THE BONG MINING COMPANY, by and thru its General Manager, Plaintiff/Appellant, v. **JOSEPH A. BENSON**, Defendant/Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT, BONG COUNTY.

Heard: December 1, 1987. Decided: February 25, 1988.

1. A ruling is interlocutory if it does not determine the rights of the parties either in respect of the whole controversy or some branch of it, but merely ascertains and settles something without which the court could not proceed to a final adjudication; or if the settlement is preliminary to a final judgment. A ruling is interlocutory if it does not dispose of the cause, but reserves further direction for further determination, or requires that some further steps be taken to enable the court to adjudicate and settle the rights of the parties.

2. At any time before trial any party may, insofar as it does not unreasonably delay trial, once amend any pleading made by him, by (a) withdrawing it and any subsequent pleading made by him. This means that the withdrawal must be effected before any examination is conducted before a competent tribunal of the facts or law put in issue in a cause, for the purpose of determining such issue.

3. While amendments of pleadings are favorably regarded and liberally allowed in order that the real controversy between the parties may be presented and the cause decided on the merits, they will not be permitted if they are unfairly prejudicial to the adverse party.

4. The right of a litigant to amend his pleadings cannot operate so as to abridge the right of a court in maintaining its judicial functions.

5. Statutory provisions conferring the right to amend pleadings or fixing the terms by which the right may be exercised are remedial and are to be construed so as to give effect to their intent. It is, however, not the purpose of such provisions to confer new or additional benefits on one who has been guilty of neglect, or to grant benefits additional to those enjoyed by litigants. Instead, they are designed merely to serve a party from the penalty of his negligence by restoring the ordinary rights he has lost.

6. A statute with respect to amendments should not be so applied as to nullify the operation of another statute.

7. 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.

8. Every person against whom a final judgment is rendered shall have the right to appeal from the judgment of the court except from that of the Supreme Court. The decision of the Supreme Court shall be absolute and final.

9. An appeal cannot be taken from an interlocutory judgment. The Appellate Court will not review cases by piecemeal.

10. Final judgment is that which puts an end to the matter in controversy so far as the same is within the purview of the court. Until final judgment is rendered, no valid appeal can be taken.

11. An appeal taken from an interlocutory judgment and before the rendition of a final judgment cannot under the statute be entertained by the appellate court.

12. The writ of certiorari is for the purpose of correcting errors committed by a subordinate court or other body while a matter is pending and when such errors materially prejudice or injure the rights of a party.

13. Even though it may appear that glaring errors have been committed in the trial of a cause, the Supreme Court is without power to correct same unless the said cause shall have been properly brought within its jurisdiction.

14. While ordinarily a party has an absolute right to have his pleading filed if it is tendered in due time and in an proper manner, yet the sanction of the trial judge is required prior to the filing of the said suit.

15. Pleadings ordinarily cannot be withdrawn without leave of court, the matter being largely within the discretion of the court. An application to withdraw a pleading should therefore be made with due diligence, in good faith, and for proper reasons.

16. In general, the withdrawal of a pleading removes it from consideration and leaves the issue in the same status as though the withdrawn pleading had never been filed.

The plaintiff/appellant Bong Mining Company instituted an action of ejectment in the Ninth Judicial Circuit Court, Bong County, against the defendant/ appellee to have him ejected from one of the appellant's housing units which it had assigned to

him while he was in the employ of the appellant. The complaint stated that although the appellee who was previously employed by the appellant as a lawyer was no longer in its employ and therefore not entitled to the enjoyment of its facilities reserved only for its employees, it having severed its relationship with him, the latter and his family had continued to retain appellant's housing unit and to deprive the appellant of the use thereof. The complaint averred that under a new contract concluded between the appellant and the appellee, the appellee services were terminated with the expiration of the contract and the refusal of the appellant to renew the same. It therefore demanded that the appellee and his family be ejected from the housing unit provided under the contract.

The appellee, for his part, noted that he was governed by another contract and not the one relied upon by the appellant in seeking to eject him from the house. He denied that he was wrongfully retaining the housing unit, stating that under the contract relied on by him, and which he alleged had not been abrogated, he and his family were entitled to live in the unit, and that until certain preconditions laid in the said contract were met, he was entitled to remain in the unit. He also attacked the appellant's action, noting inconsistencies in respect of the venue of the action, the court, and the writ of summons served upon him.

