statutory laws of this country regulating the Monthly and Probate Court plainly declare that no person or persons shall meddle or interfere with the estate of any person dying intestate (except to take a true and correct inventory of all the real and personal estate) unless authorized so to do by the said court for the county wherein such intestate resided, and any person so doing shall thereby become liable for the payment of all the debts due by the deceased and for the respective shares of all the natural or legal heirs to such estate. After the demise of an intestate it is the duty of the Probate Court to appoint an administrator or administrators who shall give bond and security in double the estimated value of said intestate estate for the faithful performance of all the duties connected therewith as follows: "He shall make a correct statement of all and singular the property and effects of the deceased; whatever there is that is perishable he may sell at auction after giving notice by advertisement in three of the public places in the county for the space of twenty days ; such sale may at the discretion of said administrator or administrators be made at a credit not to exceed six months on bond and sufficient securities for the payment thereof. He shall make returns to the next term of the court of his and all other matters and doings

connected with said estate. And should it be found that the said deceased was so indebted as to make it necessary that further sale of property should be had, then he shall be ordered by the court to sell any or all of said estate for the payment of such claims." Therefore these

duties are solemn and specific and embodied in the letter of administration issued under the seal and signature of the clerk of said court by orders of the judge thereof ; and nothing therein can be so construed as to authorize the disturbance or interference with estates settled or unsettled in the hands of the administrator as a trustee without the intervention of the Probate Court; to do otherwise would be exceeding the administrator's authority and he should be discouraged by the said court whenever its attention is called thereto. It appears from the records that the deed for the lot in question being in the possession of the late Isaac Roberts up to his death, the same being the property of his late wife W. E. Roberts, it was incumbent upon the administrator or administrators in their inventory to make this fact known to the court for the benefit of the daughter of plaintiff-in-error, she being the sole heir to the property of her late mother and the immediate surviving heir by descent. Also to declare property belonging to other parties concerned. The court should have viewed the acts of defendant-inerror with strong disfavor: being one of the administrators_of the estate, he became the legal representative. at the real and personal effects of the said intestate estate which the decedent ac_auired dvring his lifetime. If, however, the personal effects prove inadequate to meet the liabilities causing the administrators to apply to the court for an order to dispose of real property, the right of purchase is a privilege offered to all citizens, the administrators excepted. An administrator can only purchase from a third party as it is he who must execute the deed of administration. It should be the duty of every judge

of the court to preserve the purity and impartiality of the court and to retain the respect and confidence of litigants appearing at the bar of justice with their matters for adjudication. Under the Constitution it is the right of every citizen to acquire and possess property and to defend and protect it when his safety and happiness require it and no man has the right to dispossess him thereof without due course of law. This Court therefore is of opinion that it was manifest error on the part of the judge of the court below to have overruled the objections raised by plaintiff-in-error in the court below when they partook of matters of fact which could only be overruled for want of sufficient written or oral testimony. This Court is also of the opinion that whenever a deed is offered for probation, the object of the sheriff's publicly announcing it at the door is to enable those having objections to its probation to come into court and make it known; in which case the objector is allowed ten days to complete said objections and an additional ten days for respondent to make his defense. In the event the objections are not completed within the ten days granted, the same is tantamount to a waiver and the deed is ordered probated. This is merely intended to fix a time limit to parties having objections and not to be construed as a bar to objectors completing their objections forthwith if the requirements of the law make it possible. It was error for the judge to have refused plaintiff-inerror's motion for continuance because the law has cogently

laid out the grounds for which a cause may be continued, viz.: i. Inability to obtain the evidence of a witness, 2. Filing amendments to pleadings which introduce new matter of substance, 3. Illness of counsel or surprise from unexpected testimony. It appears also that notwithstanding the original docu-

ments for the said parcel of land were deposited with the decedent for safekeeping for and on behalf of Ellen R. Ross, yet it seems that the said document was clandestinely removed by the defendant-in-error from the batch of other documents. It appears also that notwithstanding the court's attention was called to the act of the administrators, yet the records prove that the trial judge failed to employ the use of the machinery of the court to have matters rightly placed before it for adjudication to the best interest of those concerned. While it is an admitted fact that it is the power of the court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision, yet its decision must be based on some principle of law or fact. And a finding without evidence, as in this case, is arbitrary and useless and an exercise of arbitrary power and places the parties to this litigation at great disadvantage. In consequence of which, at the call of the case, R. Emmons Dixon, Esq., counsel for plaintiff-in-error, and N. H. Sie Brownell, Esq., for defendant-in-error, respectfully submitted that in view of the fact that fraud is alleged to have attended the execution of the deed, the basis of this suit, said counsels have filed stipulations that said case be remanded to the court below in order that the evidence touching said allegation of fraud attending the execution of the deed in question may be sifted and said evidence be sent to this honorable Court to enable said Court to more intelligently and legally adjudicate the same. Stipulations of counsel are hereby confirmed and case remanded. Cost to follow final decision. And it is hereby so ordered.
Remanded.

Glapoh v Sawmilling Co [1970] LRSC 13; 19 LLR 451 (1970) (29 January 1970)

J. SAYOU GLAPOH, Appellant, v. BOLADO SAWMILLING COMPANY, by and through its manager, LORENZO BOLADO, Appellee.
APPEAL FROM THE CIRCUIT
COURT OF THE NINTH JUDICIAL CIRCUIT, BONG COUNTY.

Argued October 15, 1969. Decided January 29, 1970. 1. Injunctive relief is granted on equitable considerations which are assessed within the broad discretionary powers given to the court in such cases, subject to appellate reversal when discretion has been palpably abused. 2. An injunction may not issue when title to land forming the basis

of the action has not been finally determined. 3. A trial court may dissolve a writ of injunction upon its own initiative after termination of pleadings, without a motion made therefor. 4. The trial judge is empowered, after issuance of a preliminary injunction, to subsequently modify or suspend it before the final hearing. 5. The preliminary writ should only issue from the trial court when it has been clearly evidenced by the petitioner that immediate and irreparable injury will result to him during the interval before the final hearing.
6. A preliminary injunction cannot be made final until after the respondent appears to show cause why the injunction should not be made permanent 7. Since under provisions of L. 1963-64, ch. III, Civil Procedure Law, § 5177, the Supreme Court may modify any judgment of a lower court, and realizing that continued tree cutting may diminish the value of the land at issue, the Supreme Court, though affirming the judgment of the lower court, may modify the judgment to the extent of restraining the respondent from further tree cutting pending the final determination of title to the property claimed by both parties in the untried ejectment suit. 8. The judge of a trial court is the master of his own record in a proceeding.

An injunction suit was instituted to restrain the appellee sawmilling company from its timber harvesting on the ioo acres claimed by appellant as his and disputed by the company, which also claimed title to the same tract. Subsequent to the suit for injunctive relief, the petitioner in that proceeding began an action in ejectment, which remained untried to the time of this opinion. After the preliminary writ of injunction had been issued, the respondent company moved for dissolution of the restraining order. In the absence of the petitioner, who had opposed the motion, the court set bond and permitted
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the company to continue operations pending final determination of the motion to dissolve the writ, which was, thereafter, vacated by the trial court after a hearing. The petitioner appealed from both aspects of the lower court's conduct and decree. The judgment was affirmed, with the modification that until title to the acreage at issue was finally determined in the ejectment suit, the company was to refrain from its timber harvesting on the tract claimed by the appellant. lant.
Stephen Dunbar and S. Raymond Horace for appelPeter 'linos George for appellee.
MR. JUSTICE MITCHELL

delivered the opinion of the

court. On February 9, 1968, J. Sayou Glapoh, petitioner, filed an action of injunction against Bolado Sawmilling Company, in the Circuit Court of the Ninth Judicial Circuit, Bong County, sitting in its Equity Division. The complaint averred that the petitioner was the owner of one hundred acres of land, situated, lying and being on the western side of the Gonota Nyaniquellie Road, Nyanborquellie

Chiefdom, as can more clearly be seen from the copy of his deed made profert and marked exhibit "A," and that he was entitled to the title, enjoyment, use, possession and occupancy of the said tract of land. That notwithstanding his long ownership and possession of the said premises, and also the improvements he had made thereon, respondent had deliberately and without color of right, entered upon and was using the said property to its own benefit, thereby depriving petitioner of the use and enjoyment of his property. In its answer, the respondent categorically denied operating on any land owned and possessed by the petitioner, but that they operated on a parcel of land owned by the late Joel Tolbert which they did by permission of the co-

administrators of the estate of Joel Tolbert, and there was no encroachment made on any land owned by the petitioner. In support of this allegation made by the respondent in its answer, there is in the records a letter from one Henry G. Grimes, Geodetic Engineer, Public Land Surveyor, Bong County, R.L., which said, among other things that he had made a resurvey of the Tolbert estate's realty situated in the area of the Bolado Sawmilling Concession and occupied by it, and that he had found that Tolbert's area made no encroachment on Glapoh's area whatsoever. After respondent filed its answer, it moved the court for dissolution of the injunction and to grant bail so that the operations of the company would not grind to a halt on the writ of injunction since title had not been determined by the court. Immediately thereafter petitioner filed a bill of information, informing the court below that respondent had wantonly violated the writ of injunction, because notwithstanding that it enjoined, restrained and prohibited the company and all persons directly or indirectly engaged in its operations, work had continued. The court heard argument, dissolved the injunction and granted bail so that the company could continue operations pending the determination of the ejectment suit now before the said court, which would determine title.

The plaintiff excepted to the court's decree and has come before us for review on a bill of exceptions comprising six counts. Count one of the bill reads : i. Because on the 9th day of February, 1968, petitioner filed an action of injunction against the respondent in which an interlocutory writ of injunction was issued against the respondent, commanding and enjoining it and its agents to stop and desist from all operations upon the parcel of land being too acres of land owned by petitioner, the subject matter of these injunction proceedings ; and the Sheriff did on the said
"

9th day of February, 1968, go on the scene of operations and there notified Mr. Guillermo Revuelta, the superintendent of the Bolado Sawmilling Company, in the presence of nearly fifty odd

workers, that a writ of injunction had been issued against the said company, and that he was traveling to Monrovia to make further service upon the respondent but that in the meanwhile they should cease all operations thereat. But that in violation of the said writ of injunction and in defiance of the court's orders, respondent never stopped the operations but continued to saw lumber and take away several truck loads to Monrovia. . . ." This one-hundred-acre tract of land which petitioner refers to in this count, is the subject matter of an ejectment suit already pending before the Circuit Court of the Ninth Judicial Circuit, and although the matter is still in litigation, he claims that the operations should cease by virtue of the writ of injunction and remain suspended indefinitely. In view of the dispute over title and the bond which was required, the court's action seems to have been entirely correct, and there appears to have been no violation of any injunction. Injunctive relief is granted on equitable considerations and to those only who can show an equity entitling them to the remedy. A court in granting relief does so in the exercise of its discretion with the view of administering justice to the parties and this Court may not disturb the exercise of this discretion except if it is shown to have been palpably abused. An injunction does not lie except when there is a trespass and trespassing does not lie unless bona fide title is established in the one who claims ownership to the land. This had not been done, since the suit of ejectment still remains undetermined. In Wahob v. Adorkor, [1954] LRSC 30; 12 L.L.R. 152 (1954), the Court said that an action of injunction may be dismissed

by the trial court without motion of the defendant. Further in the opinion, at pp. 155-156, the Court continued: "We are of the opinion that the filing of a motion to dissolve an injunction is surely an expeditious means of bringing the case to a judicial termination upon the issues raised in the answer, but its absence will not prevent the dissolution of said injunction upon defendant's 'sufficient answer to the complaint verified by oath.' In the instant case the answer is verified by oath. Hence, the trial judge was right after the resting of pleadings to hear same and if sufficient grounds are shown in said verified answer, to support same." "Generally, a judge having the power to issue a preliminary injunction does not in doing so exhaust his power over the order, but may subsequently modify or suspend it before the trial, where it appears that the injunction was improvidently granted or that the continuance thereof in its original form would result in serious injury or unnecessary hardship." 28 AM. JUR., Injunction, § 311. The foregoing displays that the trial judge did have a right to exercise his discretion in dealing with the injunction, and although the field manager had been informed of the issuance of the writ of injunction and the service thereof and had not put a halt to his work immediately, it constituted no error on his part that he did not consider it in violation of the injunction. Count two contends : "And also because on the 14th day of February, 1968, respondent filed a motion for dissolution and bail; and on the 17th of February, 1968, petitioner filed a

resistance to said motion for dissolution; but that despite the fact that no assignment was made or served on petitioner to appeal and oppose the motion and argue his resistance, the court in violation of statute granted bail thereby giving respondent permission to continue its operations, not having first disposed of

the motion. To this act on the court's part petitioner excepted." Our statute is clear on this point, for our Civil Procedure Law, 1956 Code, tit. 6, § 1082, says that an injunction is never made permanent until the respondent has appeared to show cause why the writ shall be dissolved and why a permanent injunction shall not issue against him. The initial writ, therefore, is regarded as the preliminary one which should only issue after the judge has been fully satisfied by the evidence presented by the petitioner that immediate and irreparable injury, loss, or damage will result to him from the prospective actions of the respondent. The respondent below operated a concession given by the Government, where three or more hundred Liberian citizens earned their livelihood and contributed to the economy of the Country, who were about to be thrown out of employment and the Government lose income merely because a single citizen was claiming a contested right to a small tract of land said to be situated within the locality of the operation. This count charges the judge with granting bail to the respondent without the knowledge of the petitioner so that the operation could continue pending a determination of the injunction suit. We cannot agree with this view because, in the first place, this was the preliminary writ issued, and secondly, being a suit in equity the judge enjoyed discretionary power. "Injunctive relief, whether prohibitory or mandatory, is granted or withheld in the exercise of a sound judicial discretion and in conformity with settled equitable principles and considerations." 28 AM. JuR., Injunctions, § 21. In Young v. Embree, [1936] LRSC 21; 5 L.L.R. 242 (1935-36) this Court held that injunction does not lie where title to real property is an issue involved ; more especially, where the party sought to be enjoined sets up adverse possession to said

land, and in order to authorize punishment for the violation of an injunction, the acts complained of must be clearly embraced within the restraining clause of the injunction, so that the language of an order of injunction should not be extended to cover acts not fairly and reasonably within its meaning.

As has already been said, title to the property still has not been determined, and the trial judge commented at length on this in his ruling. Count two, therefore, is not sustained. Count five alleges : "And also because on the 22nd of February, 1968, when for the first time upon an assignment petitioner's counsel appeared in court, he insisted on making record against the court's adverse

action on the application for bail, and also the court's disposition of petitioner's bill of information." In relation to this count, the court declined such request, ruling that it would be attended to in the final judgment. We cannot forget that this was an injunction suit, and in such a case title had to be unquestionably vested in the petitioner. Moreover, the judge was master of his own record, hence, if appellant desired to make a record not applicable to the facts and circumstances, the court in its own right was vested with the authority to deny the privilege. Count five is not sustained. Count six raises objections to the trial court's references to the pending ejectment suit and its effect upon the injunction proceedings, which were entirely proper, in view of our comments above. Count six is not sustained. The one and only legal issue involved in this case that attracted our attention very strongly is the question of the cutting down or destruction of live trees on the property, which must have a tendency to diminish the value thereof. However, since under ch. III, § 5117, of our Civil Procedure Law, L. 1963-64, this Court enjoys the right to reverse, affirm or modify any judgment of a court be-

low, and, realizing that until such time as the ejectment suit is finally disposed of and title determined, the trees, whether shade, ornamental, fruit or any other kind, should remain on the property uncut, it is, therefore, our judgment that the decree of the lower court be affirmed, with the modification that the appellee in this case abstain from cutting any trees from this particular tract of land until such time as the ejectment suit above mentioned is concluded in the manner aforesaid. This opinion, of course, does not include the whole area in which the Sawmilling Company operates, but rather it refers only to the particular ioo-acre tract now in litigation. Costs are hereby ruled against the appellant and the clerk of this Court is hereby ordered to send a mandate to the court below informing it of this judgment. And it is hereby so ordered. Affirmed as modified.

Wahab v Fondo et al [1964] LRSC 38; 16 LLR 73 (1964) (22 May 1964)

HAWAII KIAZOLU-WAHAB, a Tribal Resident of Via Town, Monrovia, Appellant, v. SONIFU SONNI, Tribal Chief of said Town, and ALHAJ VAMUYAH CORNEH, MAMBU SONNI, CIAFFA JALAIBA, JENEKA BALLAH-FONDO, et. al., Residents of said Town, Appellees.
APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued April 9, 1964. Decided May 22, 1964. 1. Res judicata is a principle of law which bars litigation of issues in a case involving the same parties and the same subject matter where the case has once before

been judicially determined; that is to say, where the merits of the issues involved have previously been tried and judgment rendered thereon. 2. The statute requiring only a single withdrawal and refiling of a case was intended to mimimize the chances of harrassment and vexation resulting from repeated litigation; and the statute is in harmony with the doctrine of res judicata since it shortens litigation. 3. Any act done by a withdrawing party which puts finality to a ruling or judgment would immediatly invoke the doctrine of res judicata against another filing of the case; but if the merits of the case had not been determined and there was no law which forbade another filing of the suit, withdrawal would not be an act of finality and the doctrine would not apply. 4. A married woman is as competent a person to make a civil contract in her own name as she is to sue in her own name to protect her interests under that contract. 5. Pleadings begin with the complaint of the plaintiff which brings the suit or action into court ; and the issues raised therein may be joined in an answer of the defendant in which he may defend by denying the allegations of his adversary. The final results of a case may rest on these two pleadings only, or may be influenced by the subsequent pleading of the plantiff.

