JAIGOBIN *v.* DIAS

[Supreme Court (Bollers, J.) November 10, 11, 12, 25, 1965]

Mortgage — Nature of interest created — Whether movable or immovable property.

Immovable property — House situate on leased land — Whether movable or immovable property.

Landlord and tenant — Agreement for lease of land — Duration of lease not stated — Rent paid on monthly basis — Nature of interest created — Whether lease or licence? — Landlord and Tenant Ordinance, Cap. 185, *ss.* 6(3) *and* 7.

Practice and procedure — Mortgage on movable property — Foreclosure proceedings instituted in rem—*Validity thereof* — 0.7, *r.* 14.

Practice and procedure — Change of solicitors — No notice thereof on record — Validity of act done by new solicitor.

The plaintiff owned a building situate on land which he held under a written agreement of lease from the Transport and Harbours Department. The duration of the lease was not stated in the agreement and rent was paid on a monthly basis. The property was subject to a mortgage in favour of the defendant who instituted foreclosure proceedings *in rem* against the "proprietor or proprietors, representative or representatives of" the property, service being effected by affixing the writ with a nail to the front door of the building. Judgment having been obtained, a new solicitor, without any notice of change of solicitors having been filed, issued instructions to levy, and the property was subsequently bought in at execution sale by the defendant. The plaintiff, who had not been aware of the proceedings and the sale, instituted an action to set aside the judgment and subsequent levy and sale.

Order 7, r. 14, provides that "in an action against the owner or representative of a lot of land or plantation, the name of such owner or representative not being mentioned....., service of the writ of summons may be effected by affixing a copy of the writ to the principal building upon such land or plantation....."

Held: (i) the duration of the lease not having been stated, the document was not effective as an agreement of lease;

(ii) a tenancy from year to year did not arise under s. 6 (3) of the Landlord and Tenant Ordinance, Cap. 185, since rent was paid on a monthly basis;

(iii) the plaintiff was in the position of a person who had a mere permission or licence to go on land, which could never be made the subject of a levy;

(iv) the property was movable property and not "a lot of land or plantation" within the meaning of 0.7, r. 14, and in consequence the mode of service permitted by this provision was inapplicable;

(v) a mortgage, whether over movable or immovable property, creates merely a movable debt and does not pass title to the mortgagee over the mortgaged property;

(vi) the mode of service adopted and the purported change of solicitor without notice on record were unauthorised and were not mere irregularities but were nullities, and in consequence all the proproceedings relating to the foreclosure action, execution and sale were null and void.

Judgment for the plaintiff.

B. S. Rai for the plaintiff.

S. L. Van B. Stafford, Q.C., for the defendant.

BOLLERS, J. : In 1957 the plaintiff, Jaigobin, purchased property situate at Sparendaam, East Coast, Demerara, from the defendant, and another property at Plaisance, East Coast, Demerara, and obtained a mortgage on both properties in his favour from the defendant for the sum of $2,000 with interest thereon at the rate of 12 *per centum per annum* under a mortgage deed entered into between the parties on 11th February, 1957. The plaintiff made several payments in respect of interest but paid nothing on the capital sum, yet the defendant-mortgagee in the year 1960 released the Plaisance property from the mortgage whereby the plaintiff was able to sell that property.

In October 1964 the defendant in action No. 1587/64 instituted foreclosure proceedings in respect of the Sparendaam property, and on 2nd November, 1964, he obtained judgment therein in the Bail Court presided over by the Hon. the Chief Justice. The order made by the Honourable the Chief Justice enters judgment in favour of the mortgagee (now defendant) in the sum of $2,140 (the sum of $140 being interest) together with interest on the sum of $2,000 at the rate of 12 *per centum per annum* from the 12th February, 1964, until paid, together with costs in a sum fixed and with the usual order as to foreclosure of the mortgage on the property "wherein the mortgagee is admitted to proceed in execution against the property thereby mortgagee and recover and receive from the proceeds of sale the full amount for which judgment was given."