Having been thus informed about the defects which existed in the action, the appellant withdraw its complaint and filed an amended complaint. In his answer to the amended complaint and a motion to dismiss the amended complaint, the appellee prayed the dismissal of the same because the withdrawal had been effected and an amended complaint filed without the order of court or stipulation of the parties, as provided by the Civil Procedure Law of Liberia. The appellant, in its reply, denied that it needed a court order or a stipulation agreed to by the appellee before it could withdraw and amend its complaint.

The trial court agreed with the appellee's contention regarding the amendment of the pleadings by the appellant and therefore ruled that the amended complaint be dismissed and the original complaint reinstated. The judge then ordered the clerk to redocket the original action and assign the same for disposition of the issues of law. The appellant thereupon noted exceptions and appealed to the Supreme Court for a review. In its bill of exception, the appellant noted the several rulings of the trial judge as erroneous and prayed the reversal thereof.

The appellee however, asked the court to refuse to entertain the appeal, stating that the ruling made by the trial judge was an interlocutory one which was not appealable.

The appellee also asked the Court to affirm the ruling of the trial judge as regards the withdrawal of pleadings and actions.

In its judgment, the Supreme Court agreed with the contentions of the appellee and therefore dismissed the appeal. The Court noted that the ruling of the trial judge was only interlocutory and not a final judgment, and that the said ruling as made, was only preparatory to the hearing of the case on the merits. It did not put finality to the action of ejectment. As such, the Court said, the ruling of the judge was not appealable.

Court opined that if the appellant felt aggrieved by the decision of the trial judge, then its proper remedy was to proceed by certiorari and not by regular appeal.

On the question of the dismissal by the trial court of the appellant's subsequent action and the reinstatement of the former action, the Supreme Court stated that it was in agreement with the action taken by the judge, noting that the appellee had raised a plea in bar to the action and that the judge had to pass upon the same, and finding merits therein to dismiss the second action as having been instituted contrary to the Civil Procedure Law. The Court opined that under the Civil Procedure Law and that as a general rule, the appellant could not withdraw its first pleading and file an amended pleading without leave or order of the court first being obtained or a stipulation of the parties. It noted that while such leave of court will ordinarily be given where the other party will not be prejudiced, the matter of such withdrawals was largely within the discretion of the trial court.

In applying the rule to the instant case, the Court held that given the plea in bar presented by the appellee, the latter would have been prejudiced by the granting of the withdrawal, and hence the trial judge was correct in ruling that the withdrawal was improper and that the original action should be reinstated. The Court accordingly affirmed the ruling of the trial court, noting that none of then parties had been prejudiced by the ruling of the judge.

MR. JUSTICE AZANGO delivered the opinion of the Court.

The records before us show that the appellee, Joseph A. Benson, in 1963 was employed by appellant company in the capacity of resident legal counsel at Bong Range, Bong County. In this capacity, and in keeping with the employment procedure and practices governing a staff member, he was entitled to certain industrial benefits, including free housing facilities, for the exclusive use by him and his family, as long as

the relationship between the employer and the employee remained intact. To solidify this relationship further, a consultancy agreement was concluded between the two parties on the 16th day of November, A. D. 1968. In the clause five (5) of the said agreement, the following was provided, understood and reached as to the termination of the employee's employment with the employer:

"The services can only be terminated upon the giving of three (3) months notice in writing in advance of termination date, or of the payment of three (3) months' salary in lieu of notice, and that termination of the services above mentioned will be due to dishonorable and justifiable cause only".

It is alleged that the appellee, Joseph A. Benson, worked with the appellant company for several years during which time he enjoyed all of the industrial benefits aforesaid from the company without molestation of any nature. However, the appellant and the appellee, having decided to end or terminate their employer-employee relationship, did on the 3r d day of July, A. D. 1979, mutually enter into the following agreement, which we quote word for word:

"AGREEMENT BETWEEN BONG MINING COMPANY, INC. MONROVIA, LIBERIA AND MR. JOSEPH BENSON, BONG TOWN. LIBERIA"

In order to finally settle the dispute between Mr. Joseph A. Benson and Bong Mining Company, Inc., the following shall be agreed upon between the parties as being binding.

1. B.M.C. shall pay to Mr. Benson the amount of Eight Hundred ($800) Dollars per month, to be paid at the beginning of the respective month. The payment shall begin as per January 1st, 1979, but taxes with respect to the payment shall be borne by Mr. Benson."

2. Use by Mr. Benson, his wife and his children of the house presently occupied by them free of charge. Electricity, water and air-conditioning shall be supplied according to BMC's general regulations."