On appeal, an order dismissing a bill in equity for reformation of a lease agreement, was reversed and the case remanded with instructions for new trial on issues of law and fact.
T. Giybli Collins for appellant. Joseph F. Dennis

for appellee.
MR. JUSTICE PIERRE

delivered the opinion of the Court.
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LIBERIAN LAW REPORTS

The present appellant filed a bill in equity to have the terms of a lease agreement between herself and the appellees reformed. An answer was filed by the appellees, to which she filed a reply generally denying the sufficiency of the answer, and the pleadings rested. The issues of law were passed upon by Judge Weeks who dismissed the petitioner's case on the ground that, as a married woman, she could not sue in her own name without joining her husband, and also that the general denial filed as a reply did not traverse the specific issues of law raised in the answer. The petitioner has appealed this order. Appellee's counsel contends that under the principle of res judicata, the appellant, having once withdrawn her appeal from the ruling dismissing her bill in the court below, and having paid costs, could not file the suit again. He relied upon the position taken by this Court in Liberia Trading Corporation v. Abi-Jaoudi, [1960] LRSC 38; 14 L.L.R. 43 (1960) . We have examined that case and find that the rule laid down therein does not and cannot apply in the present case because the circumstances in the two cases are entirely different; but we shall come to a comparison of the two cases later. Res judicata

is a principle of law which forbids relitigation of issues in a case involving the same parties and the same subject matter where the said case has once before been judicially determined ; that is to say, where the merits of the issues involved have been examined and judgment rendered thereon, thereby determining the said issues. But unless and until judgment has been rendered on the merits of the issues and this judgment has finally and effectively concluded the parties in respect to the said issues, res judicata cannot apply. To support this view, I will quote the following authoritative definitions of res judicata : "A matter adjudged; a thing judicially acted upon or decided ; a thing or matter settled by judgment; a

thing definitely settled by judicial decision; the thing adjudged." 34 CYc. 1666 Res judicata, res adjudicata. "The doctrine of res adjudicata, or estoppel by judgment, as it is sometimes less accurately termed, is a rule of law founded on the soundest consideration of public policy. It means that if an action be brought, and the merits of the question to be discussed between the parties, and a final judgment be obtained by either party, the parties are concluded, and cannot again canvass the same question in another action. It is founded upon two maxims of the law, one of which. is that 'a man should not be twice vexed for the same cause' ; the other that 'it is for the public good that there be an end of litigation. . . " Wisconsin v. Torinus, 28 Minn. 175, 179, 9 N·W. 725, 726 (1881). According to the above-quoted authorities, not only is it required that there should be a judgment in order to invoke the doctrine of res judicata, but there must be finality of judgment. In other words, an appealed judgment does not invoke the doctrine unless that judgment has been made to be final by some act or proceeding which would put finality to the issues involved and constitute the judgment of the inferior court as the law of the case. This is exactly what happened in the Liberia Trading Corporation case, supra, which the appellees cited in their answer, and relied upon in argument here; but as I have said, the circumstances in that case differed from those of the present case. In keeping with our statute which provides that a pleading may be once amended or withdrawn by a party filing it and a new one filed in its stead at any time before the case is ready for trial (1956 Code, tit. 6, § -320), it is the practice of the courts of this country that in every instance where a case is withdrawn and refiled more times than the law allows, the additional filings in excess of statutory authorization are deemed in violation of law.

This was the condition and the circumstance in the Liberia Trading Corporation case which was dismissed because it had been withdrawn and refiled three times-- two times more than the law allows. The first ruling dismissing the case on this ground became final in so far as the issues involved were concerned, because that ruling of dismissal had been finalized

by the statutory prohibition against a surplus number of filings of the case; therefore the action could not legally be reinstituted before any court. The statute allowing only a single withdrawal and refiling of a civil case was intended to reduce the chances of harrassment and vexation resulting from repeated litigation of the same subject matter between the same parties to the lowest possible minimum ; and this statute is in harmony with the doctrine of res judicata since it shortens litigation and thereby ends strife between the parties. It was necessary to apply the rule with the greatest strictness in the Liberia Trading Corporation case, not only in so far as such application conformed to the principle, but also because this application was made mandatory by statute. "The doctrine of res judicata is a principle of universal jurisprudence, forming a part of the legal systems of all civilized nations. The doctrine is to be applied in particular situations as justice and sound application of the policy behind the doctrine require ; it is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice. . . . "There is support for the rule that judgments relied upon in creating an estoppel are to be construed with strictness." 3o AM. JUR. 372-373 Judgments § 325. In the instant case, the petitioner appealed from a ruling dismissing her case, withdrew the appeal, paid costs and filed again. This withdrawal of the petitioner's appeal was neither in violation of any law nor strange to our practice, because the said ruling had not traversed or determined the issues in the case; nor was there any

law which forbade another filing of the case in order that the issues might be finally determined. Therefore res judicata, as relied upon by appellees, could not possibly apply in this case. But as I have said before, appellees have cited the decision in the Liberia Trading Corporation case, and asked that the rule there might be applied in this case. Now let us see what happened in the Liberia Trading Corporation case. An action of debt was brought by Liberia Trading Corporation, a Swiss concern doing business in Liberia, against one M. J. Abi-Jaoudi, a Lebanese Trader. The plaintiffs twice withdrew their complaint, amended it each time, and filed it again under the attack of the defendant's answer. The third filing of the complaints and other pleadings brought the case before Judge Dennis for the issues of law to be passed upon, whereupon he dismissed it on the ground that the several refilings in excess of the one required by statute were illegal. Plaintiffs appealed this ruling of Judge Dennis, but while the appeal was still pending, and before the Supreme Court could hear and review, plaintiffs must have realized the futility of appealing a ruling which was based upon the illegal acts of the appealing party, so they therefore withdrew their said appeal, paid the costs of litigation and, quite strangely, filed the case of debt again for the fourth time. This fourth filing of the case brought the issues before Judge Findley who dismissed it on the same ground as Judge Dennis; and it was this ruling of Judge Findley which was appealed to the Supreme Court and which

the Court was allowed to pass upon and in which it laid down the rule: "Withdrawal of appeal and payment of costs is positive indication of submission to and compliance with the judgment appealed from, and confirms it as a conclusive adjudication of the issues between the parties." Liberia Trading Corporation v. AbiJaoudi, [1960] LRSC 38; 14 L.L.R. 43 (196o), Syllabus 7. The difference between applying this rule in that case

and being able to apply it in this case lies in the fact that whereas, in that case, the dismissal of the appeal was based upon the statutory inhibition against a refiling, there is no such statutory inhibition against another filing in this case. Our law does not, as a general rule, forbid the refiling of a case in which an appeal of ruling of dismissal has been withdrawn, absent a law which prohibits another filing as in the Liberia Trading Corporation case. In that case, not only did the withdrawal and payment of costs finalize the issues which the judgment concluded between the parties therein, but it did so because the law forbade the act which was the basis of the dismissal--refiling for more times than the once which is mandatorily commanded by statute. In respect to withdrawal of appeals, the act might have one of two results, depending upon previous circumstances. In one instance it might finalize the issue, whereas in the other it might not. That is to say, if the merits of all of the issues were passed upon in a ruling or judgment, or if any act which could lend finality to a ruling had been performed by the party withdrawing, the doctrine of res judicata would immediately forbid another entry of the suit. On the other hand, if the merits had not been determined and there was no law which forbade another filing, withdrawal would not be an act of finality and the doctrine would not apply. As important as this issue is, it was not made a ground upon which the learned judge dismissed the case; in fact this point was completely ignored in the ruling, even though it had been raised in the pleadings before him. Ever and anon this Court has endeavored to impress upon trial judges the importance of passing on all issues of law raised in pleadings. It should not have been necessary for us to have to call attention to this requirement so often. As stated in the Syllabus of Clarke v. Snyder, 9 L.L.R. III (1945) "It is necessary that a judge, in passing upon plead-

ings in a case, make his ruling so comprehensive as to embrace every material issue involved." Also for reliance see Porte v. Porte, [1947] LRSC 7; 9 L.L.R. 279 (1947), and Wo/o v. Wo/o, [1942] LRSC 10; 8 L.L.R. 36 (1942). In the Wolo case, the judge in passing upon the issues of law dismissed the petition whereupon the plaintiff appealed to the Supreme Court as was done in the present case. Mr. Justice Barclay, speaking for the majority of this Court, in passing upon

this particular point said, at 8 L.L.R. 42: "It does not appear in the records that the judge's attention was called to his omission . . . to rule on the other important issues of law which he should have done under the rule laid down by this Court in the case of Sodjie v. Tartimeh [1920] LRSC 3; (2 L.L.R. 362) . In Sodjie v. Tartimeh it was held on page 363 that 'generally the court should dispose of the issues of law before trying the facts, but it does [D]epart from the general rule, and the party affected thereby fails or neglects . . . [to act thereon] at the proper time during the trial, . . . [said party] will be presumed to have waived the points of law raised in his pleading.' " This Court therefore reversed the judgment and remanded that case for another trial in the court below. We would like to comment that neglect of the trial court to pass upon all of the issues of law raised in a case affects not only the rights of a particular party in issue, but the merits upon which issue has been joined. The judge's failure to pass upon a legal issue raised places the Supreme Court in an awkward position in so far as its appellate jurisdiction over the said issue is concerned. And now we come to review one of the counts of the answer which the judge mentioned in his ruling dismissing the petition, namely Count I, wherein it is contended that a married woman, being under coverture, cannot sue in her own name but must do so through her husband. In the general denial filed by the petitioner as her reply,

the sufficiency of the law relied upon and the truth of the facts laid and contained in the answer are taken to have been denied ; but we shall come to pass upon this point later in this opinion. According to our Domestic Relations Law, and under rights and duties of married persons, it has been specifically laid down that: 4l any married woman who in her own name shall engage in any business or enterprise may for the purpose of such business or enterprise be considered a femme sole and as such without the intervention of her husband may make and execute contracts, sue and be sued, and do all such things as may be incident and necessary to the protection of her business interests. . . ." 1956 Code, tit. 1o, § 45. In this case not only did the petitioner make the contract which is the subject of this litigation in her own name without joining her husband, to whom she was married at the time, but the respondents, who are now the appellees, and who have now raised the question of petitioner's inability to sue in her own name, are partieslessors to the said contract, and they did not raise the question of her inability at the time of signatures. It is our opinion that a married woman is no more incompetent to sue in her own name and without intervention of her husband than she is to conclude a contract without him; and if she were a competent person to have entered a civil contract in her own name it is reasonable to assume that she would be as competent a person to sue in her own name to protect her interests under that same contract. There is another phase of this question which would seem to be very interesting. This pertains to a Liberian woman marrying a foreigner who is incapable of becoming a citizen, as in this case. Our Domestic Relations Law provides that a married

woman "shall be privileged or free to enjoy all the other civil rights granted by law to citizens of this Republic not in conflict with the Con. .

stitution of Liberia." (1956 Code, tit. 1o, § 45). The communal deed out of which this litigation has grown made the petitioner-appellant a co-grantee with the respondents-appellees. Her marriage to a foreigner who cannot be a citizen would seem to raise the question of whether or not her husband could in any manner have been joined in this litigation, since the inhibitive clause of the Constitution barred him from any ownership rights to real property. We would have liked this point to have been made an issue in this case so that we might have passed upon it; but since it was only mentioned during arguments I have referred to it in passing. The only other point passed upon by the learned judge in his ruling is the question of the reply of the petitioner being a general denial and hence insufficient to properly traverse the several issues of law raised in the answer. Respondents contended--and the learned judge, agreeing, also ruled--that when a reply is a general denial of the facts contained in the answer, the plaintiff thereby waives the right to contest the legal issues raised in the answer of the defendant. In Count i of the brief which appellees' counsel filed and argued here, he relied upon West and Company v. Lomax, [1930] LRSC 1; 3 L.L.R. 147 (193o), the syllabus of which says : "No general denial, whether expressed or implied, shall ever be construed in an answer or reply to be any affirmation of any fact such as time or other affirmative matter of the intention to prove which the other party ought in fairness to have notice." I might mention that in that case an action of debt was instituted in the Municipal Court of Monrovia, and was appealed to the Circuit Court of the First Judicial Circuit, Montserrado County, where the judgment against the defendant was upheld ; and it was finally appealed to the Supreme Court. But the issue involved in that case was quite different from the issue in the present case. In that case the defendant was without a definite defense

and therefore rested on a general denial. In this case it is the petitioner's reply which is being attacked for insufficiency. Whereas in that case an answer should have joined issue with the averments of the complaint, in this case issue is joined by the presence in court of two valid pleadings : a petition and an answer; and these two alone are sufficient to adequately present contentions in litigation in most civil cases. We are not convinced that the circumstances in the two cases are analogous and we do not agree that the principle laid down in that case could legally apply in this case. The argument that the dismissal of a reply for insufficiency places a plaintiff

on a bare denial of the facts laid in the answer is very strange and foreign to our practice. Pleadings in this jurisdiction begin with the complaint of the plaintiff which brings the suit or action into court and the issues raised therein might be joined in an answer of the defendant denying the allegations of his adversary. The final results of a case might very well rest on these two pleadings only or might be influenced by a reply, the subsequent pleading of the plaintiff. Whenever this latter is the case, our law requires that said reply should conform to the following statutory provision: "A reply or subsequent pleading may contain any or all of the following: (a) A denial of the truth of the facts stated in the preceding pleading; (b) A denial of the sufficiency of the law assumed in the previous pleading; or (c) A statement of new facts pertinent to the action." 1956 Code, tit. 6, § 311. In this case the petitioner's reply was couched in the following specific words: "Hawah Kiazolu-Wahab, petitioner in the aboveentitled cause, denies that the allegations contained in the answer of Sonifu Sonni, Tribal Chief of Vai Town, et al., respondents to her petition, furnish a

sufficient defense to this action, and she also denies the truth of the said allegations." It is our considered opinion that this reply completely meets requirements of the statute just quoted, for not only does it deny the truth of the allegations of fact contained in the answer in keeping with subsection (a) as quoted above, but it also seems to deny the sufficiency of the law relied upon as a defense in the said answer, which is in keeping with subsection (b). According to the statute, either one of these denials would be sufficient to adequately and competently join issue with the answer. Therefore we find ourselves unable to agree with the learned judge when he dismissed the case of the petitioner on this ground. But what is more, we also find it difficult to understand why the alleged and presumed insufficiency of the reply should have rendered the petition dismissable ; it would seem that if there was insufficiency in the reply, that pleading alone might have been affected and not the petition. In view of the foregoing we have no alternative but to reverse the judgment of the court below and remand the case with instructions that the judge resident in the Sixth Judicial Circuit, Montserrado County, or any other who might be next assigned therein, resume jurisdiction and pass upon the remaining issues of law in the pleadings which Judge Weeks omitted to pass upon. The issues of fact should then be decided, allowing any party dissatisfied to take appeal to the Supreme Court. Costs to abide final determination. Reversed and remanded.

Mitchell v Fawaz [1964] LRSC 8; 15 LLR 541 (1964) (17 January 1964)

HAWAII KIAZOLU-WAHAB, a Tribal Resident of Via Town, Monrovia, Appellant, v. SONIFU SONNI, Tribal Chief of said Town, and ALHAJ VAMUYAH CORNEH, MAMBU SONNI, CIAFFA JALAIBA, JENEKA BALLAH-FONDO, et. al., Residents of said Town, Appellees.
APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued April 9, 1964. Decided May 22, 1964. 1. Res judicata is a principle of law which bars litigation of issues in a case involving the same parties and the same subject matter where the case has once before been judicially determined; that is to say, where the merits of the issues involved have previously been tried and judgment rendered thereon. 2. The statute requiring only a single withdrawal and refiling of a case was intended to mimimize the chances of harrassment and vexation resulting from repeated litigation; and the statute is in harmony with the doctrine of res judicata since it shortens litigation. 3. Any act done by a withdrawing party which puts finality to a ruling or judgment would immediatly invoke the doctrine of res judicata against another filing of the case; but if the merits of the case had not been determined and there was no law which forbade another filing of the suit, withdrawal would not be an act of finality and the doctrine would not apply. 4. A married woman is as competent a person to make a civil contract in her own name as she is to sue in her own name to protect her interests under that contract. 5. Pleadings begin with the complaint of the plaintiff which brings the suit or action into court ; and the issues raised therein may be joined in an answer of the defendant in which he may defend by denying the allegations of his adversary. The final results of a case may rest on these two pleadings only, or may be influenced by the subsequent pleading of the plantiff.

On appeal, an order dismissing a bill in equity for reformation of a lease agreement, was reversed and the case remanded with instructions for new trial on issues of law and fact.
T. Giybli Collins for appellant. Joseph F. Dennis

for appellee.
MR. JUSTICE PIERRE

delivered the opinion of the Court.
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The present appellant filed a bill in equity to have the terms of a lease agreement between herself and the appellees reformed. An answer was filed by the appellees, to which she filed a reply generally denying the sufficiency of the answer, and the pleadings rested. The issues of law were passed upon by Judge Weeks who dismissed the petitioner's case on the ground that, as a married woman, she could not sue in her own name without joining her husband, and also that the general denial filed as a reply did not traverse the specific issues of law raised in the answer. The petitioner has

appealed this order. Appellee's counsel contends that under the principle of res judicata, the appellant, having once withdrawn her appeal from the ruling dismissing her bill in the court below, and having paid costs, could not file the suit again. He relied upon the position taken by this Court in Liberia Trading Corporation v. Abi-Jaoudi, [1960] LRSC 38; 14 L.L.R. 43 (1960) . We have examined that case and find that the rule laid down therein does not and cannot apply in the present case because the circumstances in the two cases are entirely different; but we shall come to a comparison of the two cases later. Res judicata is a principle of law which forbids relitigation of issues in a case involving the same parties and the same subject matter where the said case has once before been judicially determined ; that is to say, where the merits of the issues involved have been examined and judgment rendered thereon, thereby determining the said issues. But unless and until judgment has been rendered on the merits of the issues and this judgment has finally and effectively concluded the parties in respect to the said issues, res judicata cannot apply. To support this view, I will quote the following authoritative definitions of res judicata : "A matter adjudged; a thing judicially acted upon or decided ; a thing or matter settled by judgment; a

thing definitely settled by judicial decision; the thing adjudged." 34 CYc. 1666 Res judicata, res adjudicata. "The doctrine of res adjudicata, or estoppel by judgment, as it is sometimes less accurately termed, is a rule of law founded on the soundest consideration of public policy. It means that if an action be brought, and the merits of the question to be discussed between the parties, and a final judgment be obtained by either party, the parties are concluded, and cannot again canvass the same question in another action. It is founded upon two maxims of the law, one of which. is that 'a man should not be twice vexed for the same cause' ; the other that 'it is for the public good that there be an end of litigation. . . " Wisconsin v. Torinus, 28 Minn. 175, 179, 9 N·W. 725, 726 (1881). According to the above-quoted authorities, not only is it required that there should be a judgment in order to invoke the doctrine of res judicata, but there must be finality of judgment. In other words, an appealed judgment does not invoke the doctrine unless that judgment has been made to be final by some act or proceeding which would put finality to the issues involved and constitute the judgment of the inferior court as the law of the case. This is exactly what happened in the Liberia Trading Corporation case, supra, which the appellees cited in their answer, and relied upon in argument here; but as I have said, the circumstances in that case differed from those of the present case. In keeping with our statute which provides that a pleading may be once amended or withdrawn by a party filing it and a new one filed in its stead at any time before the case is ready for trial (1956 Code, tit. 6, § -320), it is the practice of the courts of this country that in every instance where a case is withdrawn and refiled more times than the law allows, the additional filings in excess of statutory authorization are deemed in violation of law.