The action before the Honourable Chief Justice was brought by the plaintiff-mortgagee (now defendant) against the proprietor or proprietors, representative or representatives of a one-storeyed building standing on land leased, as defendant, and the property described in the writ followed the description of the property as contained in the mortgage deed, and is as follows:

> "One one-storeyed building measuring 22 (twenty-two) feet 6 (six) inches by 12 (twelve) feet 6 (six) inches with gallery attached measuring 22 (twenty-two) feet 6 (six) inches by 7 (seven) feet with a shed attached measuring 22 (twenty-two) feet 6 (six) inches by 4 (four) inches also with a kitchen attached measuring 8 (eight) feet by 6 (six) feet boarded with galvanised roof standing on 1 (one) foot 6 (six) inches wooden blocks situate

at Sparendaam, East Coast, Demerara, on lands leased from Transport & Harbours Department together with the rights in and to the lease of the piece of land upon which the above building stands."

On the strength of the judgment the present defendant levied execution upon the property as described in the writ of summons, and on a sale at public auction by the marshal of the Supreme Court the defendant purchased the property for the sum of $1,000 on 30th March, 1965.

The writ of summons in action No. 1587/64 was never served on the plaintiff herein and an order of the court was not obtained to dispense with personal service thereof and the mode of service is recorded on the writ as having been served by the marshal at Sparendaam Village, East Coast, Demerara, on the defendants, proprietor or proprietors, representative or representatives of a building situate at Sparendaam, East Coast, Demerara, by affixing same with a nail to to the front door of the said building which was pointed out to him by Charles Hubert Dias (defendant herein) on 9th October 1964.

It is the complaint of the plaintiff that he was never aware of the service of the writ of summons in the action, the judgment and the levy and sale at execution following thereon. This is denied by the defendant, who claims that the plaintiff was fully aware of the entire proceedings and could have taken steps at an earlier stage to set aside the proceedings if indeed there was a defect in the mode of service. There was also a dispute as to the amount of interest owed on the capital sum of the mortgage at the time of the judgment. In respect of both issues I have found in favour of the plaintiff, and from the evidence of the defendant given in cross-examination I have arrived at the conclusion that there was no interest owing to him by the plaintiff on the capital sum of the mortgage, and the plaintiff was never aware of the proceedings in action No. 1587/64, or the levy and sale at execution which followed as a consequence thereof, and took steps as early as possible by this action to set aside the entire proceedings in relation thereto. It will be seen that I have rejected the evidence of the defendant's witnesses who attempted to convince the court that the plaintiff was aware of the proceedings, as I formed the opinion that they were merely servants and relatives of the defendant seeking to assist him in the presentation of his case.

In action No. 1587/64 the solicitor on the record authorised to act for the plaintiff (the defendant herein) was Mr. D. A. Robinson, barrister-at-Law acting as solicitor, but it was Mr. R. L. Millington, barrister-at-law acting as solicitor for the plaintiff, who signed the request for the writ of execution and the instructions of levy. There was no notice of change of solicitor placed on the record. In the instructions to levy the property was stated as being movable property, and on the conditions of sale as advertised by the Registrar the form used was that normally used in a case of movable property being sold. When the writ of execution was issued the form used was that normally used in relation to immovable property, but the inappropriate words on the writ relating to immovable property were scored out. The impression to be gained, therefore, was that the property levied upon and sold at execution was treated as movable property.

In the present action, the plaintiff avers that the service of the writ of summons in action No. 1587/64 is bad in law and a nullity, hence all the proceedings flowing therefrom are a nullity, and the request for the writ of execution was signed by a barrister-at-Law acting as solicitor, who had no authority to act in the matter. Wherefore, the plaintiff now claims as against the defendant —

(a) an order that service of the writ of summons in the action against the proprietor or proprietors, representative or representatives of the one-storeyed building at Sparendaam on lands leased from the Transport & Harbours Department together with the rights in the lease of and to the piece of land on which the building stands be set aside; and

(b) an order that the judgment entered in the action and the subsequent levy and sale therein pursuant to the judgment be declared null and void and set aside;

(c) damages for the illegal levy and sale of the property;

(d) an order restraining the defendant, his servants and/or agents from selling or otherwise disposing of the property purchased by the defendant at the execution sale on 30th March, 1965.