3.Use of BMC's educational and medical facilities by Mr. Benson, his wife and his children according to BMC's regulations for medical and dental care."

4. All payments due to BMC as of this date will be deducted from the payments under item one (1) above, and covered by the schedule of payments hereto attached".

5. The benefits according to 1-3 above will be granted for a period of six (6) years, i.e., until December 31, 1984 or until Mr. Benson's demise, whichever is sooner. It is expressly agreed that no prolongation can be granted beyond the respective date".

6. In consideration of the above benefits granted by BMC, any former contracts between Mr. Benson and BMC are considered null and void and any present or future claims against BMC out of such contracts and or any other verbal or written agreement are hereby finally settled".

The records further reveal further that notwithstanding the mutually worded statement of understanding, the appellee, Joseph A. Benson, refused and neglected to vacate the premises upon the expiration of the terms agreed upon despite the repeated requests made by the appellant for him to vacate the said premises in keeping with the agreement from which he had benefitted for some six (6) years. Consequently, an action of ejectment was filed against him in the Circuit Court for the Ninth judicial Circuit, Bong County, Republic of Liberia, sitting in its June Term, A. D. 1985.

The defendant/appellee, having received the writ of summons, appeared and filed this answer containing the following points:

1. He denied the sufficiency of plaintiffs complaint to recover against him because, he said, the entire action was illegally filed and irregularly commenced. In support of the averment, he noted that:

(a) The written direction was venued in the May, A. D. 1983 Term;

(b) The complaint was venued in the June, A. D. 1985 Term;

(c) The writ of summons was venued in the February Term, A. D. 1985, which Term of Court had expired on the 9th day of April, A. D. 1985, when the writ was said to have been signed by the clerk of court and issued. Those material legal blunders and errors, he said, rendered the action a fit subject for dismissal.

2.He contended that the complaint was venued in the June Term, A. D. 1985 of the Ninth Judicial Circuit Court, which venue was wrong; for the Ninth Judicial Circuit Court, like the circuits other than the Sixth Judicial has no June Term; that the Circuit Court for the Ninth Judicial Circuit, Bong County, functions within February, May,

August and November Terms; and that accordingly, the complaint should have been venued in the May, A. D. 1985 Term and not the June Term, since the writ of summons was issued on the 9th of April, A. D. 1985.

3. He stated that his occupancy of the house in question was based upon the Agreement of November 16, 1963, attached to the complaint as exhibit "C". That agreement, he averred, has not been abrogated. It is based upon this very agreement, and not exhibit "A" proferted with the complaint, that he and his family moved into the house, subject of this suit.

4. He further contended that the consultancy agreement of November 16, 1968, i.e. exhibit "C" to the complaint, could not have been nullified by implication, for according to clause 5 of said agreement, "The services can only be terminated upon the giving of three (3) months' notice in writing in advance of the termination date, or, the payment of three (3) months' salary in lieu of notice, and that termination of the services above mentioned will be due to dishonorable and justifiable cause only". He stated further that exhibit "A" to the complaint, the agreement of July 5, 1979, did not provide for three (3) months termination notice or the payment of three months' salary in lieu of such notice. Moreover, he said, the agreement of July 3, 1979 did not refer to termination based upon or due to dishonorable and justifiable cause only", for which the agreement could be terminated. The defendant therefore prayed that counts 3 and 6 of the complaint be overruled.

5. The defendant further averred that as to counts 3 and 4 of the complaint, he was occupying the house described in count one of the complaint by virtue of the agreement of November 16, 1968, exhibit "C" to the complaint, and he denied that he was wrongfully withholding said premises from the plaintiff.

Consequent upon that answer, plaintiff/appellant withdrew its first complaint of ejectment and the writ of summons, reserving the right to refile. Thereafter, it filed a second complaint, this time in the May, A. D. 1965 term of the court, basically upon the same terms, conditions, intent and purposes to the original complaint. This later complaint stated the following:

1. That the plaintiff/appellant was the owner of a four (4) bedroom house located in its concession areas in Bong Town, Bong Mines.

2.That the defendant/appellee and the plaintiff/appellant entered into agreement, signed on July 3, 1979, for a period of six(6) years to be effective retroactively as of

January 1979; that during this period it was the expressed intent and mutual agreement of the parties that the defendant/appellee, his wife, and his children were to reside in the plaintiff/appellant's aforesaid housing unit free of charge; that is to say, they were not to pay any rent, electric bills, water bills, and air condition bills from the first of January A. D. 1979 up to and including December 31, 1984.