This was the condition and the circumstance in the Liberia Trading Corporation case which was dismissed because it had been withdrawn and refiled three times-- two times more than the law allows. The first ruling dismissing the case on this ground became final in so far as the issues involved were concerned, because that ruling of dismissal had been finalized by the statutory prohibition against a surplus number of filings of the case; therefore the action could not legally be reinstituted before any court. The statute allowing only a single withdrawal and refiling of a civil case was intended to reduce the chances of harrassment and vexation resulting from repeated litigation of the same subject matter between the same parties to the lowest possible minimum ; and this statute is in harmony with the doctrine of res judicata since it shortens litigation and thereby ends strife between the parties. It was necessary to apply the rule with the greatest strictness in the Liberia Trading Corporation case, not only in so far as such application conformed to the principle, but also because this application was made mandatory by statute. "The doctrine of res judicata is a principle of universal jurisprudence, forming a part of the legal systems of all civilized nations. The doctrine is to be applied in particular situations as justice and sound application of the policy behind the doctrine require ; it is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice. . . . "There is support for the rule that judgments relied upon in creating an estoppel are to be construed with strictness." 3o AM. JUR. 372-373 Judgments § 325. In the instant case, the petitioner appealed from a ruling dismissing her case, withdrew the appeal, paid costs and filed again. This withdrawal of the petitioner's appeal was neither in violation of any law nor strange to our practice, because the said ruling had not traversed or determined the issues in the case; nor was there any

law which forbade another filing of the case in order that the issues might be finally determined. Therefore res judicata, as relied upon by appellees, could not possibly apply in this case. But as I have said before, appellees have cited the decision in the Liberia Trading Corporation case, and asked that the rule there might be applied in this case. Now let us see what happened in the Liberia Trading Corporation case. An action of debt was brought by Liberia Trading Corporation, a Swiss concern doing business in Liberia, against one M. J. Abi-Jaoudi, a Lebanese Trader. The plaintiffs twice withdrew their complaint, amended it each time, and filed it again under the attack of the defendant's answer. The third filing of the complaints and other pleadings brought the case before Judge Dennis for the issues of law to be passed upon, whereupon he dismissed it on the ground that the several refilings in excess of the one required

by statute were illegal. Plaintiffs appealed this ruling of Judge Dennis, but while the appeal was still pending, and before the Supreme Court could hear and review, plaintiffs must have realized the futility of appealing a ruling which was based upon the illegal acts of the appealing party, so they therefore withdrew their said appeal, paid the costs of litigation and, quite strangely, filed the case of debt again for the fourth time. This fourth filing of the case brought the issues before Judge Findley who dismissed it on the same ground as Judge Dennis; and it was this ruling of Judge Findley which was appealed to the Supreme Court and which the Court was allowed to pass upon and in which it laid down the rule: "Withdrawal of appeal and payment of costs is positive indication of submission to and compliance with the judgment appealed from, and confirms it as a conclusive adjudication of the issues between the parties." Liberia Trading Corporation v. AbiJaoudi, [1960] LRSC 38; 14 L.L.R. 43 (196o), Syllabus 7. The difference between applying this rule in that case

and being able to apply it in this case lies in the fact that whereas, in that case, the dismissal of the appeal was based upon the statutory inhibition against a refiling, there is no such statutory inhibition against another filing in this case. Our law does not, as a general rule, forbid the refiling of a case in which an appeal of ruling of dismissal has been withdrawn, absent a law which prohibits another filing as in the Liberia Trading Corporation case. In that case, not only did the withdrawal and payment of costs finalize the issues which the judgment concluded between the parties therein, but it did so because the law forbade the act which was the basis of the dismissal--refiling for more times than the once which is mandatorily commanded by statute. In respect to withdrawal of appeals, the act might have one of two results, depending upon previous circumstances. In one instance it might finalize the issue, whereas in the other it might not. That is to say, if the merits of all of the issues were passed upon in a ruling or judgment, or if any act which could lend finality to a ruling had been performed by the party withdrawing, the doctrine of res judicata would immediately forbid another entry of the suit. On the other hand, if the merits had not been determined and there was no law which forbade another filing, withdrawal would not be an act of finality and the doctrine would not apply. As important as this issue is, it was not made a ground upon which the learned judge dismissed the case; in fact this point was completely ignored in the ruling, even though it had been raised in the pleadings before him. Ever and anon this Court has endeavored to impress upon trial judges the importance of passing on all issues of law raised in pleadings. It should not have been necessary for us to have to call attention to this requirement so often. As stated in the Syllabus of Clarke v. Snyder, 9 L.L.R. III (1945) "It is necessary that a judge, in passing upon plead-

ings in a case, make his ruling so comprehensive as to embrace every material issue involved." Also for reliance see Porte v. Porte, [1947] LRSC 7; 9 L.L.R. 279 (1947), and Wo/o v. Wo/o, [1942] LRSC 10; 8 L.L.R. 36 (1942). In the Wolo case, the judge in passing upon the issues of law dismissed the petition whereupon the plaintiff appealed to the Supreme Court as was done in the present case. Mr. Justice Barclay, speaking for the majority of this Court, in passing upon this particular point said, at 8 L.L.R. 42: "It does not appear in the records that the judge's attention was called to his omission . . . to rule on the other important issues of law which he should have done under the rule laid down by this Court in the case of Sodjie v. Tartimeh [1920] LRSC 3; (2 L.L.R. 362) . In Sodjie v. Tartimeh it was held on page 363 that 'generally the court should dispose of the issues of law before trying the facts, but it does [D]epart from the general rule, and the party affected thereby fails or neglects . . . [to act thereon] at the proper time during the trial, . . . [said party] will be presumed to have waived the points of law raised in his pleading.' " This Court therefore reversed the judgment and remanded that case for another trial in the court below. We would like to comment that neglect of the trial court to pass upon all of the issues of law raised in a case affects not only the rights of a particular party in issue, but the merits upon which issue has been joined. The judge's failure to pass upon a legal issue raised places the Supreme Court in an awkward position in so far as its appellate jurisdiction over the said issue is concerned. And now we come to review one of the counts of the answer which the judge mentioned in his ruling dismissing the petition, namely Count I, wherein it is contended that a married woman, being under coverture, cannot sue in her own name but must do so through her husband. In the general denial filed by the petitioner as her reply,

the sufficiency of the law relied upon and the truth of the facts laid and contained in the answer are taken to have been denied ; but we shall come to pass upon this point later in this opinion. According to our Domestic Relations Law, and under rights and duties of married persons, it has been specifically laid down that: 4l any married woman who in her own name shall engage in any business or enterprise may for the purpose of such business or enterprise be considered a femme sole and as such without the intervention of her husband may make and execute contracts, sue and be sued, and do all such things as may be incident and necessary to the protection of her business interests. . . ." 1956 Code, tit. 1o, § 45. In this case not only did the petitioner make the contract which is the subject of this litigation in her own name without joining her husband, to whom she was married at the time, but the respondents, who are now the appellees, and who have now raised the question of petitioner's inability to sue in her own name, are partieslessors to the said contract, and they did not raise the question of her inability at

the time of signatures. It is our opinion that a married woman is no more incompetent to sue in her own name and without intervention of her husband than she is to conclude a contract without him; and if she were a competent person to have entered a civil contract in her own name it is reasonable to assume that she would be as competent a person to sue in her own name to protect her interests under that same contract. There is another phase of this question which would seem to be very interesting. This pertains to a Liberian woman marrying a foreigner who is incapable of becoming a citizen, as in this case. Our Domestic Relations Law provides that a married woman "shall be privileged or free to enjoy all the other civil rights granted by law to citizens of this Republic not in conflict with the Con. .

stitution of Liberia." (1956 Code, tit. 1o, § 45). The communal deed out of which this litigation has grown made the petitioner-appellant a co-grantee with the respondents-appellees. Her marriage to a foreigner who cannot be a citizen would seem to raise the question of whether or not her husband could in any manner have been joined in this litigation, since the inhibitive clause of the Constitution barred him from any ownership rights to real property. We would have liked this point to have been made an issue in this case so that we might have passed upon it; but since it was only mentioned during arguments I have referred to it in passing. The only other point passed upon by the learned judge in his ruling is the question of the reply of the petitioner being a general denial and hence insufficient to properly traverse the several issues of law raised in the answer. Respondents contended--and the learned judge, agreeing, also ruled--that when a reply is a general denial of the facts contained in the answer, the plaintiff thereby waives the right to contest the legal issues raised in the answer of the defendant. In Count i of the brief which appellees' counsel filed and argued here, he relied upon West and Company v. Lomax, [1930] LRSC 1; 3 L.L.R. 147 (193o), the syllabus of which says : "No general denial, whether expressed or implied, shall ever be construed in an answer or reply to be any affirmation of any fact such as time or other affirmative matter of the intention to prove which the other party ought in fairness to have notice." I might mention that in that case an action of debt was instituted in the Municipal Court of Monrovia, and was appealed to the Circuit Court of the First Judicial Circuit, Montserrado County, where the judgment against the defendant was upheld ; and it was finally appealed to the Supreme Court. But the issue involved in that case was quite different from the issue in the present case. In that case the defendant was without a definite defense

and therefore rested on

a general denial. In this case it is the petitioner's reply which is being attacked for insufficiency. Whereas in that case an answer should have joined issue with the averments of the complaint, in this case issue is joined by the presence in court of two valid pleadings : a petition and an answer; and these two alone are sufficient to adequately present contentions in litigation in most civil cases. We are not convinced that the circumstances in the two cases are analogous and we do not agree that the principle laid down in that case could legally apply in this case. The argument that the dismissal of a reply for insufficiency places a plaintiff on a bare denial of the facts laid in the answer is very strange and foreign to our practice. Pleadings in this jurisdiction begin with the complaint of the plaintiff which brings the suit or action into court and the issues raised therein might be joined in an answer of the defendant denying the allegations of his adversary. The final results of a case might very well rest on these two pleadings only or might be influenced by a reply, the subsequent pleading of the plaintiff. Whenever this latter is the case, our law requires that said reply should conform to the following statutory provision: "A reply or subsequent pleading may contain any or all of the following: (a) A denial of the truth of the facts stated in the preceding pleading; (b) A denial of the sufficiency of the law assumed in the previous pleading; or (c) A statement of new facts pertinent to the action." 1956 Code, tit. 6, § 311. In this case the petitioner's reply was couched in the following specific words: "Hawah Kiazolu-Wahab, petitioner in the aboveentitled cause, denies that the allegations contained in the answer of Sonifu Sonni, Tribal Chief of Vai Town, et al., respondents to her petition, furnish a

sufficient defense to this action, and she also denies the truth of the said allegations." It is our considered opinion that this reply completely meets requirements of the statute just quoted, for not only does it deny the truth of the allegations of fact contained in the answer in keeping with subsection (a) as quoted above, but it also seems to deny the sufficiency of the law relied upon as a defense in the said answer, which is in keeping with subsection (b). According to the statute, either one of these denials would be sufficient to adequately and competently join issue with the answer. Therefore we find ourselves unable to agree with the learned judge when he dismissed the case of the petitioner on this ground. But what is more, we also find it difficult to understand why the alleged and presumed insufficiency of the reply should have rendered the petition dismissable ; it would seem that if there was insufficiency in the reply, that pleading alone might have been affected and not the petition. In view of the foregoing we have no alternative but to reverse the judgment of the court below and remand the case with instructions that the judge resident in the Sixth Judicial Circuit, Montserrado County, or any other who might be next assigned therein, resume jurisdiction and pass upon the remaining issues of law in the pleadings which Judge Weeks omitted to pass upon. The issues of fact should then be decided, allowing any party dissatisfied

to take appeal to the Supreme Court. Costs to abide final determination. Reversed and remanded.

Cavalla River Co. v Fredericks [1920] LRSC 6; 2 LLR 375 (1920) (3 February 1920)

THE CAVALLA RIVER COMPANY, Limited, by Lancelot Mathews, their agent at Cape Palmas, Plaintiff in Error, v. **JOHN HAROLD DICKINSON FREDERICKS**, Defendant in Error.

ARGUED DECEMBER 23, 1919. DECIDED FEBRUARY 3, 1920.

Dossen, C. J., Johnson and Witherspoon, JJ.

1. The law to be applied in suits for the breach of contracts is that: as to the mode of solemnization the *lex loci arty&* must generally be followed; they should be interpreted according to the *lex loci contractus :* and as to the choice of remedies for the breach of, and the competency of witnesses to establish, the *lex foci* governs.

2. One is not therefore compelled to sue for a violation of a contract in the jurisdiction of the *lex loci contractus* because the agreement provides that it must be interpreted according to the rules of law obtaining thereat, and hence the *lex loci solutionis* may properly take jurisdiction of the suit.

3. One may with impunity neglect to probate and register an agreement which does not convey real estate; nor is the validity of agreements not purporting to effect the transfer of real estate affected by the neglect to affix a revenue stamp.

4. One who was a party to a reference is not estopped from bringing a suit in spite of an award if the subject matter of the new action was not within the submission to the arbitrators, nor passed upon by them.

5. In actions against corporations it is sufficient to describe the corporation sued by its corporate name.

6. A defendant may be required to produce deeds or other writings in his possession to be used by a plaintiff at the trial either by a notice given in his written pleadings or by a *subperna duces tecum.*

7. When a jury empanelled in a case is charged with such misconduct as is prejudicial to the interest of a party, the act complained of should be brought to the notice of the court before the jury is dismissed.

Mr. Justice Johnson delivered the opinion of the court :

Damages on a Written Contract. This was an action brought in the Circuit Court of the fourth judicial circuit, Maryland County, by John Harold Dickinson Fredericks, plaintiff in the court below, against the Cavalla River Company, Limited, defendants, for damages for the breach of a contract.

The history of the case, so far as can be gathered from the records, is as follows :

The defendant in error entered into a written contract with the Cavalla River Company, Limited, dated the 23rd day of August, A. D. 1911, at the City of London, in the Kingdom of Great Britain, by which he contracted, *inter alia,* to serve said company as their General Manager in Liberia, upon the following conditions : that the defendant should proceed to Liberia and approach the Liberian Government with the view of securing further rights and concessions for and on behalf of the company, and use his best endeavors to promote the company's interest. The defendant in error also contracted to supervise all the company's interests, and report to the head office all transactions beneficial to the company's interest.

The company on the other hand, contracted to pay to defendant in error the sum of five hundred pounds sterling per annum, as salary, and a mess allowance not exceeding ten pounds sterling

per month; and to provide him with a first class passage to and from England at the end of every twelve months' service. The agreement was for five years certain, subject to renewal for another term of five years on terms therein set forth. It might be terminated however in case defendant in error became bankrupt or insane, or in the event of mismanagement, drunkenness or absence from duty through illness for over six months. There was also a clause reserving to defendant in error the right to further interest in other companies which were proposed to be formed, and the privilege of accepting any position in the Liberian Government, provided same did not interfere with the company's interest. On the 10th day of June, A.D. 1912, defendant in error, who was then performing the duties of manager of said company, was dismissed by McKay, Managing Director of said company.

Afterwards to wit : On the 26th day of September, A. D. 1912, the plaintiff and the defendant in error submitted all matters in dispute between them, to the sole award and determination of His Excellency J. P. Crommelin, the Liberian Minister, in the following memorandum :

"We hereby agree to submit all matters in dispute between us whether claims against the Cavallo. River Company, Limited, or Mr. Collard, by Mr. Harold Fredericks for salary money advanced, damages or payment of balance of purchase consideration, whether money or counter-claims by Mr. Collard or the company for refund of monies paid, or cancellation with Mr. Fredericks or for damages, to the sole award and determination of His Excellency J. P. Crommelin the Liberian Minister as arbitrator ; signed by Harold Fredericks and Alf. S. Collard, for the Cavalla River Company."

On the 27th day of September, A. D. 1912, one day later, defendant in error wrote the following letter to Mr. Crommelin:

"Royal Colonial Institute,
Northumberland Avenue,
London, W. C., 27th Sept. '12.

"Dear Minister Crommelin,

"Reviewing the whole situation relative to the difference between myself and the Cavallo. River Company, Ltd., I accept your offer to act as an Arbitrator to settle the matter. MySolicitors have

advised the pure atmosphere of a public court, but as you pointed out when at the Legation that any publicity of my matter at this particular time would be prejudicial to Liberia's interest and your task in connection with the loan negotiations and the establishment of the receivership rendered most difficult. With this in view .and in keeping with the assurances given me by you at our last interview. I agree as a basis of settlement (1) that I be paid my salary up to the time of my leaving the coast less of course any drawings on my private a/c. (2) That as you regard my return to Cape Palmas as the company's Advisory Manager in a different agreement as feasible I am prepared to forego my claims for damages for wrongful dismissal and Breach of Contract and will not present it, as the former action by the company would naturally counteract the effect of the latter. I thank you for the efforts you have put forward in trying to effect an amicable settlement and remain.

Yours sincerely,
(Sgd.) Harold Fredericks."
To this letter Mr. Crommelin replied as follows :
"Liberian Legation,
13, Eaton Place, S. W.,
September 28, 1912.

"Dear Mr. Fredericks,

"I received your letter and one from Mr. Collard as well this morning asking me to arbitrate on your differences of opinion.

"I will do so, but in order to be enabled to come to the right conclusion to the agreement between yourself and the Company and to the way the monies have been spent; the company's money and the monies you told me you had paid personally and which you claim ought to be refunded you.

"Mr. Collard can not come to Holland before the 8th or 9th of October, so that would give me a full week to carefully study these details.

"You could perhaps come and see me early next week and give me these details.

"Yours sincerely,
(Sgd.) J. P. Crommelin."