In this court, counsel for the plaintiff has submitted that the property which was sold at execution sale and which was the subject-matter of the mortgage deed dated 11th February, 1957, and which was the subject-matter of action No. 1587/64, was in fact movable property and could not have been proceeded against in the manner adopted by the plaintiff in that action. He submits that the mode of service was not warranted by the manner in which his client's property was proceeded against. His submision is that the mode of service adopted was clearly that as provided for by O. 7, r. 14, of the Rules of the Supreme Court (and, indeed, this is not denied by counsel for the defendant), and this rule which does not speak of movable or immovable property, but only of a limited class of immovable property, that is to say, "lot of land or plantation", can have no application in the present circumstances, as the property which was levied upon was neither a lot of land nor a plantation, nor was the action against the owner or representative of a lot of land or plantation, the name of such owner or representative not being mentioned.

Counsel referred me to the rubric of action No. 1587/64 and pointed out that the defendant named therein was the proprietor or proprietors, representative or representatives of the building des-

cribed together with the rights in and to the lease of the piece of land upon which the building stands which, he suggested, showed clearly that the defendant in that action who was sued was the owner or representative of a building. Hence the mode of service authorised by O. 7, r. 14, could not apply, as there was no question of a lot of land or plantation being involved.

Counsel for the defendant submitted that the mode of service authorised by O. 7, r. 14, would be applicable to the circumstances as the defendant named in the action was the proprietor or representative of a lot of land. He submitted also that these proceedings were proceedings *in rem* taken against the property and whether it was movable or immovable provision was authorised for the proceedings *in rem* by proviso (b) of s. 3D of the Civil Law of British Guiana Ordinance, Cap. 2.

I think it is meet that I should enter into a discussion as to the nature of the property levied upon; whether it was movable or immovable, the legal position of the plaintiff in relation thereto, and whether the manner of proceeding adopted against the property was authorised by the Rules of Court.

I think it is clear that when a levy is made on movable or immovable property for non-payment of village rates under the Local Government Ordinance, Cap. 150, the levy and proceedings thereto are *in rem* and not in *personam*. The proceedings against the property are taken there by way of parate or summary execution and are proceedings *in rem*, that is, as I understand it, the person purchasing at execution sale acquires rights in the property as against the world at large. *Ramnarine* v. *Bassoo*, 1956 L.R.G.B. at pp. 15 and 16. As LUCKHOO, C.J., said in that case:

> "Nor is it akin to the position where a levy is made *in personam* on the property; for example, if the plaintiff had failed to satisfy a judgment given against him for non-payment of a debt, a levy made on the land to recover the amount due under the judgment would have been a levy *in personam*."

Support for this view is to be found in DUKE'S TREATISE ON THE LAW OF IMMOVABLE PROPERTY IN BRITISH GUIANA in Chapter 8, at p. 28, where the author states:

> "In former times, as soon as *fiat executio* was granted, or a writ of execution was issued out of the Supreme Court Registry, the execution could take immovable property in execution without any proof to the Registrar that it belonged to the judgement-creditor. This procedure led to many abuses, many lands being taken in execution in respect whereof the judgement-debtor was never in possession. A change was made in 1910 when it was provided (a) that an affidavit of title was necessary except in cases of proceedings *in rem* by way of parate execution. It was, however, provided that possession of the judgement-debtor for any period not being less than five years shall be deemed *prima facie* evidence of title."