3. That the plaintiff/appellant had notified the defendant/ appellee to vacate its premises on December 31, 1984, but that the defendant/appellee had woefully refused to do so up to the filing of the action of ejectment; and that the defendant had continued to deprive and dispossess the plaintiff of its right to the premises, and was still keeping himself in possession of the mentioned promises.

4. That the defendant/appellee was unlawfully, illegally and wrongfully occupying and depriving plaintiff/appellant of the rightful use of the four (4) bedroom house, without any color of right.

5. That on the 16th day of November, 1968 the plaintiff/ appellant and the defendant/appellee had entered in an agreement under terms and conditions mutually accepted by the contracting parties, the plaintiff/appellant and the defendant/appellee. That eleven (11) years after execution of the November 16, 1968, agreement, an agreement was also executed under terms and conditions mutually accepted and agreed upon by the plaintiff/ appellant and the defendant/appellee who jointly, severally, and mutually nullified previous agreements between the plaintiff and the defendant.

6. That after the agreement of July 3, 1979, there was no other agreement that existed between the parties or which had any binding effect on them. Therefore after December 31, 1984, the expiration date of the July 3, 1979 agreement, the only agreement which existed between the parties, the plaintiff/appellant and the defendant/ appellee became separate and distinct persons, as far as their contractual relationship was concerned; and therefore there was no privity of contract between them as would have entitled the defendant to remain on the premises of the plaintiff. That the defendant's continued occupation of the aforesaid premises was unlawful, illegal, wrong and a trespass which had caused the plaintiff financial embarrassments as well as inconveniences. The plaintiff then gave notice that at the trial it would request the court to issue a writ of subpoena duces tecum for the production of the original copies of exhibits "A", "B", and "C".

It was in view of the foregoing that the plaintiff requested the court below to have

the defendant/appellee ousted, ejected and vacated from said premises, to have the plaintiff/appellant placed in possession of the housing unit, and to grant unto the plaintiff/appellant a sufficient amount enough so compensate it as the court deemed just.

To this second complaint the defendant/appellant filed an answer on the 30th day of April A. D. 1985, to which also a reply was filed and pleadings rested. In the defendant/appellee's answer, he contended:

1. That the suit had been re-instituted contrary to law and the statute extant within this jurisdiction. In that light, the defendant said that the Civil Procedure Law provides only for MENDMENT OF PLEADINGS AND "VOLUNTARY DISCONTINUANCE" as follows: AMENDMENT TO PLEADINGS PERMITTED: At any time before trial any party may, insofar as it does not unreasonably delay trial, once amend any pleading made be by him by:

(a) Withdrawing it and any subsequent pleading made by him.

(b) Paying all costs incurred by the opposing party in filing and serving pleadings subsequent to the withdrawn pleading; and,

(c) Substituting an amended pleading.

2. That under VOLUNTARY DISCONTINUANCE, it is provided:

(1) *Without an order*. Except as otherwise provided by law, any party asserting a claim may discontinue it without an order

(a) by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading or a motion for summary judgment is served, whichever first occurs, and filing the notice with proof of service with the court; and

(b) by filing with the court a stipulation in writing signed by the attorneys of record for all parties.

(2) *By order of court:* Except as provided in paragraph 1, an action shall not be discontinued by the claimant except upon order of the court and upon such terms and conditions as the court deems proper.

(3) *Discontinuance after submission.* A discontinuance may not be granted after the case has been submitted to the court or jury to determine the facts except upon the stipulation of all parties . . . ."

The defendant submitted that after they had served the answer, their "responsive pleading", on the plaintiff, it (the plaintiff) could not and should not have withdrawn its suit and re-instituted said action without the filing of a stipulation in writing, signed by both parties, on an order of the court below to discontinue the suit.

Arguing his brief before us, the defendant further contended and re-emphasized that his occupancy of the house in question was based upon the agreement of November 16, 1968, proferted as Exhibit "C" to the complaint; that agreement, he maintained, had not been abrogated when the suit was filed. It was based upon the said agreement, he said, that he and his family moved into the house, subject of the suit, and not exhibit "A" referred to in count 2 of the complaint. The defendant argued further that the agreement of July 3, 1979 did not in any wise nullify the consulting agreement entered into between Bong Mining Company and Joseph A. Benson" on November 16, 1968, and made profert of as exhibit "C' to the complaint, since that agreement could not be nullified by implication. That agreement, he said, provided that "the services can only be terminated upon the giving of three (3) months' notice in writing in advance of termination date, or the payment of three (3) months' salary in lieu of notice, and that termination of the services above mentioned will be due to dishonorable and justifiable cause only". But more than that, he said, the agreement of July 3, 1979 neither referred to nor was based upon is honorable and justifiable causes only, which were the only reasons for which the agreement could be terminated.