On the 13th day of November, A. D. 1912, Mr. Crommelin made the following Award :

"To all to whom These Presents shall come, Jacob Pieter Crommelin of 13, Eaton Place in the County of London, Minister of the Liberian Legation, sends greeting:

"Whereas divers disputes and differences have arisen between John Harold Fredericks now of the Royal Colonial Institute, Northumberland Avenue, in the County of London, and Alfred S. Collard of Tower Buildings, Water Street, Liverpool, concerning an agreement dated the 9th day of August, 1911, and made between the said John Harold Fredericks and the said Alfred S. Collard.

"And whereas by an Instrument in writing dated the 26th day of September, 1912, under the hands of the said John Harold Fredericks and Alfred S. Collard they thereby agree to submit all matters in dispute between them (whether claims against the Cavalla River Company, Limited, or by the said Alfred S. Collard or John Harold Fredericks for salary money advanced, damages or payment of balance or purchase consideration whether money or shares or counter-claims by the said Alfred S. Collard or the Cavalla River Company, Limited, for the refund of monies paid or the cancellation of agreements with the said John Harold Fredericks or for damages), to the sole award and determination of me, the said Jacob Pieter Crommelin, and to the Arbitrator on their behalf in respect of the matter aforesaid.

"Now, I, the Jacob Pieter Crommelin having taken upon myself the burthen of the said reference and having examined and considered all the allegations of the said parties and the documents concerning the premises do hereby make and publish my award in writing of and concerning the premises in manner following, that is to say :

"1. I award and adjudge that the said John Harold Fredericks is not entitled to be paid the £500 claimed by him from the said Alfred S. Collard or any sum as the balance of the consideration money of £1500 agreed to be paid on the said Alfred S. Collard to the said John Harold Fredericks at the expiration of six months from the completion of the agreement for the transfer of the concession therein named.

"2. I award and adjudge that the said John Harold Fredericks is not entitled to have allotted to him 2000 of any shares in the said Cavalla River Company, Limited, as claimed by him.

"3. I am not yet in a position to make my award in reference to the said John Harold Fredericks' claim for salary; but I will do so when I have been furnished with the necessary further information and accounts.

"4. I award and find that the said John Harold Fredericks had sustained no damages and that he has no claim for damages against the said Alfred S. Collard.

"5. I award and direct that the said John Harold Fredericks is to retain the £1000 already paid him by the said Alfred S. Collard under the terms of the agreement of the 9th August, 1911.

"6. I award and find that the said Alfred S. Collard is not entitled to recover any damages from the said John Harold Fredericks.

"7. I direct that the cost of an incidental to this reference and of this my award shall be borne between the parties equally.

"8. I assess the cost as mentioned in Clause 7 of this my award at £35.3.0.

In witness whereof I have hereunto
set my hand this 24th day of October, 1912.
(Sgd.) J. P. Crommelin.

"Signed and published by the said Jacob _Pieter Crommelin in the presence of :

(Sgd.) John Singleton
Clerk to Messrs. Pollock & Co.,
6 Lincoln's Inn., Fields
SOLICITORS (Stamps)."

Afterwards Mr. Crommelin made a Supplemental Award which reads as follows:

"To All to Whom These Presents shall come, Jacob Pieter Crommelin of 13 Eaton Place in the County of London a Minister of the Liberian Legation sends greeting:

"Whereas by an instrument in writing dated the 25th day of September, 1912 under the hands of John Harold Fredericks and Alfred S. Collard they thereby agree to submit all matters in dispute between them whether claims against the Cavallo. River Company, Limited, or by the money advanced, damages or payment of balance of purchase consideration whether money or shares or counterclaims by the said Alfred S. Collard or the said Cavalla River Company, Limited for the refund of monies paid or the cancellation of agreements with the said John Harold Fredericks or for damages to the sole award and determination of me Jacob Pieter Crommelin and to be the arbitrator on their behalf in respect of the matters aforesaid.

"Whereas I, the said Jacob Pieter Crommelin, took upon myself the burthen of the said reference and on the 24th day of October, 1912, I signed and published my Award of and concerning the premises so far as it relates to matters at that date I was in a position to deal with.

"Now I, the said Jacob Pieter Crommelin, having further examined, investigated and considered certain of the allegations of the said parties and the documents and accounts submitted to me concerning the premises, do hereby make and publish my further Award in writing (which is supplemental to my said Award of the 24th of October, 1912) in manner following, that is to say :

"1. Subject to the findings in my award of the 24th October, 1912, I award and find that the said Cavalla River Company, Limited, sustain no damages and that the said company has no claim for damages against the said John Harold Fredericks.

"2. I award and find that the said John Harold Dickinson Fredericks has no claim for damages against the said Cavalla River Company, Limited.

"3. With reference to the claims of the said John Harold Dickinson Fredericks against the said Cavalla River Company, Limited, for salary and for monies alleged to have been paid by him for and on behalf of the said company, I award and find that there is due and payable from the said Cavalla River Company, Limited to the said John Harold Fredericks the sum of £160.-.-. in respect of such claims.

"4. I direct that the costs of said incidental to this my supplemental Award shall be borne between the parties equally.

"5. I assess the costs as mentioned in clause 4, of this my Award at £31.10.0.

In witness whereof I have hereunto set my hand this 13th day of November, 1912.

(Sgd.) J. P. Crommelin. "Signed and Published by the said Jacob Pieter Crommelin in the presence of:

(Sgd.) Arthur Pollock,
SOLICITOR Seal.
6 Lincoln's Inn., Fields, London. Stamp.

"Subsequently defendant in error gave to plaintiff in error a receipt worded as follows :

"London
30th Nov., 1912.

Myself and Messrs. The Cavalla River Company, Limited, received the sum of the one hundred and twenty-six pounds, eight shillings and six pence payable to me under the award herein. (£126.8.6).

(1 ct. stamp) (Sgd.) J. Harold Fredericks.
"The following letter from Fredericks to Mr. Crommelin, dated November 20, 1912, is pertinent :

"Royal Colonial Inst.,
Northumberland Avenue,
London, W. C., 20-11-12.

Dear Minister Crommelin :

"By the tone of your letter of the 10th instant relative to the deal between Levers and the C. R. C., Ltd., I must register my objections to your award which I received from my solicitors this p. m. "Directly I returned from Liberia you called and advised Arbitration instead of going to Court as advised and intended by my Solicitors and offered your good offices to act in that capacity, your reasons being due to the loan which was then being effected and the Receivership about to be established. My matters going to a public court would bring to light the Major's connection with the Cavalla River Company and his unwarranted actions whilst out there for them not only as regard myself but the government which in view of your recommendations and representations to the United States Government at Washington and at Monrovia would seriously handicap me in the negotiations as the press would get hold of it and at an inopportune time.

"You further reminded me that I enjoyed President Howard's confidence and returning as I intended to Liberia my consenting to your request you know would be very much appreciated by the authorities out there. Having the fullest confidence in you, I agree and in good faith accepted

your kind offer as arbitrator having discussed with you the basis on which I was prepared to entertain a compromise as evidenced in my letter to you of the 27th, September.

"At one of our meetings I asked for the production of the minute book of C. R. Co., Directors' meeting, they objected and you regarding it so unnecessary, upholding their objections. I now see obvious reasons for its suppression and on the whole regret my non-compliance with my Solicitors' advice have the whole matter thrashed out in a public court.

With all due deference and respect,

I remain,
(Sgd.) Harold Fredericks.

"We will now consider the questions raised in the assignments of errors:

The first assignment of error attacks the jurisdiction of the court below,—plaintiff in error contending "that as by the agreement between the parties to the cause it was provided that said agreement shall be interpreted according to the laws of England, the courts of England, and not the courts of Liberia, can exercise jurisdiction in an action for the violation of said agreement."

This position is not in our opinion well taken. The rule as to contracts is thus stated by Mr. Wharton,—"obligations in respect to the mode of their solemnization, are subject to the rule *locus contractus regit actum;* in respect to their interpretation to the *lex loci contra,clus ;* in respect to their performance to the law of the place of their performance."

It would seem that matters respecting the remedy depend upon the law of the place, where the action is brought. There is no weight in the contention that where an agreement provides that it must be interpreted by the law of the place where the contract was made, a suit for the violation of such contract can not be brought in any other jurisdiction.

The *lex loci* governs as to the formalities and authentication requisite to the valid execution of contracts. But in providing the existence of, and seeking remedies for, the breach, as well as in all questions relating to the competency of witnesses, course of procedure, the *lex fori* must govern. (Story's Conflict of Laws. pp. 567-634.)

The court below did not err therefore in taking jurisdiction over the case.

The second and third assignments of errors are stated as follow :

"2. Because defendant says that the parties to the agreement being aliens and foreigners and the said agreement having been made and executed in a foreign state, that is to say in Liverpool, England, and not being duly registered and probated in Maryland County, nor in any of the other counties within this Republic ; it being an agreement which had to deal with certain concessions granted plaintiff by the Republic of Liberia, which extend to and affect real property within the said Republic ; and it not being clothed with the essential statutory requirements, said agreement is void.

"3. Because said agreement was not stamped as the law directs." The statute laws of Liberia provided that all agreements for the sale, transfer, or lease of real estate shall be probated and registered.

On inspecting the agreement in this case we are of the opinion that it does not fall within the rule which requires the probation and registration of agreements, as from the mere fact that plaintiff contracted in said agreement "to approach the Liberian Government with a view of securing further consessions," this instrument could not be construed to be an agreement for the sale, transfer or lease of lands.

As to the third assignment of error we say that by inspection of the Stamp Act it will readily be seen that an agreement of the nature of the one under consideration is not included among the documents enumerated in said Act, which must be stamped in order to be received in evidence in court.

The fourth assignment goes to the award of J. P. Crommelin.

Defendant claims that plaintiff was thereby precluded and estopped from maintaining his said action; and this we will now consider.

In a number of cases tried and determined in the American courts it has been held that where parties have submitted all demands to arbitrators and they have made their report, it may still be shown that in an action afterwards brought on the particular demand that it was not in dispute and not laid before the referees. *(Whittemore v. Whittemore,* 2 N. H. 26; *Hodges v. Hodges,* 9 Mass. 320 *;Buck v. Buck,* 2 Vt. 417; *Hayes v. Blanchard,* 4 Vt. 210.)

Courts in such cases go behind the submission to see what construction the parties gave it, and what was in fact included under it; and where an award is pleaded they will not hold themselves concluded by the mere fact of an award, but inquire what was actually decided by the arbitrator.

Now, in the case at bar, it appears to us that in the submission and in the letter of the 27th September, 1912, written by defendant in error the question of defendant in error's claim for damages for breach of contract by the Cavalla River Company, Limited, was received, defendant in error offering to withdraw said claim in consideration that a new agreement be made between himself and plaintiff in error, appointing an Advisory Manager; a fact which it seems the arbitrator induced the defendant in error to believe was likely to happen.

The amount of £160.00 which was awarded to defendant in error, was, as stated in the award, for salary and for monies expended by defendant in error for and on behalf of the company.

Under these circumstances we are of the opinion that the plaintiff in the court below was not estopped by said award from bringing this suit.

The fifth assignment of error refers to the defendant's plea that the process and entire pleadings of plaintiff were defective by reason of the non-joinder of proper parties as defendants.

The agreement which is the subject of this suit was made between defendant in error and the Cavalla River Company, Limited, plaintiff in error; and the action was brought against said company for the alleged violation of said agreement by the said plaintiff in error ; this contention has therefore no weight, and can not claim the serious consideration of the court.

In actions against corporations the corporation sued must be described by its corporate name.

The agreement is because the court below required defendant to produce at the trial of the cause certain instruments of writing, among which was the agreement between the parties in the action.

It is a well settled rule of law that a defendant may be required to produce deeds or other writings in his possession in order that they may be used to maintain the right of the party asking it, in some suit or other proceeding.

The practice is either to give notice in the written pleadings requiring the party to produce the document desired, or to apply for a subpoena *duces tecum*, by which the party is summoned to appear and give evidence in the case and to produce the deed or other writing to be used as evidence in the case.

Plaintiff in the court below having given notice to defendant to produce the counterpart of the agreement between the parties, and said defendant neglecting or refusing to produce same, plaintiff in the court below had a legal right to offer in evidence a copy of the agreement, or to prove the contents thereof by oral testimony.

The error committed by the court below was in refusing the agreement as evidence.

In the case *Ditchfield v. Dossen et al., transacting business under the name and style of the "Cape Palmas Mahogany Company,"* this court ruled as follows : "The record shows that the plain-tiff, following the rule of the statute laws of Liberia served due notice upon the defendant,

requiring him to produce at the trial the counterpart original of the libellous letter said to be in his possession, which the defendant failed to produce, or to prove that it was not in his possession ; which failure the statute laws of Liberia .do not only construe as an admission of the authority and truthfulness of the document sought to be proved, but also opens the door for the plaintiff to put in evidence a copy of said letter as well as to bring in witnesses to prove its contents." (See I Lib. L. R. 492 and cases there cited.)

There are a number of other exceptions taken to the rulings of the court as to the admission and rejection of evidence and to certain alleged defects in the pleadings of the plaintiff ; but as they were not presented for our consideration in the brief of the plaintiff in error or argued before us we regard them as having been waived.

We must refer however to the charge of grave misconduct on the part of the jury empanelled in the case.

When on the trial of a case a jury is charged with committing some act, by which the right of one of the parties is prejudiced the fact should be brought to the notice of the judge before the jury is discharged, in order that the matter may be investigated.

The plaintiff in error having failed to make his complaint to the court at the proper time is guilty of laches and the matter can not claim the serious consideration of the court.

Besides, there was nothing to show that the letter to the plaintiff in error was really written by the empanelled jury, or any of them.

The next assignment of error goes to the verdict of the jury which plaintiff in error contends was not supported by the evidence in the case.

The weight of the evidence was clearly in favor of the defendant in error. There was evidence, there was an agreement, a copy of which was produced at the trial by the defendant in error on the refusal or neglect of plaintiff in error to produce the agreement, after notice or to show that it

was not in his possession. There was also evidence that said plaintiff in error acted in the capacity of manager of said company, and a copy of the notice published by the managing director after the discharge of the said defendant in error was produced at the trial of the case in the court below.

No evidence was produced at the trial by plaintiff in error to rebut the evidence of the witnesses for the defendant in error, nor did the plaintiff in error show that the dismissal of plaintiff was justifiable under the terms of the agreement.

We find, however, that the amount awarded defendant in error is excessive, taking into consideration the payments previously made to defendant in error ; in this respect the judgment of the court below should be amended. And the same is hereby amended to the effect that the defendant in error shall recover from plaintiff in error the sum of nine thousand dollars ($9,000.00), each party to pay his own costs ; and it is so ordered.

C. B. Dunbar and L. A. Grimes, for plaintiff in error.

Arthur Barclay, for defendant in error.

Couwenhoven v Green [1918] LRSC 4; 2 LLR 301 (1918) (24 April 1918)

P. COUWENHOVEN, Agent for the Oost Afrikaansche Com-pagnie, Grand Bassa County, Appellant, v. **JAMES H. GREEN**, Appellee.

HEARD APRIL 9, 1918. DECIDED APRIL 24, 1918.

1. The provisions of the statute laws, governing the mode of procedure in commencing actions, apply to all actions in equity except injunctions.

2. The failure of plaintiff to notify defendant of the filing of his complaint, will not warrant the trial court to dismiss the action.

3. Where relief is sought from the terms of a lease which is regarded as immoral or illegal, the proper action is a bill in equity for the cancellation of the deed of lease.

4. Where the parties neglect to raise the point of illegality of consideration, it becomes the duty of the court *sua sponte* to take notice of such illegality. A court of equity will impose its active aid by decreeing the cancellation of instruments arising out of illegal contracts.

5. A lease of lands to foreigners is limited by the statute laws of Liberia, to twenty-one years, but it may be renewed for another term.

6. A deed of lease, giving a foreigner a right to hold lands for an indefinite number of terms at the option of lessee, is illegal.

7. Where a deed of lease contains a clause which provides: that in the event the Constitution of Liberia becomes open for foreigners to hold real estate in fee, the lessee shall hold the lands in fee, the contract is immoral and contrary to public policy.

8. Where a contract is in part illegal and the legal part is severable from the balance, the effect of the illegality is not to render the whole illegal, but the court will enforce the legal part.

9. If the court should rescind the contract, it will do so upon the terms of due compensation and the allowance of the countervailing equities of the plaintiff.

Judgment reversed. Case remanded.

Mr. Justice Johnson delivered the opinion of the court:

Cancellation of Lease Deed. This was a bill in equity brought in the equity division of the Circuit Court of the second judicial circuit, Grand Bassa County, by J. H. Green, plaintiff in the court below, now appellant, for the cancellation of a deed of lease from James A. Toliver to the Oost Afrikaansche Compagnie, appellee in this case. The trial resulted in a judgment in favour of appellee.

A brief history of the controversy between the parties is essential to an understanding of the questions presented for the consideration of this court.

The late James A. Toliver, a resident of the Township of Hartford in the County of Grand Bassa, on the second day of May, A. D. 1916, leased to the Oost Afrikaansche Compagnie lot number 3, situated in the lower ward of the City of Buchanan in said county, for twenty years with the privilege of renewal for another term or terms at the option of the lessee for an annual rental of five dollars ($5.00).

There was also a clause in said deed of lease which provided that : "should the Constitution of Liberia ever become open for foreigners to hold real estate in fee simple in Liberia, then and from that date this deed shall entitle the lessee to have and to hold said premises in fee simple, to them and their heirs forever."

On the death of the said James A. Toliver, his personal estate having been found insufficient to settle his debts, said lot was put up to public auction by the administrators of the said estate, by virtue of a writ of sale, issued out of the Monthly and Probate Court of Grand Bassa County, and knocked down to I. P. Harris for two thousand dollars ($2,000.00) ; Harris being unable to pay said amount, the lot was sold to James H. Green the next highest bidder for the said sum of two thousand dollars ($2,000.00) ; due notice being given at the sale of the existence of the deed of lease from Toliver to the Oost Afrikaansche Compagnie. After perfecting his title, appellee filed a bill in equity in the equity division of the Circuit Court of the second judicial circuit, Grand Bassa County, for the cancellation of the deed of lease from Toliver to the Oost Afrikaansche Compagnie. For appellee it was held:

1. That a lease to appellant of the lot in question for successive periods of twenty years, was an indeterminate lease, and equivalent to a transfer of the property in fee.