AS FRASER, J., pointed out in *Simpson* v. *Yhap*, 1960 L.R.B.G. 326, at p. 329, a sale and purchase following proceedings *in rem* by way of parate execution create rights of a nature quite different from those taken *in personam* by way of ordinary execution for the recovery of a judgment debt, the difference being that the levy in a case of parate execution is against the land as such irrespective of rights over it, and a sale in that event conveys a title free from all rights and encumbrances, including the rights which might have been obtained by other persons including those in adverse possession for the statutory period, enabling them to obtain title by prescription. He cites *Ramnarine* v.*Bassoo*, 1956 L.R.B.G. 12, following *Bowen* v. *Jones*, 1948 L.R.B.G. 55, and *Incorporated Trustees of the Diocese of Guiana* v. *McLean*, 1939 L.R.B.G. 182, as authority for that proposition, whereas in the case of the levy in execution *in personam* the levy is against the right, title and interest of the execution debtor only, and no more. In other words, the purchaser at the sale could obtain no better right and title than that vested in the execution debtor.

By s. 3D (b) of the Civil Law of British Guiana Ordinance, Cap. 2, the Roman-Dutch law and practice relating to conventional mortgages was retained, and it is well settled that a conventional mortgage in this country is a transaction of a different quality from the mortgage known to the English law of real property. The element of security is common to both systems, but the main difference is that unlike the English mortgage the Roman-Dutch mortgage does not transfer to the mortgagee *dominium* or ownership over the property.

DR. F. H. W. RAMSAHOYE, in his TREATISE ON THE DEVELOPMENT OF THE LAND LAW IN BRITISH GUIANA, at pp. 456-465, shows that the courts were of the opinion that a mortgage of real property was a movable debt, the thing pledged never becoming the property of the creditor, and could only be sold after a previous decision of the court in order to realise from the proceeds the capital sum with the arrears of interest. He states:

> "The right of the mortgagee was always an action for the recovery of money, the real security being only subsidiary, the primary demand being personal."

The author depends upon the unreported case of *Mendonca* v. *Gonsalves*, (1883) for this proposition, and points out that the learned judges CHALMERS, C.J., and ATKINSON, J., observed that even the sentence of foreclosure in the proceedings did not have the effect of passing property to the mortgagee for he then only acquired power to sell the property and apply the proceeds in liquidation of his debt.

There is nothing in this statement of the law to suggest, as counsel for the defendant has submitted, that the mode of pro-

ceeding against the property mortgaged should be as in an action *in rem*, although it may well be that the mortgage acquired rights *in rem* over the property in the recovery of the mortgage debt from the proceeds of sale. It would be illogical, in my view, to proceed against movable property *in rem*, for if the writ in the action were to be attached or merely placed on a movable object, it could hardly be brought to the attention of the defendant mortgagor who might be far removed from it and who would have no notice of the pending action. The mortgagee could, of course, adopt proceedings *in rem* against the property mortgaged in the case of immovable property, provided it was authorised by the rules of court.

Counsel's reference to one or two cases where the mode of service adopted against movable property mortgaged was as proceedings *in rem* could hardly establish a practice and must have been clearly wrong. As he concedes there is no case to be found on this aspect of the matter, I am of the opinion that if this were the general practice there would not be this significant lack of authority. Confirmation for this view is to be found at p. 46 of DUKE'S LAW OF IMMOVABLE PROPERTY, where the author states that a foreclosure action may be of one of two kinds. It may be either an action against the mortgagor himself, or it may be an action *in rem* against the very property. In the latter case, the defendant's name is not given. He is merely described as the owner or representative of the land in question, and the writ is served by affixing a copy "to the principal building upon such land or plantation, or if there be no building or plantation to any railing, tree, or to some conspicuous place on such land or plantation." (O. 7, R. 14, of the Rules of Court, 1900). In the former case, if the proceeds of the sale are insufficient to meet the amount of the mortgagee's claim, then the mortgagee is at liberty to proceed against other property of the mortgagor for the recovery of the balance. But in the latter case, the mortgagee can look only to the proceeds of sale for the recovery of his debt.

If there is authority then for the bringing of a foreclosure action against the mortgagor himself in the case of movable property where the writ could be served personally on the mortgagor, there could be no need to resort to the proceedings *in rem* against the movable property itself giving rise to the illogical situation already described.

It is important to observe that the statute speaks of the law and practice and is to be contrasted with s. 44 of the Supreme Court Ordinance, Cap. 7, which speaks of the practice and procedure of the court. The word "practice" in s. 3, Cap. 7, must therefore be construed as relating to substantive law and not to adjective law which would of course be the law relating to procedural matters.