Additionally, he filed a three-count motion to dismiss the action based upon the averments contained in counts 1, 2, 5 and 4 of his answer. He prayed that in view of the alleged legal blunders made by the plaintiff, the entire action be dismissed. (See Answer). This motion was resisted by the defendant/ appellant on the 4th day of July, 1979. The Court met, heard and disposed of the motion, dismissing the latter suit. The trial judge ordered the clerk of court to redocket the first action which had been withdrawn, and to schedule the same for disposition, beginning with the law issues. To which ruling, the plaintiff/ appellant noted his exception and announced an appealed to this forum for review on a bill of exceptions containing four (4) counts.

In count one (1) of the bill of exceptions the plaintiff/ appellant contended that the

trial judge erred when he ruled that the plaintiffs action which was legally withdrawn and notice thereto formally served on the defendant after the payment of all legal fees thereto, was in violation of the law. The appellant also contended that the judge illegally ruled that the original action filed on the 9th day of April, 1985 was still considered pending. This, it said, was reversible error.

In count two (2) of the bill of exceptions, the plaintiff/ appellant also contended that the trial judge erred in dismissing the last action of the plaintiff, which act was against the statute, in that, plaintiff had complied with the law controlling withdrawal of actions. The plaintiff asserted that prior to the filing of the last action; it had paid all accrued costs and had filed a notice of withdrawal with reservation to refile.

In count three (3) of the bill of exceptions, the plaintiff also averred that the statute stipulates the grounds upon which actions can be vacated. In the case at bar, it said, none of the grounds existed in that there was no case pending since the original case had been withdrawn in keeping with law.

In addition, the plaintiff claimed that the trial judge also erred in dismissing the action because not only had the plaintiff's complaint been withdrawn, but that the action had also been withdrawn along with the writ; that costs had been paid; and that the notice of reservation had been properly used. Hence, it said, the suing out of the second action constituted no legal blunder.

The plaintiff maintained further that the trial judge also erred in dismissing the second action because a party has the right to file, withdraw and amend a complaint or pleading or to file a new action. Therefore, it said, after the party had withdrawn its pleading, the court had no right to nullify the withdrawal.

The plaintiff argued that as there was no option for summary judgment, a joint stipulation of the parties was not necessary before there could be a withdrawal. Hence, there was no legal need for the plaintiff to obtain permission of the court before withdrawing the action. The plaintiff opined that to accept this trend of procedure and allow same to be sustained, would mean restricting litigants rights and liberty, and forcing them to remain in court against their will. The courts, it said, would be given power to dictate to litigants what causes they should maintain so as to please the courts and the adversaries. The plaintiff/ appellant therefore argued that having legally withdrawn the first action, including the summons and the complaint, the said action was legally withdrawn. Accordingly, it said, it was bitterly wrong for the trial judge to hold that the action was still pending, in preference to the latter

action which was filed.

The plaintiff finally contended that the courts should pass upon issues raised and brought before them, and not select causes of actions for the parties as was done in the case at bar. It prayed that the trial judge's ruling be reversed because his ruling was contrary to our civil procedure laws as well as our practices. It maintained that counts 1, 2, 3, and 4 of the bill of exceptions be sustained, as well as the entire bill of exceptions, because the Civil Procedure Law, Rev. Code 1: 11.2, states in plain and simple language the grounds upon which causes can or should be dismissed. It averred that even though these cogent contentions were squarely raised and argued, yet the trial judge held otherwise, relying upon a law which was not applicable, and thereby abusing our statute with regards to grounds of dismissal.

Those points were well articulated, re-emphasized and forensically argued during arguments before us. In addition, in its presentation, the appellee argued further that the statute on dismissal was clear; that pleadings had not rested when the cost was paid, since, although the answer had been filed, the reply had not yet been filed. Therefore, it said, the appellant was within the pale of the law when it withdrew with reservations and paid the accrued costs before refiling the same matter. It argued further that the grounds to dismiss were not present in the matter, and hence the trial judge erred in dismissing the case on what amounted to no legal grounds. It re-emphasized that a party has the right to withdraw his case and to refile the same, and that therefore the court was without legal authority to order that the case legally withdrawn be considered still pending before the court. It maintained that the legal withdrawal nullified the pendency of the first case. It was therefore an error, it said, for the judge to rule that the case which was withdrawn was still considered pending when the appellant filed a formal withdrawal, and had therefore run out of time to file its reply. Concluding its argument, the plaintiff/appellant insisted that the withdrawal of its first case and the refiling of its second case had not caused any injury to the appellee because there was no other case pending involving the same parties and the same subject matter. The trial court, it said, had jurisdiction over the subject matter, the parties, and the territory. It noted that the appellant had the capacity to sue and that the trial judge therefore erred when he dismissed the second case.