2. That the stipulation therein that : "should the Constitution of Liberia ever become open for foreigners to hold real estate in fee simple in Liberia, then and from that date this deed shall entitle the lessee to have and to hold the said premises in fee simple, to them and their heirs forever," was a wagering contract and contrary to the statute laws of Liberia.

3. That it was contrary to public policy to allow such a contract or deed to remain uncancelled.

On the hearing of the case in the court below the case was decided with the result already mentioned.

The points mainly relied upon by appellant for reversal of the judgment may be summarized as follows:

1. Because the court below erred in ruling that the petition was not a complaint in law, but a bill in equity, and as such did not require the statutory notice as set up in respondent's answer.

2. Because the court below erred in overruling counts one and two, of respondent's answer.

3. Because the court below erred in ruling that it had jurisdiction to hear and determine petitioner's petition, thereby overruling count five of respondent's answer.

4. Because the court below erred in admitting as evidence the documents "P" and "G" being certificates that James A. Toliver and J. Vieweg parties to the deed of lease acted as officials of their respective Governments when making said lease.

5. Because the court below erred in ruling that the petitioner was not estopped in setting up the illegality of the deed of lease; and

6. Because the court finally decreed that said lease deed be cancelled with costs against respondent.

The first, second and third points in the bill of exceptions may be taken together as they relate to the proceedings by which the respondent was brought into court.

By the statute laws of Liberia, all actions except injunctions and replevin are ordinarily commenced by a writ of summons. This process, which can only be issued on the written directions of the plaintiff, requires the defendant to appear in court on a day certain to answer the complaint of the plaintiff. From the fact that the action of injunction was excepted, it is obvious that the provisions of the statute laws governing the mode of procedure in commencing actions were intended to apply to all other actions in equity.

In this respect, the point set out in appellant's brief, "that the procedure in respect to pleadings in law and in equity is assimilated by the general practice of the courts of this Republic," is well taken.

By referring to the records, we find that in the written directions of the plaintiff, the clerk of the Circuit Court was required to issue a writ of summons directed to the sheriff commanding him to summon the respondent to appear at such time as the court in chambers might assign to hear the petition, and that the writ of summons was issued accordingly.

We must here remark that, in general, the case, whether in law or equity, should be complete and issue joined, before the court assigns a day for hearing the case. It would appear, therefore, that the day for the appearance of the defendant, and the time for the hearing of the case, are separate and distinct matters.

The court below erred, therefore, in its ruling on these points. This court however will not dismiss the case for the above reasons, but will proceed to consider the other points raised in the bill of exceptions.

The section of the statute laws cited by appellant in support of the first point in the bill of exceptions, strikes us as being inapplicable. The section referred to, provides for the giving of notice in the written pleadings of all facts which are intended to be set up ; and not to the service of notice of the *filing* of such pleadings. We will remark, however, that the failure of plaintiff to notify defendant of the filing of his complaint, will not warrant the trial court to dismiss the action.

The point raised in the fifth count of respondent's answer : that the proper action to be brought against a tenant holding a leasehold, against the lessor, or his assigns, is an action of ejectment, is not well taken. In the case *Reeves v. Hyder* (I Lib. L. R. 271) it is held that ejectment is a possessory action and presupposes the taking of adverse possession by defendant, hence it is used for the trial of legal titles of the contending parties.

Again in the case *Oost Afrikaansche Compagnie v. Dunbar* (I Lib. L. R. 279) the court ruled as follows : "We will here repeat the rule of universal acceptance in such cases : (Ejectment) The plaintiff must not only show in himself title, but lawful title to the lands in dispute, and also the right of entry at the time of purchase, or his legal claim would, if a remainderman, be reduced to an equitable claim until the happening of the contingency then affecting his right of entry."

In the case at bar appellant did not dispute the title of appellee ; the latter sought relief from the terms of a lease which he regarded as immoral and illegal. The action was therefore properly brought in equity for the cancellation of the deed of lease.

The next point is the plea of estoppel raised in respondent's answer.

It seems that when a deed or other contract is contrary to the provisions of a statute, the doctrine of estoppel will not apply.

There does not seem to be the least reason to doubt the correctness of the proposition set out in the second point of appellant's supplemental brief which is stated as follows :

The illegality of the contract between Toliver and the Oost Afrikaansche Compagnie, *ab initio,* having been established, the question of privity between Toliver and Green would be immaterial, since according to the principles of law, a party himself may assert the illegality of a contract, and moreover is forbidden to give it a *quasi* validity. However if parties neglected to raise the point of illegality of consideration, it becomes the duty of the court *sua sponte* to take notice of such illegality.

By the weight of authority, it is held that a court of equity will interpose its active aid by decreeing the cancellation of instruments arising out of illegal contracts.

Green was therefore not estopped from attacking the deed of lease from Toliver to the Oost Afrikaansche Compagnie on account of its illegality.

The next point was taken to the admission of the documents marked "P" and "G" being certificates that James A. Toliver and J. Vieweg acted as officials of their respective Governments in making said lease.

This exception is in our opinion well taken, as there was nothing in the deed of lease to show that Toliver and Vieweg acted in an official capacity. The acts of individuals in their private capacity should be carefully distinguished from acts performed by them officially.

The court therefore erred in admitting said certificates as evidence in the case.

We come now to the consideration of the points raised in the petition, on which the court based its decree, and which referred to the terms of the deed of lease in question.

By the statute laws of Liberia, a lease of lands to foreigners is limited to twenty-one years; it may, however, be renewed for another term. (Acts Leg. Lib., 1898, p. 12, sec. 1.)

In the case *Bingham v. Oliver* (I Lib. L. 11. 47, 49) this court in rendering its judgment said: "To hold real estate under the authority of the Constitution of Liberia means to be absolutely possessed of lands in Liberia; hence to have the exclusive right to it and to dispose of same. A lease held under the Constitution with respect to aliens in treaty stipulations with Liberia extends to mere chattel right; that is, the lessee can only hold the right of the use of the land and tenement. * * * A lease of land to an alien for ninety-nine years is an evasion of the prohibition of the Constitution, and is therefore unconstitutional."

We are of the opinion that the lease deed from Toliver to appellant, containing as it does, a clause giving appellant a right to hold the land for an indefinite number of terms at appellant's option, falls within the rule laid down in the above decision, and is therefore illegal.

We are of the opinion that the clause in the deed of lease which provides that in the event that the Constitution ever becomes open for foreigners to hold real estate in fee, appellant should hold the land in fee, is an immoral contract, and one that is against public policy.

One of the cherished objects of the framers of the Constitution was to provide a home for persons of Negro descent on these shores where unmolested by the interference of aliens, they might enjoy the lands provided for them and undisturbedly work out their own destiny.

To allow these deeds to be made containing such objectionable features as are contained in the deed of lease in the case at bar, would result in placing in the hand of foreigners, an instrument for the overturning of the Constitution and the subversion of the Government. Becoming possessors of large tracts of land they would soon claim that the right to hold real property carries with it the right to the franchise and to representation, as did the Outlanders in the Transvaal in the eighties. The deed of lease in question should not therefore be allowed to stand.

Counsel for appellant submitted : That where a contract is in part illegal and the legal part is severable from the balance, the effect of illegality is not to render the whole illegal, but the court will enforce the legal part.

This opinion is in harmony with well settled principles of equity jurisprudence, for : "there may be circumstances which may justly mitigate the rigid severity of the law; or may place the parties in *pari delicto;* or may require a court of equity, from the merit of the plaintiff in the particular transaction, to abstain from the slightest interference ; or may even induce it, if it should rescind the contract, to do so only upon the terms of due compensation and the allowance of the countervailing equities of the plaintiff." (See Story's Equity Jurisprudence, vol. 1, sec. 694, latter part ; see *Baries v. Geary,* 35 Ch. D. 125.)

This rule has been confirmed in a large number of cases.

In view of the foregoing, this court will not affirm the decree of the court below, but will reverse same and remand the case in order to allow the parties to reconstruct the deed of lease by eliminating the illegal clauses in the instrument, taking into consideration the equitable rights of all parties concerned, and to report the result to this court at the November term, A. D. 1918 ; and it is so ordered.

C. B. Dunbar and *Arthur Barclay,* for appellant.

Charles B. Reeves and *L. A. Grimes,* for appellee.

Roberts v Roberts [1878] LRSC 11; 1 LLR 107 (1878) (1 January 1878)

SARAH A. ROBERTS VS. **JONES ROSE ROBERTS**, Appellee.

[January Term, A. D. 1878.]

Appeal from the Court of Quarter Sessions and Common Pleas, Montserrado County.

Wills—written evidence—Rules of practice of courts.

The right to devise property by will was conferred upon the people of Liberia by the passage of an act in 1824, during colonial government, in the following words: "All persons are permitted to dispose of property by will." Upon the erection of the Republic this ordinance was incorporated into the laws of the Republic by Art. 5, sec.1, of the Constitution.

The common law by Blackstone and Kent, and the statutes embraced in those commentaries, where not in conflict with Statutes of Liberia, form part of the laws of Liberia. The Statute of Wills embraced therein is one of such statutes and is in force in this country.

Interlineations in deeds will be presumed to have been made contemporaneous with the execution of the instrument unless there are reasons to suspect that fraud have been committed, which is a question for the jury.

This case comes before us on an appeal from the Court of Quarter Sessions and Common Pleas, Montserrado County. This, an action in ejectment, was brought by the plaintiff to recover possession of certain lands, etc., belonging to J. J. Roberts, deceased, the title to which she claimed, as his heir-at-law, had come to her by descent, and alleged that the defendant wrongfully withheld the same from her. The defendant denied the right of the plaintiff to recover, because the said deceased left a will by which he disposed of his real and personal estate, disinheriting said plaintiff from all his real estate, except two lots, and that she, the defendant, was executrix of said will. The plaintiff in reply attacked the validity of the ill, as being unlawful, made according to the wishes of the defendant, etc.

During the progress of the trial several exceptions were taken to the ruling of the judge presiding, and upon the termination of the suit in favor of the defendant, the case has been brought up on appeal by the plaintiff. The several issues raised in this case as presented to us by the bill of exceptions have been very carefully considered, and in giving the conclusions of our deliberations with respect to them we have not deemed it necessary in every instance to refer to the points separately, especially when they had no material bearing upon the result of the case.

1st. The first point of exceptions having been waived by appellant we come to the second, which is thus stated: "And also because upon the motion of the said defendant's counsel the sixth section was ruled out of the plaintiff's reply." By reference to the reply we find this section refers to that portion of the will creating a charity, etc.

Courts of equity have exclusive jurisdiction over the subject of charities, which are a species of trusts deriving their signification from the statute of 43 Eliz., c. 4, in the preamble of which are enumerated uses that are considered charitable, and among those are gifts, devises, and bequests for the relief of the aged, impotent and poor people, for the maintenance of sick and maimed soldiers and mariners, for schools of learning, free schools, and scholars of universities, etc. (2 Bouv. Inst. sects. 398o, 3981; Adams, Equity, page 66.)

The court was right in ruling out said section, and this we say without reference to the reasoning upon which that ruling was based.

2nd. As to the exception taken to the question asked, objected to, and ruled upon, and comprising from the third to the thirteenth points, inclusive, of the bill of exceptions, we have found that the rulings of the court, upon the whole, on those questions which had any material bearing on the issues of the case, were correct.

3rd. The fourteenth exception is: "Because when plaintiff objected to the defendant's written evidence, number one, being the will of J. J. Roberts, because the said will cannot be introduced as evidence in a case when the validity of the said will is to be contested, the said objection was overruled and the said will was admitted as evidence in the case."

On the trial of the validity of a will, it should be read to the jury; they must consider the evidence with reference to the paper, and it is highly proper they should see it in the first instance. It should have been admitted by the court, not as evidence, but to enable the jury to see what they were to try. (U. S. Digest, first series, Vol. XIV, page 352, sec. 2382; Redfield on Wills, vol. 1, p. 49 and n. 42.)

4th. The fifteenth exception is "because the said will was admitted as evidence notwithstanding the other three objections made to the said will," etc.

The second objection to the admission of the will, as appears from the record, was the probation thereof contrary to a rule of the Probate Court with respect to the probate of wills. "Cursus curie est lex curia" (the practice of the court is the law of the court) is a legal maxim. Every court is the guardian of its own records and master of its own practice. Should the Probate Court in the admission of the will to probate have done so in violation of some law of the land, it would have

been a proper subject for review, but a court of error does not notice the practice of another court. (Broom's Legal Maxims, p. X, 134.)

"A court may change its practice without written rules, and when the question is whether it has done so, its own solemn adjudication is the best evidence." (Curtis, Supreme Court Decisions, i, Ir.) The question then being on the practice of the court, and not a law of the land, the court did not err in its ruling.

5th. The third objection to the admission of the will was that "in the absence of a statute of wills the testator, J. J. Roberts, deceased, could not make a legal devise of real estate."

This raises a most vital and important issue—the capability to devise real estate in this Republic. Mr. Redfield opens his work on Wills with this section: "The right of testamentary disposition of property is unquestionably one of the results of cultivated social life, and dependent upon municipal law. But it is nevertheless an instinctive sentiment intimately associated with that love of acquisition, and of dominion, which forms the basis and the stimulus of all social progress: and which, in its normal development, is the sure measure of advancing civilization, and in its morbid excesses equally marks the process of declension and the increase of crime."

We do not propose to enter into an historical review of the subject of wills generally, or of devises particularly, but in giving our opinions thereupon we shall, as we have endeavored to do on other points, use the language of the law as far as practicable, rather than our own.

In the year 1824 the Colonial Government of Liberia passed an act in these words: "All persons are permitted to dispose of property by will." When the statute (which is an act or resolution of the Legislature) allows certain actions without commanding them, it is a permissive one. Here, then, in the early days of the colony, we have a permissive act of the law-makers for the disposal of property by will, i. e., by a legal declaration of a man's intention of what he wills to be done with his property after his death; and as property is the lawful right which a man has in lands or chattels, the permission extended equally to the devising of real estate as to the bequeathing of personal property.

This permission thus granted, exercised and enjoyed by the people during the colonial days was renewed on the formation of the Republic, in these words: "All laws now in force in the

Commonwealth of Liberia, and not repugnant to the Constitution, shall be in force as the laws of the Republic of Liberia until they shall be repealed by the Legislature." (Constitution, art. 5, sec. I, p. 240.) By virtue of this, the people of this country continued to make wills and to devise real property, the Legislature not repealing the act giving its tacit consent and authority for the continuation of the permission.

In later years we find the Legislature adopting a civil and criminal code for the Republic. And here we would remark that the plaintiff in her reply, as also in her motion now under consideration, advances the proposition that "the statute laws of Liberia enacted by the Legislature, and the general principles of the common law, are the laws by which the people of this nation have consented to be governed." Thus far it is true, but on an examination of the act of the Legislature adopting a civil and criminal code, we will discover whether or not the laws of this Republic do not embrace more than what is comprehended in the idea intended to be conveyed by that proposition. In an act to amend an act entitled "An act defining certain crimes, and relating to the punishment of crimes," we have the provisions for the codes referred to thus set forth at large :-

"It is enacted by the Senate and House of Representatives of the Republic of Liberia in Legislature assembled. Sec. i. That so much of the seventh section of an act entitled, An act defining certain crimes and relating to the punishment of crimes, as reads 'Such parts of the common law set forth in Blackstone's Commentaries as may be applicable to the situation of the people, except as changed by the laws now in force, and such as may hereafter be enacted, shall be the civil code of laws for the Republic,' be so altered and amended as to read that 'Blackstone's Commentaries, as revised and modified by Chitty or Wendell, and the works referred to as the sources of municipal or common law in Kent's Commentaries on American Law, volume first, shall be the civil and criminal code of laws for the Republic of Liberia, except such parts as may be changed by the laws now in force, and such as may hereafter be enacted ; and all laws and parts of laws conflicting with the provisions of this act be and the same are hereby repealed'." (Lib. Stat. Bk. 2, pages 72-3.)

Here is an adoption not only of the common law as set forth in Blackstone's Commentaries as in the previous act amended by this, but of the whole of those Commentaries as revised and modified by the writers named in the act. The statutes embraced in those Commentaries, where they remain unchanged by laws now in force, have thus been adopted as laws of this Republic, and among these are the Statute of Wills and the Statute of Uses, which Blackstone says made a great alteration as to property, the former by allowing the devise of real estate by will, etc. (Chitty's Blackstone, Vol. 12, p. 43o.)

Kent in his Commentaries, Vol. 1, in giving an account of the sources of the common law to the American people, makes this statement: "It is also the established doctrine that English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country." (See page 473.)

These statutes, being one of the sources of the common law referred to by him, have been incorporated by that act of the Legislature within our laws. As to the wisdom, policy or expediency of adopting these statutes as a whole, or of the works referred to in Kent, as sources both of the municipal and common law, and incorporating them as laws of the Republic, the court has nothing to do; these are matters of legislative deliberation and cognizance. The legal right to devise real estate, therefore, by the laws of the Republic, has been granted and secured to the people, and the court very properly refused to sustain the objection.

6th. The fourth objection to the admission of the will was, "because the attesting witnesses had not been examined by the Probate Court," etc.

Nothing appearing to the contrary, it is to be presumed that the court followed its usual practice in the admission of the will to probate; and in this connection our views as to practice stated under head fourth will apply. The ruling was therefore not an error.

7th. The sixteenth exception was taken because of plaintiff's objection to defendant's written evidence, number two,—1st, on the ground of irrelevancy; and, because the document was interlined.

The deed was relevant because it tended to prove one of the issues raised in the pleadings that the plaintiff had taken possession of certain lots devised to her in the will. The rules with respect to interlineations as laid down by the several authorities are diverse. This court, however, adopts the view that an interlineations, without anything appearing against it to create a suspicion, will be presumed to have been made at least contemporaneous with the execution of the instrument; and even in the case of suspicion, the question is one for the jury to settle as to the time when the interlining was made, before, or after execution. The interlineations in this deed are not such as to create a suspicion in the eye of the court, as one seemed to have been for want of space between printed words, and the other of a word that had been omitted but did not affect the title of the rightful owner in any respect whatever. The deed, too, was over forty years old and for these reasons should have been admitted.

8th. The seventeenth exception was to the overruling of the plaintiff's objection to the defendant's written evidence, number three, "because it had no seal."