In *Charlestown Sawmills, Ltd.* v. *Husbands*, 1931—37 L.R.B.G. 92, the Full Court considered the practice of the Supreme Court in

the case of sales at execution of property subject to mortgage, and referred to *Adamson* v. *Higgins*, 1922 L.R.B.G. 24, in discussing the question whether the mortgagee, after the costs had been paid, was allowed to claim any balance of the proceeds of sale not exceeding the amount due on his mortgage in priority to any payment to the judgment-creditor by the marshal, and decided that this was so even where the mortgagee bought the property. The Full Court did not discuss any question of procedure or manner of proceeding against the property mortgaged.

It is true that in the English case of *Lever Bros. Ltd.* v. *Kneale & Bagnall*, [1937] 2 K.B. 87, the question arose as to whether, if an order for injunction had been made and there was a disobedience to it followed by a committal, the order of committal was a part of "the practice or procedure", and SLESSER, L.J., in the Court of Appeal thought that it was. He cited with approval the dictum of LUSH, L.J., in *Poyser* v. *Minors*, 7 Q.B.D. 329, who, on speaking of the word "practice" which occurs in s. 32 of the County Courts Act, 1856, which authorised county court judges with the approval of the Lord Chancellor to frame rules and orders for regulating the practice of the courts and forms of proceedings therein, said:

> "Practice in its larger sense, the sense in which it was obviously used in that Act, like procedure, which is used in the Judicature Act, denotes the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right and which by means of the proceeding the court is to administer the machinery as distinguished from its product. Practice and procedure, as applied to this subject, I take to be convertible terms."

It is to be seen, however, that in *Poyser* v. *Minors* the word "practice" was used along with the words "forms of proceedings", and in the case SLESSER, L.J., was then considering the word "practice" was used along with the word "procedure", and I take it then that the word "practice" in those instances was being used in its larger sense and that is why SLESSER, L.J., came to the conclusion that the order of committal was a mode of proceeding by which a legal right is enforced.

In the instant case, the word "practice" is not used with the word "procedure" or with the words "form of proceedings" and must of necessity be given a more restricted meaning. It should be noted that SLESSER, L.J., came to the conclusion that the order of committal is a matter of "practice or procedure" but never fully made up his mind which one it was, and whether it was a rule of practice or a rule of procedure. In my view then, the mode of proceeding against the property *in rem* would be a matter of procedure, and in the case of immovable property the mode of proceeding *in rem* could only be authorised by o. 7, r. 14. In any event, DALTON in his DIGEST OF THE CIVIL LAW at p. 15, considers that sub-s. (b) has been repealed by the Deeds Registry Ordinance, 1919, which now settles the law

relating to mortgages and other deeds in so far as the provisions of sub-s. (b) are contrary to the provisions of the Ordinance.

Order 7, r. 14, of the Rules of the Supreme Court, 1955, follow along the lines of O. 7, r. 14, of the 1900 Rules and reads as follows:

> "In an action against the owner or representative of a lot of land or plantation, the name of such owner or representative not being mentioned (or in the case of vacant possession, when it cannot otherwise be effected) service of the writ of summons may be effected by affixing a copy of the writ to the principal building upon such land or plantation, or, if there be no building, to any railing, bridge, tree, or to some conspicuous place on such land or plantation. In addition a notice of the writ approved by the Registrar shall be published in one Sunday issue of a daily newspaper circulating within the jurisdiction."

When one reads the description of the property as set out in the summons in action No. 1587/64, it is abundantly clear that the defendant proceeded against is the proprietor or representative of a building on a piece of land together with the rights in and to the lease of the said piece of land. There is no question of the defendant proceeded against in the action being the proprietor or representative of a lot of land or plantation. Order 7, r. 14, would not, therefore, be applicable to the present circumstances.

Counsel for the defendant has sought to impress me with the argument that the words "lot of land" in the rule must be given their ordinary English meaning, that is, any piece or parcel of land. I cannot accept this contention, as it appears to me that what the rule is seeking to do is to provide an action or proceedings *in rem* against the owner or representative of a limited class of immovable property, to wit, a lot of land or plantation. If that is so, the words "a lot of land" must be interpreted to mean a specific portion of land that has been ascertained, measured and defined with reference to a plan. When the property is sold at execution sale the purchaser obtains a judicial sale transport granting title to the property to him, and this can only be passed in his favour under the Deeds Registry Ordinance, Cap. 32, if the lot of land is clearly defined with reference to a plan. If there is no reliable description of the property, the transport cannot be passed.

In *Perreira* v. *Perreira*, (1931—1937) L.R.B.G. 464, VERITY, J., (as he then was) discussed the meaning of "lot" where the word was not defined or described by reference to metes and bounds, limitations of area or reference to any plan or diagram considered, and pointed out that where that situation existed the lot could only be identified by the production of evidence from which may be rightly inferred what was the actual parcel of land referred to. Even if counsel's argument were sound — that "lot of land" meant "piece of land" — it would be readily seen that it was not a lot of land being proceeded against and levied upon, but merely the building with the rights in and to the lease of a piece of land upon which the building stands.

I would divert here to say that the transaction into which the plaintiff entered with the Transport & Harbours Department on 15th February, 1957, purported to be an agreement of lease and not a lease. It is true that under the common law an agreement of lease can operate and be construed as a lease if it contains words of present demise and if the essential terms are fixed, and especially if the lessee has entered into possession (as in this case), and if the covenants which would be inserted in the lease are to be binding at once. See 23 HALSBURY'S LAWS (3rd Edn.) p. 436, para. 1033. Whether the agreement operates as a demise or as an agreement only depends on the intention of the parties.

The matter is now, however, regulated by s. 6 (3) of the Landlord and Tenant Ordinance, Cap. 185, which states that every agreement for a lease made in writing or orally under which the person to become lessee went into possession of the land or building, shall take effect and be construed as a tenancy from year to year from the date of the entry into possession and until the lease has been actually executed. Section 7 of the Ordinance, however, states that every lease shall contain the duration of the lease, but the document which purports to be an agreement of lease does not give the duration of the lease. It is trite that the term must be for a definite period in the sense that it must have a certain beginning and a certain ending. It follows then that the document entered into by the plaintiff and the Transport & Harbours Department was neither a lease nor an agreement of lease, but merely an agreement for a void lease. In that situation, under the Landlord and Tenant Ordinance the plaintiff would not even under the statute have held a tenancy from year to year.

Prior to *Walsh* v. *Lonsdale* (1882), 21 Ch.D 9, the doctrine was firmly established that where a person was let into possession under a mere agreement for a future lease, he became only a tenant at will, but it was equally well established that when he paid or agreed to pay any part of the annual rent thereby reserved, his tenancy at will changed into a tenancy from year to year upon the terms of the intended lease, so far as they were applicable to and not inconsistent with a yearly tenancy. This doctrine applied to an entry upon a void lease. *Doe d. Rigge* v. *Bell* (1793), 5 T.R. 471.

The plaintiff in this case, however, had never paid or agreed to pay any part of the annual rent and indeed never paid rent on that basis, but paid rent on a monthly basis. The doctrine, therefore, could not assist him in creating a tenancy from year to year. The plaintiff then is in a position of a person who had a mere permission or licence to go on the land, which could never be made the subject of a levy.

Can he, however, be said to have a licence coupled with an interest in land? If indeed he had that kind of licence, then he would have an incorporeal right in immovable property, which itself would be immovable property, and would be what is known as an incorporeal

hereditament. If he had the right to enjoy, draw and remove the things growing on the land and dispose of it and the profits and income from the land, then he would have had what is known as a *profit á prendre* (the law of the Colony relating to which is Roman-Dutch) and he would hold a licence coupled with an interest in land or, as VAN LEEUWEN called it in his COMMENTARIES, a full usufruct. But there is no evidence of this. In any event, a licence coupled with an interest in land does not fall within the limited class of immovable property mentioned in O. 7, r. 14.