At the time of the execution of this deed, October 14, 1837, there was no law in the Colony requiring a seal to be attached to deeds; such parts of the common law as set forth in Blackstone's Commentaries as were applicable to the people having been adopted by the Constitution of the Commonwealth, January 5th, 1839. There was therefore no error in the admission of the deed.

9th. The next two points are objections to certain written evidence of defendant's, numbers four to seven, these being extracts from the records of the Probate Court. As these related to the practice of the court, we regard them as irrelevant for the reasons given under our fourth head.

10th. The twentieth and twenty-first exceptions are, "because the verdict of the jury was contrary to the law and evidence, that the court rendered final judgment against the plaintiff, and for all the rulings of the court during the progress of the trial, to which exceptions were taken at the time by the plaintiff."

Having already passed upon the several rulings of the court as they have presented themselves to us, it only remains for us to consider the verdict of the jury and the judgment of the court.

The right of the testator to devise real estate being sustained by law, his execution of a will, and his capability at the time to do so, as to his state of mind, having been established by evidence, no undue influence having been proven, and upon a consideration of all the issues raised, and evidences as brought before this court by records, it cannot be seen wherein the verdict of the jury was against the law and evidence, and it was the duty of the court to render final judgment thereupon.

Having thus reviewed the case, this court adjudges that the judgment of the court below is affirmed, and the appellant is ruled to pay costs.

Brown v Payne [1861] LRSC 5; 1 LLR 9 (1861) (1 January 1861)

SAVINIA E. BROWN, Appellant, vs. **FRANCIS PAYNE**, Appellee.

[January Term, A.D. 1861.]

Appeal from the Court of Quarter Sessions and Common Pleas, Sinoe County.

Ejectment-Husband and wife-Courtesy.

1. The husband cannot inherit the property of his wife at her death; nor does he acquire a title therein by virtue of coverture ; nor can he dispose of it without her express authority under the Constitution of Liberia.

2. Where during coverture an heir capable of inheriting has been born, the husband, on the death of the wife, may hold her estate as a tenant by the courtesy, but he cannot sell or otherwise dispose of said estate by virtue of the coverture.

The general view to be taken of the law governing titles and claims, and also possession, should be in all its parts alike, especially whenever the right of property is questioned.

The case reviewed before this court on a plea of ejectment brought up on appeal from the decision and judgment of the court below is interesting as may it appear to be complex, as it does most assuredly invalue the rights of parties purchasing from those supposed to have had the right to sell. Its antiquity and the circumstances connected thereto would at first view, aside from reflection and the law governing the case, cause apprehension that the innocent would be compelled to suffer pursuant to the acts of the wrongdoers.

Ejectment is an ancient remedy coming down to us, greatly modified and arranged suitably to the circumstances of the present age. It lies to recover the possession of lands, with damages and cost, for the wrongful withholding of them, being the principal method now in use for trying

titles to lands. The particularities of this action are fully explained in the words of Blackstone on Real Property.

The commencement of this action presupposes the real title to the land from which the parties are to be ejected. The appellant denies the right of the plaintiff to recover the property consequent upon the purchase being made by the appellant from the son of the legal possessor of said property. The appellee equally claims special right to said lands, as being purchased from the husband of the woman who held possession in her own right after the death of her husband, Seiper, and her heir or son, who after the death of his mother held no claim to the land held in fee simple by his mother. Hence the pivot of the question appears to be resting upon the right of possession by inheritance.

Our constitutional law has established a permanent basis respecting the property of a woman, as to how it shall be disposed of and by whom; but as this is a question of some moment requiring deliberate action, involving, as it does, considerable interest, it would be well to treat a little upon the right of the husband in the property of his wife, which she was possessed of at the time of her marriage, as well as also to
Speak of the law governing descent in such actions, when occurring under the circumstances. There is a way by which the husband can come in possession of the property of his wife of which she was in possession at the time of her marriage. But that possession is only temporary in some cases by the principle of courtesy, a term used to explain this particular mode of proceeding. It is thus defined : "An estate to which a man is by law entitled on the death of his wife"— the lands of which she was possessed during marriage in fee simple, provided he had issue by her during marriage, and capable of inheriting her estate. (1st Stept. 246). It is a species of freehold estate, not of inheritance, equally known to English, Scotch and American law (4th Kent's Comm. 27-28),—courtesy as understood in its ordinary sense of favor.

The estate being enjoyed rather by favor of law, e gratia legis, than as a matter of right, this special favor accrues from the existence of the fact of his having issue by her, and holding his right and possession for the legal title to be given at the proper time, and the next heir of kin to the wife can claim a right, which would be the same if she had two or more relatives. It is given as authority that the husband acquires a right to the use of all the lands or real estate of the wife during her life, but not to sell, and also during his own life, if he has a child by her as a tenant of the courtesy. (1st Swift, Dig. 26.) Hence it is clear that the husband cannot dispose of real estate of which his wife was in possession at the time of marriage, and all land disposed of under such title is "null and void."

If Byrd obtained his title from Mrs. Seiper, and upon that right possessed by marriage, and affixes his seal as valid, it is clear, then, without a shadow of doubt, that Mrs. Seiper's right must be unquestionable, and if we supposed Mr. Payne to have had a perfect right devised from Mr. Byrd, this, also, is another reason which influences the court to preponderate in favor of the right, the bona fide right of Mrs. Seiper before marriage. As far as regulations of the Colonization Society are concerned, the whole arrangement appears to be clear and consistent to the court, and that a woman may draw lands on her arrival here for herself and children, and this being true it follows that at her death her children heir the property.

With respect to the doubts expressed in reference to Parsons being the son of Mrs. Seiper, alias Mrs. Byrd, the law will presume him to be her lawful heir until the contrary is shown. This point should have been contested and established in the court below. The evidence in the case is not material, especially that in parole, as it is held that a proposition made by a party to effect a settlement is not admissible in evidence against him. (Mitchell vs. Preston, 5 Day, 100.) This is both reasonable and just in every respect. In proving confession, the whole must be taken together. (I Root, 434.) Parsons was the rightful inheritor after the death of his mother, Mrs. Seiper, to a clear and definite title by descent. (Refer to Dutton Comm. Digest, page 77.)

Therefore, with the foregoing conclusions it is the opinion and judgment of this court that the title of Joseph S. Brown and James E. Brown is valid, and that Parsons, as the only remaining heir of Mrs. Seiper, was the sole owner at her death, and have the right to sell said lands. It is decreed by the court that the judgment of the Court of Sinoe County in this case of ejectment be reversed, and that said property remain in the possession of James and Joseph S. Brown's estate undisturbed, with costs of court, and that a mandate be issued directing and commanding the same.

Nagbe v Nagbe et al [2001] LRSC 1; 40 LLR 337(2001) (5 July 2001)

CASES ADJUDGED

IN THE

SUPREME COURT OF THE REPUBLIC OF LIBERIA

AT THE MARCH TERM, 2001

_____

THE HEIRS OF THE INTESTATE ESTATE OF THE LATE S. B. NAGBE, JR., represented by EDDIE NAGBE, et al., Appellants/Respondents, v. THE INTESTATE ESTATE OF THE LATE S.B. NAGBE, SR., represented by SARAH NAGBE et al., Administratrixes, Appellees/Petitioners.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE GRANTING THE PETITION FOR A WRIT OF CERTIORARI.

Heard: April 4, 2001. Decided: July 5, 2001.

1. Under our system of jurisprudence a person must be heard before he is condemned, and he must be given a fair hearing before he suffers a penalty.

2. Due process of law means that there must be (a) a tribunal competent to pass on the subject matter; (b) notice, actual or constructive: (c) an opportunity to appear and produce evidence; (d) an opportunity to be heard in person or by counsel, or both; and (e) having to be duly served with process or having otherwise submitted to the jurisdiction of the tribunal.

3. The due process right of a person extends to every governmental proceeding which may interfere with personal or property rights.

4. A trial judge commits error when, in passing on the law issues in a probate proceeding, he sua sponte orders that the letters of administration of the administrator be suspended pending the final determination of the suit.

5. In order for a probate judge to legally suspend the letters of administration of the administrators of an estate, there must have been filed a complaint of misconduct or mismanagement of the estate or of the affairs thereof, an opportunity accorded to the administrators to defend against the charges, and evidence to establish or disprove the charges.

6. The administrator of an estate may only be removed for cause after he has been confronted with evidence establishing his misconduct in office.

7. The curator for a county can only perform the duties of an administrator where there is not an eligible administrator or where the one who is eligible declines to serve.

8. The probate court should exercise extreme care and diligence to follow the prescribed procedures in supervising the administrator of estates.

9. A judge must first dispose of the law issues in a case before proceeding to dispose of the issues of fact, and the failure of the judge to so act constitutes a reversible error.

10. Issues not raised during the trial of a case will not be heard on appeal, and the Supreme Court will not review issues where no exceptions were taken in the lower court, or consider an issue not included in the bill of exceptions.

11. Letters of administration are granted to persons who are distributees of an intestate estate and who are eligible and qualified in the following order: (a) the surviving spouse; (b) the children; (c) the grandchildren; (d) the father or mother; (e) the brother or sister; and (1) any other persons who are distributees, preference, however, being given to the person entitled to the largest share in the estate.

12. Where the son of a decedent does not challenge the paternity of his sisters and their right to inherit of their father's property, but recognizes them as his sisters, his children lack the capacity to raise such challenge.

13. A probate court judge cannot remove a child of a decedent from administration of his estate and replace such administrator with a grandchild, as such act violates the order of preference under the Decedents Estates Law, and especially where no notice is given or opportunity provided before the removal is effected by the court.

The appellants appealed from the ruling of the Justice in Chambers granting the appellees' petition for a writ of certiorari and reversing the decision of the Monthly and Probate Court for Montserrado County. The Monthly and Probate Court had suspended the appellees from administering the estate of their late father and appointed the grandchild, one of the appellants, along with the curator of Montserrado County, in their stead to administer the estate. In his ruling the Justice in Chambers ordered the reinstatement of the appellees as administratrixes of the mentioned estate. The action of the Monthly and Probate Court grew out of a petition filed in that court by the appellants for proper accounting by the appellees, alleging that they were unaware of the lessees and tenants of the estate and that they had not been given their one-third share of the said estate. The probate judge, while acknowledging that there were law issues in the case which had to be disposed of, did not dispose of the said issues but instead proceeded to order the suspension of the appellees from administration of the estate and to then appoint their nephew, along with the curator for Montserrado County, to administer the estate pending the final disposition of the case.

In its decision, the Supreme Court held that the probate court had erred in several respects. Firstly, it said that the trial court had erred in suspending the appellees from administration of their father's estate without providing them notice or information as to the charges levied against them before it effected the suspension; and that in not according the appellees the opportunity to be heard and to defend against the charges, it (the trial court) had denied the appellees of their fundamental right to due process of law. The Court noted that an administrator of an estate may only be removed for cause after he or she has been confronted with the evidence establishing

misconduct in office or mismanagement of the estate. Moreover, the Court observed, no request had been made by the appellants in their petition for the removal or suspension of the appellees from the administration of the estate. The Court concluded that these were good reasons to warrant the reversal of the lower court's decision.

Secondly, the Court held that the judge had erred in passing on the factual issues in the case before disposing of the law issues, which the Court noted was still pending up to the hearing of the petition for certiorari. The Court restated its long standing position that under the law the judge had a duty to first dispose of the issues of law before resorting to dispose of the issues of fact.

Lastly, on the issue of the appellees not being the legitimate children of the decedent, the Court ruled that as the issue had not been raised in the trial court, the appellants were precluded from raising it for the first time before the Supreme Court, noting that the Supreme Court cannot hear or dispose of issues not raised in and disposed of by the lower court, excepted to, and included in the bill of exceptions. Notwithstanding, the Court proceeded to delve into the merits of the issue, holding that the appellants were without the capacity to raise the issues since their father, who was the proper person to raise such issue, had not raised the issue but had instead accepted the appellees as his sisters. The ruling of the lower court was therefore declared null and void, the appellees ordered reinstated, and the case was remanded for a new hearing, beginning with the disposition of the law issues.

Flaawgaa R. McFarland of the Flaawgaa R. McFarland Legal Services appeared for the appellants. N. Oswald Tweh of Pierre, Tweh and Associates Law Firm, and M. Kron Yangbe, appeared for the appellees.

MR. JUSTICE WRIGHT delivered the opinion of the Court.

The full bench of the Supreme Court is sitting to review the ruling of the Chambers Justice, wherein he granted a petition for a writ of certiorari, reversed the ruling of the judge of the Monthly and Probate Court for Montserrado County, and remanded the case for hearing of the main suit, commencing with the disposition of law issues. The appellants, being dissatisfied, excepted to the Chambers Justice's ruling and appealed therefrom to this Court of last resort for review, praying the Court to reverse the aforesaid ruling of the Chambers Justice and to reinstate the ruling of the trial judge. The appellees, for their part, have prayed the Court to affirm the ruling of the Chambers Justice.

This case presents another family feud, wherein the late S. B. Nagbe, Sr., decedent, is the patriarch, and the appellees are children of the said decedent, the late S. B. Nagbe, Sr., and aunts

of the appellants. The appellants, on the other hand, are children of the elder brother of the appellees, the late S. B. Nagbe, Jr., and grandchildren of the decedent, S. B. Nagbe, Sr.

On May 28, 1973, S. B. Nagbe, Sr., of Monrovia, died intestate, being seized, at the time of his death, of divers and sundry real and personal properties, and leaving three children, namely, S. B. Nagbe, Jr., Sarah Nagbe, and Christiana Nagbe. Just over two weeks after his death, on June 14, 1973, his son, S. B. Nagbe, Jr., filed in the Monthly and Probate Court for Montserrado County a petition for letters of administration to administer the intestate estate of his late father, S. B. Nagbe, Sr. The petition was heard and granted by the court, and letters of administration were issued him.

On December 4, 1974 the aforementioned probate court, at the time presided over by Judge G. C. N. Tequah, declared the estate of the Late S. B. Nagbe, Sr. closed. But two years later, on November 22, 1976, Christiana Nagbe filed a petition to reopen the estate of her late father, S. B. Nagbe Sr., to have her brother, S. B. Nagbe, Jr., the administrator, give a proper accounting of the administration of the estate, and to have the court join her as an administratrix of the said estate, since she was the only other child of S. B. Nagbe, Sr. still living in Monrovia, her sister, Sarah Nagbe, having returned to Germany to continue her education immediately after the burial of their father.

In the petition, Christiana Nagbe alleged that their father's estate was brought to court for administration by their brother, S. B. Nagbe, Jr., and that the said estate was later closed without the knowledge of the two sisters and without any distribution of the assets of the said estate. She further alleged that her sister and she were ignorant of the properties that constituted their father's estate because their brother had failed to provide them with a report on the status of the said estate.

Following a hearing on the petition, the probate court, on June 15, 1977, reopened the estate, noting as the ground that the estate had been irregularly closed. Later, on May 27, 1980, the probate court, presided over by Judge Gladys K. Johnson, granted Christiana Nagbe letters of administration to operate as co-administratrix along with her brother, S. B. Nagbe, Jr. In her ruling of May 27, 1980, aforementioned, Judge Gladys K. Johnson held that all "properties of S. B. Nagbe, Sr. belong to the three heirs of his body, S. B. Nagbe, Jr., Sarah, and Christiana and that the said property should be shared alike among them."

Eight (8) years thereafter, on May 31, 1988, S. B. Nagbe, Jr. died, and on October 27, 1995, seven (7) years later, two of his children, Eddie T. Nagbe and George T. Nagbe, were granted letters of administration by the probate court to administer his intestate estate. Then two years later, on October 29, 1997, the letters of administration granted to Christiana Nagbe to jointly administer the intestate estate of the late S. B. Nagbe, Sr., along with her brother, S. B. Nagbe, Jr., was cancelled due to the death of her brother, S. B. Nagbe, Jr., and new letters of

administration were issued to Sarah Nagbe (now Wilson) and Christiana Nagbe (now Jallah), appointing them as administratrixes de bonis non of the estate of S. B. Nagbe, Sr.

About seven (7) months thereafter, on May 19,1998, the children of S. B. Nagbe, Jr., namely Eddie T. Nagbe, George T. Nagbe, Anna W. Nagbe, Josephine G. Nagbe, Louise J. Nagbe, Lanoel G. Nagbe, Cleopatra D. Nagbe, Samuel B. Nagbe, Precious T. Nagbe, and Henry T. Nagbe, filed a petition for proper accounting praying the Monthly and Probate Court for Montserrado County to have their aunts, the administratrixes of the Intestate Estate of the late S. B. Nagbe, Sr., Sarah Nagbe Wilson, and Christiana Nagbe Jallah, give a proper accounting of their handling and administration of the affairs of the aforementioned estate of the late S. B. Nagbe, Sr. The petitioners therein complained that the administratrixes had failed to survey the estate, in keeping with the orders of the probate court, and further, that they, the said administratrixes, had not informed them as to who the lessees and tenants of the estate were, how much each of them was paying, and how the funds were being disbursed. Finally, the petitioners therein alleged that they had not benefitted from their fair and equitable share of their grandfather's estate, being one-third interest in the said intestate estate of the late S. B. Nagbe, Sr., by virtue of their father, the late S. B. Nagbe, Jr., being one of his three children.

The administratrixes filed returns to the petition for proper accounting on June 7, 1998, denying the averments and allegations contained in the petition. The petitioners therein did not file a reply, and thus the pleadings rested only with the petition and the returns.

On July 15, 1998, when the case was called for disposition of law issues, counsel for the petitioners therein submitted that there were no law issues and that the trial should therefore be proceeded with. However, counsel for the respondents therein resisted the submission, contending that there were law issues in the returns and the court should therefore first dispose of the issues of law before going into the factual aspects of the case. The court reserved its ruling to another date.

On August 4, 1998, the judge ruled sustaining the appellees/administratrixes' resistance that there were law issues and that the court would proceed to firstly dispose of those law issues before going to trial of the facts of the case. However, in the same ruling, the judge suspended the two administratrixes and placed the Intestate Estate of S. B. Nagbe, Sr. under the control and administration of the curator and sheriff of the probate court.