I think that the true position is that the property levied upon was movable property and the defendant named in the writ was the owner or representative of movable property, that is, a building standing on a piece of land and, in the circumstances, the mode of service permitted by O. 7, r. 14, was not warranted in this situation.

In *Administrator-General* v. *da Silva*, 20th December, 1902, the court said that —

> "a lease of land is a chattel, that is, movable property, and a levy on a house which is a chattel together with the lease of the land on which it is erected cannot possibly change the nature of the things levied upon and convert what is movable into immovable property."

In *Charlestown Sawmills* v. *Husbands*, 1932 L.R.B.G. 94, the Full Court held that a building along with a piece of land on which it stood was movable property. DUKE in his *Treatise* at p. 5 summed it up by saying that according to the Roman-Dutch law houses built on leased land will usually be considered as movable property.

I must now consider whether the mode of service adopted in the action, which I have found to be wrong, amounted to a nullity, in which case all the proceedings arising therefrom must be set aside as being null and void and of no effect, or, whether there was a non-compliance of such a nature as to be treated as an irregularity which could be amended without the subsequent proceedings being set aside. At p. 1958 of the ANNUAL PRACTICE, 1957, it is stated that:

> "The line between a nullity and an irregularity is difficult to draw, but an order can properly be described as a nullity if it is something which a person affected by it is entitled to have set aside *ex debito justitiae*, and could be set aside by the court in the exercise of its inherent jurisdiction." (*Craig* v. *Kanssen* (1943), 168 L.T. 38, C.A.)

In *Caesar* v. *B.G. Mine Workers' Union*, 1960 L.R.B.G. 72, the Full Court upheld a ruling that the issue and service of a writ which was issued against the defendant union and not served at the registered address for service and place of business of the union, but was served on the union's secretary at some other place, was bad, and that the flaw in the writ was so fundamental as to be regarded as bad *ab initio*,

and consequently a nullity. In *Baynes* v. *Prince* 1949 L.R.B.G. 99, WORLEY, C.J., referred to *Apicon* v. *Woodford* decided in General Civil Jurisdiction by a court of three judges in 1905, which decided that in cases of parate execution where the summation is not duly served, the subsequent proceedings by way of execution are null and void, and that all the subsequent proceedings in execution, including the sale of property, were null and void and the sale must be set aside, and said that that statement of the law was as good in 1949 as it was in 1905.

In *McFoy* v. *United Africa Co.*, [1961] 3 All E.R. 1169, where the Privy Council was called upon to consider the effect of the non-compliance rule of the Supreme Court of Sierra Leone, which was in identical terms with O. 54, rr. 1-4 of the Rules of the Supreme Court of British Guiana, 1955, that Court held that the delivery of a statement of claim in the long vacation is an irregularity and thus is voidable if the court in its discretion under the Rules of the Supreme Court, O. 70, r. 1, so orders, but it is not a nullity, and unless it is set aside by order of the court, it remains good and will support a subsequent judgment in default of defence. Lord DENNING in his judgment pointed out that the rule only applied to proceedings which are voidable, that is, where the non-compliance is a mere irregularity, and not to proceedings which are a nullity, for these are automatically void and a person affected by them can apply to have them set aside *ex debito justitiae* in the inherent jurisdiction of the court without going under the rule. Where the non-compliance consists of a mere irregularity, however, under the rule the act is only voidable and may be waived, and there must be an order of the court setting it aside, and the court would only do this if justice demands it but not otherwise. Meanwhile, it remains good and a support for all that has been done under it.

As I said in *Caesar* v. *B.G. Mineworkers' Union*, it is submitted that there is an irregularity when a party has power to do something but does it wrongly or in a wrong manner (as in *McFoy's* case, and a nullity when he has no power to do the particular act which is unauthorised. It must follow then that when in action No. 1587/64 the defendant-mortgagee adopted the mode of service permitted under O. 7, r. 14, the proceedings were unauthorised under the Rules of Court, and any subsequent proceedings thereunder must be null and void and of no effect.

I am also of the view that when there was a change of solicitor without notice on the record, which was not discovered until the present action was filed, it was too late a stage to be regarded as an irregularity which could be amended on proper terms, and all the proceedings arising therefrom must be deemed to be a nullity and of no effect. The criticism made by counsel for the defendant that the plaintiff could have taken steps by way of motion or summons to set aside the service of the writ and sale under the Rules of Court (O. 10, r. 20(2), and O. 36, rr. 36 and 37) without embarking on an action, is not justified by the decision in *Gourick* v. *Nascimento*, 1938 L.R.B.G. 106, where the court held that if there is anything irregular

in the mode of execution in the seizure or sale of property following a judgment against the execution debtor whereby the plaintiff was deprived of the fruits of his judgment, his remedy was by action for damages to which he would have been entitled without the need for any proceedings to set aside the sale, and that as he had elected to take proceedings by way of summons to set aside the sale and the expense or loss involved in so doing did not flow from the act of the defendant, the action must fail.

It follows then that all the proceedings in action No. 1587/64 must be declared null and void and judgment must be entered in favour of the plaintiff and the orders of the court sought under (a), (b), (d) and (f) of the relief be granted. It is the evidence that the plaintiff received rent from this property up to the end of May 1965 at the rate of $40 per month and he has thus been deprived of the use of his property up to the present time, and I assess damages at $300.00. There will therefore also be judgment for the plaintiff for that sum with costs, certified fit for counsel.

Judgment for the plaintiff.

Solicitors: *L. L. Doobay* (for the plaintiff), and *H. A. Bruton* (for the defendant).

In the Full Court, on appeal from the decision of a judge in chambers (Persaud, Khan and Crane, JJ.) September 18, December 11, **[1965].**

Practice and procedure — Opposition action — statement of claim — Necessity to disclose with preciseness the nature of interest claimed.

Practice and procedure — Vexatious proceedings — Two actions relating to same cause of action.

Injunction — Proceedings stayed — Attempt by party to transport property in dispute — Whether application may be made for interim injunction.

The respondent instituted an action against the appellants claiming title to certain lands. By order of court the proceedings were stayed until she furnished full particulars of her descent from the original owner. These particulars were never furnished. The appellant, who held title for the property, advertised transport to a third party. The respondent opposed the passing of this transport, giving in her reasons for opposition that she claimed "an interest to the title to the land described" in the transport. In paras. 1 to 11 of her statement of claim subsequently filed she alleged that she was descended from one A to whom the property originally belonged and asserted that she was entitled to an interest in it to the extent of 1/320 parts. The appellants applied for an order striking out these paragraphs as contravening r.9 of the Rules of the Supreme Court (Deeds Registry) Rules, Cap. 32. The application was dismissed by the Chief Justice. (See elsewhere herein). On appeal,

Held : (i) an opponent must in his statement of claim disclose with preciseness the nature of his interest, for to do otherwise would have the effect not only of embarrassing the proponent but also of failing to disclose a triable issue;

(ii) the genealogical table on which the respondent relied in support of her interest in the land did not disclose the nature of her interest, whether it be legal or equitable, and this she must do in order to sustain her opposition;

(iii) paragraphs 1 to 11 of the statement of claim would therefore be struck out and the action in opposition dismissed;

(iv) *per* CRANE, J., if a litigant brought two actions concerning the same matter in two different courts of the same jurisdiction in the same country his conduct was in all cases deemed to be vexatious and a defendant in such a case might demand that he be put to his election between the two proceedings. In this case there was one substantially serious question to be tried in both actions, namely, the title of the plaintiff, and the bringing of the second action was vexatious;

(v) *per* CRANE, J., while the first case was still pending it was for the appellants to advertise transport. They should first have moved the court for a dismissal of the first action;

(vi) *per* CRANE, J., the fact that the first action was stayed did not disentitle the respondent from applying in it for an interlocutory injunction restraining the appellants from passing transport.

Appeal allowed.