On August 14, 1998, the appellees/administratrixes filed a motion with the court for reconsideration, praying the judge to modify his ruling of August 4, 1998 by reinstating them as administratrixes. On February 19, 1999, the judge denied the motion and confirmed the suspension of the administratrixes, contained in the ruling of August 4, 1998. However, prior to ruling on February 19, 1999 denying the administratrixes' motion for reconsideration, the court had, on December 30, 1998, granted letters of administration to Emmanuel Nagbe, one of the sons of S. B. Nagbe, Jr., and nephew of the administratrixes, to co-administer the Intestate Estate of the late S. B. Nagbe, Sr., along with the curator of the probate court, replacing the sheriff. This action was taken by the judge while the original petition for proper accounting, which was the

main suit, was still pending and the law issues had not then been disposed of. Indeed, up to today's date, the law issues raised in the pleadings have still not been argued and disposed of and, thus, the main suit is itself still pending undetermined.

The administratrixes, being dissatisfied with the conduct of the probate court judge in the three instances, namely, (a) the August 4, 1998 ruling suspending the administratrixes from office without cause, (b) the February 19, 1999 ruling denying the motion for reconsideration of the August 4, 1998 ruling, and (c) the December 30, 1998 appointment of Emmanuel Nagbe as administrator, along with the curator, without notice to the suspended administratrixes, they proceeded to the Chambers of the Supreme Court where they filed a petition for a writ of certiorari, praying this Court to review and reverse the three above stated rulings of the probate judge, and to set aside and declare null and void the appointment of Emmanuel Nagbe and the curator of the probate court as administrators of the Intestate Estate of the late S. B. Nagbe, Sr.

The Chambers Justice ruled on October 4, 2000 granting the petition for the writ of certiorari filed by the two suspended administratrixes and setting aside all of the rulings and actions of the probate court judge complained of in the petition for certiorari. The petitioners in the court below, who are the respondents in these certiorari proceedings, have come to this Court en banc aggrieved by the ruling of the Chambers Justice and praying its reversal.

There is no dispute that the petition for proper accounting was the proper course of conduct for the appellants to pursue. However, the administratrixes have complained of the following acts committed by the probate court judge: (a) that they were suspended from office without any notice to them, without any cause being stated, and hearing being conducted, and while the main suit for proper accounting was still pending, all contrary to the due process of law; (b) that they raised these issues in their motion for reconsideration, which motion was denied by the court; and (c) that the court erred in appointing Emmanuel Nagbe, a grandchild, as administrator, in preference to the children of the deceased, while the petition for proper accounting, filed by appellants, children of S. B. Nagbe, Jr., nieces and nephews of the administratrixes, and grandchildren of the deceased patriarch, S. B. Nagbe, Sr., remained undetermined.

The Chambers Justice found that the trial judge was in error on all three counts stated hereinabove. We hold that the ruling of the Chambers Justice finds complete support in the law and is in harmony with the views of the Court en banc, for which his ruling should be and is hereby accordingly affirmed and confirmed. Relevant parts of the said ruling shall be quoted later in this opinion.

Suffice to say that it is an elementary principle of law and one of the rudiments of our system of jurisprudence that one must be heard before he is condemned; he must be given a fair hearing before he suffers a penalty. Recognizing this principle, this Court held in the case Wolo v. Wolo, [1937] LRSC 12; 5 LLR 423 (1937), that due process of law means that there must be (a) a tribunal competent to pass on the subject matter, (b) notice, actual or constructive, (c) an

opportunity to appear and produce evidence, (d) the right to be heard in person or by counsel, or both, and (e) having to be duly served with process or having otherwise submitted to the jurisdiction of the tribunal. These fundamental constitutional rights extend to every governmental proceedings which may interfere with personal or real property rights. In essence, due process embraces the fundamental conception of a fair trial, with an opportunity to be heard. Ayad v. Dennis, 27 LLR 165 (1974), text at 177; LIB. CONST. (1986) Art. 20(a).

Accordingly, we hold that the probate judge committed an error in suspending the appellees as administratrixes of the intestate estate of their father while ruling on whether or not there were law issues in the pleadings, which upon making the said determination he would then be required to first dispose of before proceeding further. The judge correctly ruled that there were law issues in the pleadings and that he would have to dispose of those issues first. But his error came when he immediately moved on and sua sponte ordered that the letters of administration issued to the two administratrixes be suspended pending a final determination of the main suit.

We note, however, that the issue of suspending the letters of administration issued to the appellees was not raised by any of the parties at anytime, and certainly not by the appellants in their petition for proper accounting. The appellants only complained that the estate had not been surveyed or closed as ordered by the court, and that they did not know who were the lessees and tenants of the estate, how much rental each was paying, and what was being done with the money. Finally, they complained that they had not benefitted from their fair one-third (1/3) share of the property which should have accrued to their father. These were issues of fact to be established during the hearing of the petition for proper accounting filed by appellants, for which they gave notice they would prove during the trial. These therefore should not have been the basis for the suspension of the letters of administration of the appellees prior to a hearing of the factual issues. The word “suspension” was mentioned for the first time by the judge in his ruling. We believe that for the probate judge to have legally suspended the letters of administration of the appellees, there should have been a complaint alleging misconduct or mismanagement of the estate, or its affairs, an opportunity accorded the appellees to defend themselves against the charges, and evidence to establish and/or disprove the charges before the court could effect the suspension of the letters of administration of the appellees under section 107. 10 of the Decedents Estates Law. Clearly, the act of the judge was illegal, baseless, prejudicial and, as ruled by the Chamber Justice is hereby declared null and void and set aside.

This Court has held that “an administrator of an estate may only be removed for cause after he has been confronted with the evidence establishing his misconduct in office.” Cole- Larson et al v. Thompson,

[1971] LRSC 41; 20 LLR 339 (1971), Syl 4, text at 341; Dennis v. Weeks, 11 LLR317 (1952), Syl. 1, text at 3l9.

The law also provides that a curator for a county can only perform the duties of an administrator where there is not an eligible administrator or where the one who is eligible declines to serve. Decedents Estate Law, Rev. Code, § 112.2, 111.1(3); also, Lloyd et a!. v. Roland et al.[1974]

LRSC 70; , 23 LLR 421 (1974), Syl. 2, text at 423. The trial judge therefore erroneously appointed the Curator for Montserrado County to administer the affairs of the estate in litigation when the administratrixes, duly and regularly appointed by said court, were eligible, available, willing to serve, and are in fact serving.

In Woodson v. Houston. [1954] LRSC 26; 12 LLR 133 (1954), text at 134, this Court held that "probate courts should exercise extreme care and diligence to follow prescribed procedures in supervising the administrator of estates." In the instant case, the main suit, the petition for proper accounting, was and is still pending, the very law issues still not yet disposed of, and as such, the charges levied against the administratrixes still to be established by the production of evidence during a hearing or trial. We note further the fact that the said petition for proper accounting was devoid of any mention of, or call for, the revocation or suspension of the letters of administration issued to the administratrixes being one of the desired reliefs sought by the petitioners therein. It was bad enough that the issue was raised and action thereon taken sua sponte by the court; but it was even worse that the court effected its suspension of the administratrixes without prior information to them or affording them the opportunity to be heard.

As we did in the Woodson case, supra, we hereby reverse the suspension of the letters of administration of the appellees/ administratrixes and order that they remain in office and continue to perform and function as the legal administratrixes of the estate of their late father until they are formally and properly charged in keeping with law, in a separate action other than the instant petition for proper accounting, which does not raise the issue, and regarding which the appellees were not given a fair hearing and ruling thereon.

Another issue passed upon by the Chambers Justice, and in which he ruled that an error was committed by the trial judge, relates to the claim that the judge failed to first dispose of the issues of law raised in the pleadings before taking further action in the case. It is an elementary principle of law and part of the practice and procedure in this jurisdiction that a judge must first dispose of law issues before the issues of fact. Cooper v. Davis, [1978] LRSC 57; 27 LLR 310 (1978) Syl.5; Thompson v. Faraj, [1976] LRSC 26; 25 LLR 34 (1976), Syl. 1; Gallina Blanca v. Nestle Products, 25 LLR 16 (1974) Syl. 4. We do not need to go any further on this issue; we hold simply, as the Chambers Justice did, that the act of the trial judge constituted reversible error, for which the case is hereby remanded to be commenced anew, starting from the disposition of the law issues.

There is one final issue we wish to address in this opinion, an issue raised for the first time in the appellants' brief and argued before this Court en banc. That issue relates to the claim of the appellants that the appellees are not legal heirs of the late S. B. Nagbe, Sr., but rather are children of his widow, begotten unto her first husband, Dr. Karpeh, and that prior to the death of S. B. Nagbe, Sr., Christiana Nagbe-Jallah was formerly called and known as Christiana Karpeh-Jallah, but that she changed her name after the death of the decedent in order to qualify as an heir and be appointed as one of the administratrixes of the estate.

Two contentions were advanced in respect of the foregoing issue. Firstly, the appellees contended that the issue was improperly raised before this Court since it was not raised in the court below or before the Chambers Justice to be passed upon and to thereafter form a part of the exceptions to be brought up for review by this Court.

This Court has been consistent and vehement in its stance that issues not raised during the trial will not be heard on appeal, Benson v. Johnson, [1974] LRSC 55; 23 LLR 290 (1974), and that the Supreme Court will not review issues where no exceptions were taken in the lower court, or consider an issue not included in the bill of exceptions. Cooper v. Davis, supra, Syl. 2. Accordingly, that issue is overruled and dismissed.

But having said that and thus ruled, we wish to further comment on the issue. We note that appellants, who were petitioners in the petition for proper accounting, are the grandchildren of the decedent, S. B. Nagbe, Sr., and nieces and nephews of the appellees. We note also that upon the death of the decedent patriarch of the family on May 28, 1973, his intestate estate was brought to court for administration by his eldest child and only son, S. B. Nagbe, Jr., who was appointed sole administrator after his petition, filed June 14, 1973, was heard and granted by the probate court. After the estate was closed on December 4, 1974, it was reopened on June 15, 1977, on petition of the one sister who was here in Liberia, and who told the court that they had no knowledge of the petition filed by their brother nor of his appointment as administrator, and that he had not informed them of the assets of the estate or of the closure of the said estate. In a ruling dated May 27, 1980, the probate court appointed Christiana Nagbe as co-administratrix, along with her brother, S. B. Nagbe Jr., and also ordered that as all the properties of their father, S. B. Nagbe, Sr., belonged to the three heirs of his body, namely, S. B. Nagbe, Jr., Sarah, and Christiana, the said properties should be shared alike among them. Accordingly, S. B. Nagbe Jr., and his sister, Christiana Nagbe (now Jallah) jointly administered their father's estate until the death of S. B. Nagbe, Jr., on May 31, 1988, a period of eight (8) years following the probate court's order.

The records do not reveal any issue ever being raised by S. B. Nagbe, Jr., that Christiana and Sarah were not his sisters or that they are not children of his father, or that as such they were not entitled to inherit from S. B. Nagbe, Sr. or that they did not qualify to be administratrixes of the estate. Thus, if S. B. Nagbe, Jr., the known son and legal heir of S. B. Nagbe, Sr., did not challenge the legitimacy of Sarah and Christiana as children of S. B. Nagbe Sr., and hence not his sisters, we wonder what is the basis upon which the appellants, who are children of S. B. Nagbe, Jr., nephews and nieces of Christiana and Sarah Nagbe, and grandchildren of S. B. Nagbe, Sr., have made the assertion that Sarah and Christiana are not children of S. B. Nagbe, Sr. This Court asks, as between the appellants and their father, S. B. Nagbe, Jr., who was in a better position to challenge the paternity of Sarah and Christiana? We hold that their father, S. B. Nagbe, Jr., was better suited to raise such an issue. After all, the property is for S. B. Nagbe, Sr., who was father of S. B. Nagbe, Jr., Sarah, and Christiana, while the appellants are grandchildren of S. B. Nagbe, Sr. The question therefore is, as between the children and the grandchildren of a decedent, which of them have preference or priority to the property?

The law provides that "letters of administration must be granted to the persons who are distributees of an intestate estate and who are eligible and qualified in the following order; (a) the surviving spouse; (b) the children; (c) the grandchildren; (d) the father or mother; (e) the brother or sister; and (f) any other persons who are distributees, preference, however, being given to the person entitled to the largest share in the estate." Decedents Estates Law, Rev. Code 8:111.1.

Therefore, S. B. Nagbe, Jr., a child of the decedent, not having challenged the paternity of his sisters, but instead recognized them as such and thus co-administered the decedent estate with them, the appellants, being grandchildren of the decedent, lack the capacity to raise such challenge. Moreover, the probate court reopened the estate on June 15, 1977, on petition of the two sisters, and thereafter appointed them on May 29, 1980 to co-administer the estate and ruled that all the properties of S. B. Nagbe, Sr. belonged to the three heirs of his body, namely S. B. Nagbe, Jr., Sarah and Christiana, and that said properties should be shared alike among them. We note that the court specifically named the two sisters, now appellees, and that the issue was therefore squarely closed.

Therefore, it was a complete travesty for the trial judge in the instant case to remove a child of the decedent as administratrix of his estate and replace her with a grandchild. That act violated the order of preference, and was clearly erroneous since it was done without any notice to her as the existing administratrix or any hearing or opportunity to defend herself. It is for these two reasons that the appointment of Emmanuel Nagbe has to be declared illegal and null and void, and warrants being set aside and reversed, and the original administratrixes reinstated.

Wherefore, and in view of the laws, facts and circum-stances hereinabove set forth, it is the ruling of this Court that the Chambers Justice, Mr. Justice Sackor, committed no error in granting the petition for the writ of certiorari and ordering the peremptory writ issued. His ruling is therefore confirmed and affirmed in toto. We also hold that the ruling and actions of the probate court judge, being irregular, arbitrary, illegal, and a prejudicial abuse of judicial discretion, the same are all hereby null and void and set aside, and the case remanded to the trial court to recommence the entire proceedings, starting from the disposition of the law issues raised in the pleadings. In that connection, the ruling of the probate judge suspending the administratrixes, being illegal and hence reversed, the appellees are ordered reinstated immediately as the legal administratrixes of the intestate estate of their late father. We further hold that the appointment of the curator, being illegal, the same is also reversed. In addition, we direct and order that following the disposition of the petition for proper accounting, the probate court should proceed without undue delay to have the estate closed in keeping with law.

The Clerk of this Court is hereby ordered to issue the peremptory writ of certiorari setting aside all the proceedings and reversing all the rulings made in the Court below and returning the parties to status quo ante, and to send a mandate to the Monthly and Probate Court for Montserrado County commanding the judge therein presiding to resume jurisdiction over the case and proceed to hear the petition for proper accounting filed by the appellants, commencing

with the disposition of law issues raised in the petition and returns thereto. Costs of these proceedings are ruled against the appellants. And it is hereby so ordered.

Petition granted.

Note: Mr. Justice Sackor, having heard this case in Chambers, recused himself from its final determination, and hence, did not sign this judgment.

Note: Mr. Justice Jangaba, having traveled abroad, did not participate in the hearing of this case; hence, did not sign this judgment.

Firestone Plantations Co. v Bravy [1990] LRSC 25; 36 LLR 893 (1990) (9 January 1990)

FIRESTONE PLANTATIONS COMPANY, Respondent/Appellant, v. **JOHN BRAVY,** alias REED, Movant/Appellee.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL CIRCUIT, MARGIBI COUNTY.

Heard: December 28, 1989. Decided: January 9, 1990.

1. Certificate of deposit may be defined as a written acknowledgment of a bank or banker promising to pay to the depositor or to the order of the depositor, or to some other person or to his order, whereby the relation of the debtor between the bank and the depositor is created.

2. For the purposes of cash bond, a cashier or manager's check is equivalent to a bank certificate and therefore meets the statutory requirement for giving of cash bond.

3. A bank certificate or other negotiable instrument, delivered to the sheriff as security for an appeal bond is under the control of the sheriff. That is, in the event of a final judgment for the appellant and the appellee defaults in satisfying that judgment, the sheriff is clothed with the authority to proceed against the issuer of the negotiable instrument (the bank for a bank certificate) to recover the face value of said negotiable instrument.

4. In order for an affidavit of sureties accompanying an appeal bond to satisfy the statutory requirement that the property offered as security be sufficiently identified to establish the lien of the bond, the property should be described by metes and bounds.

5. An affidavit of sureties is legally necessary only when a property bond is being perfected.

6. Any written security, which may be transferred by endorsement and delivered by delivery merely so as to vest in the endorsee the legal title and thus enable him to sue thereon in his own name is a negotiable instrument.

7. An appeal will be dismissed for failure to pay costs of court, file approved bill of exceptions, file an approved appeal bond or where such bond is defective and the non-appearance of the appellant at the call of the appeal.

8. The right of an appeal from a judgment, decree, decision or ruling of any court or administrative board or agency, except this Supreme court is a constitutional right and the Constitution further provides that the law should make it *easy*, expeditious and inexpensive for the aggrieved party to exercise this right of appeal. So appeals should not be dismissed on technicalities or inaccuracies, but only for statutory grounds or other substantial grounds such as would materially and adversely affect the rights of the appellee or the enforcement of a final judgment of the Supreme Court if the appeal is not dismissed.

9. An appeal will only be dismissed for reason expressly provided by the statutes.

John Bravy, appellee, instituted an action of damages for wrong against the Firestone Plantations Company, appellant in the Thirteenth Judicial Circuit Court of Margibi County, alleging that properties to the value of $25,847.50 got missing as a result of an illegal search carried out at his home by the Plant Protection Force (security employees) of appellant. The trial court rendered judgment in the said amount of $25,847.50 in favor of appellee, to which appellant excepted and announced an appeal to the Supreme Court.

In perfecting its appeal, appellant secured a cash bond, (in the form of a certificate of deposit) drawn on Meridien Bank Liberia Limited, with Albert K. Maxwell and James B. Dono, named as authorized officials of the said Meridien Bank Liberia Limited. The said cash bond was approved by the trial judge. Appellee, as movant, filed a motion challenging the cash bond as being defective on the grounds that the language employed was improper and prayed the Supreme Court to dismiss appellant's appeal. Appellant, as respondent, resisted the motion.

After entertaining arguments, the Supreme Court held that the language employed in the certificate of deposit, posted as security to the appellant's appeal bond, was proper and met the statutory requirement for posting of cash bond. The Court also held that appeals will not be dismissed on mere technicalities or inaccuracies, but only for good reason or on substantial grounds. The motion to dismiss was *denied.*

Francis Y S. Garlawolu appeared for the appellee. *H Varney G. Sherman* and *Pei Edwin Gausi* appeared for the appellant.

MR. JUSTICE AZANGO delivered the opinion of the Court

This case emanated from the Thirteenth Judicial Circuit Court, Margibi County, sitting in its November Term, A. D. 1987, where John Bravy, alias Reed (appellee) instituted an action of damages for a wrong in which he alleged that on the orders of the appellant (the Firestone Plantations Company), its employees, to be specific the Plant Protection Force (PPF), on July 2, 1987, at about 3:00 p.m. forcibly invaded his home and, conducted a search in absolute violation of his privacy. This violation, according to appellee, resulted into the loss of his properties to the value of twenty-five thousand eight hundred forty seven dollars and fifty cents ($25,847.50). Here is the statement of properties allegedly lost:

1) Cash in the sum of $20,823 25---- $20,823.25
2) One video set valued at--- 2,175.50
3) Thirty video cassettes at $50.00 each 1,500.00
4) One radio and record player 550.00
5) One damaged ice box 265.00
6) One damaged stove 225.00
7) One cassette recorder 175.00
8) One damaged washing machine 334.25
Total------ $25,847.50

When this case was called for hearing in the court below, counsel for appellant defended itself by submitting that the search was not illegal in that it was carried out on the orders of a court of competent jurisdiction; that the officers who conducted the search were not exclusively its employees, for the team consisted of members of the joint security; and that since appellee was present when the search was being carried out, he could have objected to the removal of the listed missing items from his premises or would have immediately reported the alleged losses to the police had any such losses occurred. Notwithstanding, on April 25, 1989, judgment was rendered in favour of the appellee for the amount of twenty-five thousand, eight hundred forty-seven dollars and fifty cents ($25,847.50); but to this judgment, appellant excepted, announced and prayed for an appeal to the Honorable Supreme Court of Liberia.

Having secured a cash bond on Meridien Bank Liberia Limited, which the judge in the court below approved on May 2, 1989, appellant filed its appeal before this Court on May 20, 1989. In response to the filing of the appeal by appellant, appellee filed a four-count motion to this Court to dismiss the appeal, contending that the appeal bond is fatally defective and, as the basis for his motion, gave the following legal and factual reasons:

1. That appellant's appeal bond tendered, submitted to and approved by the trial judge on the 2" day of May, A.D. 1989, bound Albert K. Maxwell and James B. Dono, two natural persons, as sureties with the use of the following words:

The condition of this obligation is that we will pay and satisfy the final judgment of the Honourable Supreme Court and indemnify the plaintiff/appellee from all costs and injuries and damages arising from the appeal taken by defendant/appellant from the ruling/judgment of his Honor Sebron J. Hall, Resident Circuit Judge, presiding over the February, A. D. 1989 Term of the Thirteenth Judicial Circuit Court on the 25th day of April, 1989 in the above captioned cases should the final judgment of the Supreme Court be for the plaintiff/appellee. The penalty of this bond is thirty eight thousand, seven hundred seventy-one dollars twenty-five cents ($38,771. 25)."

Hence, two natural persons having signed the appeal bond, obligating themselves to indemnify the appellant, they were duty bound under Section 63.2 of the Civil Procedure Law, to have attached thereto property valuation, sureties' affidavit, and revenue certificate to the effect that they are householders and free-holders within the Republic of Liberia.

2. That the appeal bond is further defective in that notwithstanding, appellant had tendered a paper bond and the same approved, said appellant adroitly posted a piece of paper referring to it as a Certificate of Deposit-Appeal Bond, purportedly from the Meridien Bank, obligating itself as guarantor thus:

`Know all men by these presents that we, Meridien Bank Liberia Limited, banking institution doing business in Monrovia, Liberia, hereby certify that Firestone Plantations Company, Harbel, Liberia, the above named appellant, will comply with judgment to the sum of thirty-eight thousand seven hundred seventy-one dollars twenty five cents ($38,771.25)." Appellee submits that under our statute, the Meridien Bank is not authorized to serve as surety, but rather an insurance company or two natural persons. Appellee further submits that a bank can only show by certificate a deposit that the sureties or insurance company has specifically deposited adequate amount to indemnify an appellee in a given case, but not the bank as surety as in the instant case.

Section 63.2 of the Civil Procedure Law specifically states who may offer security as sureties, as follows: "Unless the court orders otherwise, a surety on a bond shall be either two natural persons who fulfill the requirement of this section or an insurance company authorized to execute surety bond within the Republic of Liberia.

Thus, section 63.1 of the Civil Procedure Law only refers to the type of securities but not the class of sureties to offer....these securities on a bond.

Appellee submitted that the so-called bank certificate failed to state who specifically deposited the alleged amount, whether the appellant itself or the sheriff of the Thirteenth Judicial Circuit Court or the two signatories to the said document; hence, the appeal bond is incurably defective. The appellee continued by submitting that the appeal bond is further defective because no mention is made in the body of the paper bond that the purported bank certificate of James B. Dono and Albert K. Maxwell is that of two natural persons who actually exist, no affidavit duly sworn and subscribed to before a justice of the peace or notary public to the effect that these two (2) persons named above actually exist, whether they are employees of the Meridien Bank Liberian Limited and that the signatures appearing thereon are theirs. Hence, the absence of an affidavit to verify the signatures and also to confirm the availability of the money in the bank, renders the appeal bond dismissible to all intents and purposes.

Another submission made by the appeal in its motion to dismiss is that the appeal bond is defective because the sheriff has no control over the so called security, which ought to have been offered by a duly qualified surety, and submitted to the sheriff for deposit to a Government depository.

To this motion, a resistance embodying five (5) counts was filed by the appellant, stating, in substance, the following:

1. Respondent says that the motion in its entirety is legally bad, defective and constitutes a misconception of the law on bonds. Respondent submits that in keeping with Section 63.1 of the Civil Procedure Law, a bond may be, secured by one or more methods as provided therein, and in the instant case, respondent elected to and did secure its bond by means of cash deposit in the Meridien Bank. The signing of the bank's certificate by Messrs Albert K. Maxwell, Manager of International Department and James B. Dono, authorized signatory of said bank, cannot legally be interpreted or inferred that the two officers of the bank are natural sureties of Firestone Plantations Company. On the contrary, the signatures of the two officers of the bank evidenced that cash of thirty-eight thousand seven hundred seventy-one dollars twenty-five cents ($38,771.25) has been deposited in the said bank by appellant; and secondly, the signatures showed the authenticity of the bank's certificate. Hence, count one (1) together with the entire motion should be denied.

2. And respondent further submits that the motion is defective and a fit subject for dismissal. Respondent says that the averment in said motion to the effect that the Meridien Bank is not authorized to serve as surety but rather an insurance company or two natural persons is absolutely irrelevant and immaterial since Section 63.2 of the Civil Procedure Law is inapplicable. Respondent contends that it deposited with the said bank and obtained a bank's certificate in keeping with Section 63.1 of the Civil Procedure Law. Hence count 2, together with the entire motion, should be denied by this Honourable Court.

3. And appellant/respondent submits that count 3 of the motion is a novelty, in that under the law, and in keeping with the practice within this jurisdiction, an affidavit is not required to substantiate a cash deposit with a bank; instead it is required that the respondent should show evidence of such deposit by a bank's certificate or receipt from the sheriff. In the instant case, respondent showed evidence of its deposit at the Meridien Bank by the bank's certificate; and so count 3 of the motion should be overruled.

4. Respondent/appellant denied all and singular the allegations of law and facts contained in the Motion to dismiss which have not been specifically traversed in the resistance. From the foregoing facts and circumstances, the only issue that the Court will address itself to is:

Whether or not the appellants/respondent's appeal bond failed to meet the statutory requirements and therefore renders it defective?

In order to provide an answer to the above question, we will carefully discuss appellee's motion in light of the relevant laws regarding the use of bonds in our judicial system, beginning with the first two counts.

In counts one and two of his four-count motion, appellee argues and contends that: (a) the signing of the appeal bond and the certificate of deposit by Messrs. Albert K. Maxwell and James B. Dono, Manager-International Department and an Authorized Signatory, respectively of the Meridien Bank, appellant's bankers, makes them sureties to indemnify him and were therefore duty bound in keeping with law, and have appended thereto the property valuation, sureties affidavit and revenue certificate to the effect that they are householders and freeholders within the Republic of Liberia; (b) since Meridien Bank Liberia Limited is not an insurance institution, it cannot legally execute surety bond or serve as surety within the Republic of Liberia; and (c) the bank certificate issued by the Meridien Bank does not indicate who specifically deposited the amount of the bond in the bank.

This Court cannot subscribe to these views, for they are in absolute disharmony with the statutes governing the use of bonds in this jurisdiction. We will further like to make it clear here and now that the requirement of two sureties in securing a bond to perfect an appeal is only applicable to cases in which the appellant gives real property as security for the bond.

In the instant case, appellant posted a cash bond and obtained a certificate of deposit signed by two officers of the bank evidencing that the amount of thirty-eight thousand seven hundred seventy-one dollars twenty-five cents ($38,771.25) was being held to the credit of the appellee, if the appellee should obtain judgment.

The fact that Messrs. Albert K. Maxwell and James B. Dono signed the bond and the certificate of deposit in their respective capacities as Manager-International Department and authorized

signatory does not them make them sureties to the bond but rather their signatures served to authenticate the genuineness of said documents.

To throw more light on the issue of the certificate of deposit, let us resort to appropriate authorities for a definition. A certificate of deposit is "a written acknowledgment of a bank or banker promising to pay to the depositor, or to the order of the depositor, or to some other person or to his order, whereby the relation of the debtor between the bank and the depositor is created." 10 AM. JUR. 2d., *Banks,* §455. "A certificate of deposit is a writing having the requisites of negotiability and consisting of an acknowledgment by the bank of receipt of money with the engagement to repay it." U.C.C. §3-104 (2).

In the certificate of deposit under consideration, the bank certified as follows: "Know all men by these presents - That we, Meridien Bank Liberia Limited, a banking institution doing business in Monrovia, Liberia, hereby certify that Firestone Plantations Company, Harbel, Liberia, the above named appellant, will comply with judgment up to the sum of $38,771.25, out of monies set aside and available at this bank, if final judgment shall be rendered in favour of John Bravy, the above named appellee, the same being one and a half times the judgment of $25,847.50 awarded the appellee in the above case. . .." The issue before this Court is: Does the signing of such a document by the two bank officers make them sureties indemnifying appellee? The answer is in the negative.

The bank certificate itself was drawn on Meridien Bank and addressed to The sheriff, Thirteenth Judicial Circuit Court, Kakata, Margibi County, Liberia. The caption of the case as stated on the certificate is "Firestone Plantations Company, Harbel, Margibi County, Appellant, versus John Bravy Appellee, Action for Damages.

Considering the wording of the first paragraph of the bank certificate and the caption of the case, it is but reasonable and logical to conclude that it is appellant, the Firestone Plantations Company, that deposited the money in the Meridien Bank. This conclusion negates appellee's contention that the bank certificate does not indicate who specifically deposited the money in the bank.

In the case *Liberia Mining Company v. Bomi Workers Union,* [1976] LRSC 42; 25 LLR 198 (1976), this Court held that for the purposes of a cash bond, a cashier's or managers' check is equivalent to a bank certificate and hence meets the statutory requirement for giving of cash bond. In the same view, the certificate of deposit issued by the bank in the instant case

evidencing the availability of the amount of $38,771.26 to defray all expenses incurred by appellee should judgment be rendered in his favour meets the statutory requirement for giving a cash bond.

On the issue of whether or not the Meridien Bank, though not an insurance institution, is competent enough to execute surety bond or serve as a surety within the Republic of Liberia, the law is perfectly clear and well settled. The statute provides that "except as otherwise provided by statute, any bond given under this title shall be secured by one or more of the followings: "(a) cash to-the value of the bond; or cash deposited in the bank to the value of the bond as evidenced by a bank certificate." Civil Procedure Law, Revised Code 1:63.1.

It is therefore the conclusive opinion of this Court that counts one and two have no legal basis and are hereby overruled.

In count three of the motion to dismiss, appellee argues that the bond is defective because the bank certificate is not supported by any affidavit to substantiate (a) the existence of the signatories of Albert K. Maxwell and James B. Dono; and (b) whether the signatories are employees of Meridien Bank. Appellant's notion that a cash bond should be supported by an affidavit is a complete novelty in this jurisdiction. Therefore, we are not in agreement with appellee's view.

In the *case Doe v. Dent-Davies*, [1978] LRSC 56; 27 LLR 306 (1978), we held that "in order for an affidavit of sureties accompanying an appeal bond to fulfill the statutory requirement that the property offered as security is sufficiently identified to establish the lien of the bond, the property should be described by metes and bounds" in keeping with Section 63.2 (c) -of the Civil Procedure Law. From this ruling, it is clear that an affidavit is legally necessary only when a property bond is being perfected. Count three of the motion is therefore overruled.

On the issue of the sheriffs lack of control over the security, which issue was raised in count four (4) of the motion, we would like to remind appellee that a certificate of deposit is an instrument that has the requisites of negotiability; that is, it is a "written security which may be transferred by indorsement and delivered by a delivery merely so as to vest in the endorsee the legal title and thus enable him to sue thereon in his own name". BLACK' S LAW DICTIONARY (4thed). Thus, the endorsement and subsequent delivery of the certificate to the sheriff puts him in control of the security - the amount on the bank as holder in due course. Should there be a default in

payment in the event that the final judgment of this Court is in the appellee's favour, the sheriff is clothed with the legal authority to proceed against the bank in order to recover the amount.

It is a settled principle of law that the dismissal of appeals is limited to the following four (4) causes:

1. Failure to announce the taking of the appeal;

2. Failure to file a bill of exceptions;

3. Failure to file an approved appeal bond or where said bond is fatally defective;

4. Failure to file and serve a notice of the completion of the appeal. Civil Procedure Law, Rev. Code 1: 51.4.

None of the aforementioned causes is applicable to the case at bar. In *Dennis and Dennis v. Holder*, 8 LLR 301 (1950), this Court, citing the case *of Johns v. Cess-Pelham and Witherspoon*, [1944] LRSC 15; 8 LLR 296 (1944), reiterated the intention of the Legislature in passing the Act of 1930 when it said: "To all intents and purposes, it is obvious that the intention of the Legislature in passing that act was to discourage the dismissal of appeals on technical legal grounds and to give the appellants an opportunity to have their cases heard by this court on their merits in order that substantial justice could be done to all concerned."

This view has been re-echoed in a number of cases in this jurisdiction, including *Firestone Plantations Company v. Greaves*, [1946] LRSC 2; 9 LLR 147 (1946) and *Cole v. Williams, [1949] LRSC 17; 10* LLR 191 (1949). A generally accepted principle of law is that "Appeals will not be dismissed on mere technicalities or inaccuracies, but only for good reason or on substantial grounds. Thus, a motion to dismiss an appeal must be made on some legal grounds recognized by statute or rules of court or otherwise present substantial defect of such a nature as to preclude a fair determination of the case on appeal or the motion will be denied". 5 C.J.S., *Appeals & Error, §1353.*

Finally, this Court must address the issue of the language of a certificate of deposit, even though the issue was not squarely raised in the motion and resistance, it was argued lengthily. The question is the clause "will comply with judgment up to the sum of thirty eight thousand seven hundred seventy-one dollars twenty five cents ($38,771.25). The use of the term "will comply" or "will pay" was a subject of lengthy argument before us.

The law writers have said that: "A certificate of deposit ordinarily is defined as a written acknowledgment by a bank of the receipt of a sum of money on deposit which the bank or banker promises to pay to the depositor, to the order of the depositor or to some other person or to his order, whereby the relationship of debtor/creditor between the bank and the depositor is created. No particular form is necessary to constitute a certificate of deposit. For instance, a letter of advice written by the cashier of a bank to another bank stating that a person therein named had deposited with the former bank a sum of money therein stated, to the credit of the latter bank for the use of another, has been held to be a certificate of deposit."7 AM JUR *Banks, §* 491 (1937).

The use of the words "will comply" or "will pay" constitute the promise to pay, which the law requires. The certificate of deposit need not be in any particular form; it should acknowledge receipt of a deposit and promise to repay it; should be signed by a duly authorized officer of the bank of issuance and should be supported by an adequate consideration, and it will be presumed in the absence of contrary evidence that it was so supported. 9 C.J.S., *Banks and Banking, §* 313.

We therefore hold that the language employed in the certificate of deposit posted as security to appellant's appeal bond was proper and the use of the words "will comply with judgment" or "will pay", does not negate or nullify said certificate of deposit but to the contrary is in compliance with the intent of the law, the promise to pay.

Appeals are not to be dismissed on mere technicalities or inaccuracies for the intention of the Legislature in passing an Act stating the grounds for dismissing an appeal was to discourage the dismissal of appeals on technical grounds and to give to appellants an opportunity to have their cases heard by the Supreme Court on their merits. *Kerpai et. al. v. Kpene[1977] LRSC 4;* , 25 LLR 422 (1977). The right of an appeal from a judgment, decree, decision or ruling of any court or administrative board or agency, except this Supreme court is a constitutional right and the Constitution further provides that the law should make it easy, expeditious and inexpensive for the aggrieved party to exercise this right of appeal. Article 20 (b), Liberian Constitution. We have therefore consistently held, and we reaffirm that appeals will not be dismissed on mere technicalities. *Biggers v. Good-Wesley,* [1974] LRSC 54; 23 LLR 285 (1975).

Throughout his motion, appellee vehemently argued that appellant's appeal bond is defective. What this allegation should ordinarily entail is that the appeal bond lacks something essential to complete it, something that the law requires. We find no such defect in the appeal bond in this case. To cause the Supreme Court to dismiss an appeal, the movant must place his case squarely within one of the grounds expressly provided by the statutes or the motion will be denied. It is therefore our view that the motion be and same is hereby denied.

Wherefore, and in view of the foregoing, the motion to dismiss is hereby denied.

Our distinguished colleague, His Honour, the Chief Justice being in disagreement with the interpretation of the clause "will pay" has accordingly prepared a dissenting opinion to that effect. However, our opinion being supported by legal authorities, shall continue to be the law of the land. And it is hereby so ordered.

The Clerk of this Court is hereby ordered to have the main case docketed for the March A. **D.** 1990 Term of this Honourable Court for hearing and determination.

Motion to dismiss denied

Editors' Note: Mr. Chief Justice Gbalazeh dissented in this case, but did not file a dissenting opinion. He merely did not sign the final judgment.