Opposing the argument of counsel for the appellant, the appellee has succinctly, substantially and forensically maintained:

1. That the appeal was irregularly taken and ought to be denied. The appellee prayed

therefore that the ruling of Judge Pearson should be affirmed by this Honourable Court with the modification that the first suit, having been withdrawn without permission of court, the action should be barred because the ruling from which the appeal was taken was not a FINAL JUDGEMENT. Hence, it was not reviewable by this Honourable Court.

2. That as the case was still pending, whatever irregularity appellant might have claimed should have been done by certiorari.

3. That the judge's ruling was in keeping with law and that the issue was clearly stated in the defendant's answered. The appellee maintained that the withdrawal and re-institution of the suit by the appellant was done contrary to law, in that the appellant did not withdraw to amend as provided under the statute permitting the amendment to pleading. Also, he said, the re-institution of the suit did not square with the law or statute on "Voluntary Discontinuance." The appellee mentioned in his motion to dismiss and his answer to the subsequent complaint, filed on the 23rd day of April 19, 1985, that the appellant's voluntary "responsive pleading," should have been filed only by order of court, and not without such court order.

4. That discontinuance may not be granted after the case has boon submitted to the court or jury to determine the facts except upon the stipulation of all parties.

5. That appellee had filed his answer to the original complaint before the appellant withdrew or discontinued the first suit. Hence, the appellant should have sought an order of the court.

6. That the ruling of the trial court on the motion to dismiss was in order and should be affirmed by this Honourable Court.

7. That this Court has held in numerous cases that the Supreme Court has no authority to extrapolate the intent of the Legislature beyond the specific wording of the statute; and that this limitation is all the more mandatory where it requires that an act be done. The statute on voluntary discontinuance is plain, unambiguous and mandatory, for it expressly states how and when an action may be voluntarily discontinued. It provides that an action should be withdrawn before a responsive pleading or motion for summary judgment is served; and that when a responsive pleading has been served, as in the instant case, a party cannot discontinue the action without an order of court.

The appellee argued therefore that the appellant having failed to obtain an order of court before voluntarily discontinuing the action, the trial judge was correct when he dismissed the reinstituted action of April 23, 1985.

Concomitant with the above issues, the following have been brought to our attention for our consideration and determination.

1. Whether an appeal is the proper relief since the matter is still pending.

2. Whether the trial court's dismissal of the subsequent suit is legally tenable.

3. Whether or not a party litigant has the right to withdraw his action with reservation to refile prior to pleading being rested in a case.

4. Whether a party, without the permission of the court and/or with a stipulation of the parties, can voluntarily withdraw his complaint with reservation to refile while pleadings have not yet rested.

5. Whether a trial judge has the legal right to order an action which has been withdrawn re-docketed, and the new action dismissed.

6. Whether permission of court to withdraw refers to actions in which pleadings have not rested.

7. Whether joint stipulations to withdraw are applicable when pleadings have not rested and the case committed to the court.

The questions that demand an immediate answer is whether the ruling of trial judge dismissing the action is a final judgment or is interlocutory in nature. If it is the latter, could the ruling be considered as an appealable judgment to be reviewed by us. If not, couldn't certiorari have been the proper remedy to be applied for since the appellee has contended that the matter is still pending.

According to our statute, "Every person against whom a final judgment is rendered shall have the right to appeal from the judgment of the court except from that of the Supreme Court. The decision of the Supreme Court shall be absolute and final." Civil Procedure Law, Rev. Code 1:51.2 - under *Judgment Subject to Review*. In taking recourse to the ruling of the trial judge, we find the following:

"The court reviewed the case file; it discovered that the prerequisite for the withdrawal of an action after a responsive pleading has been filed with the clerk of court and served on the plaintiff had been made a part of the case file in this action; but that the prerequisite of a voluntary discontinuance was never observed and followed by the plaintiff, as provided by law before a new action was instituted. Civil Procedure Law, Rev. Code 1: 11.6(1)(a) and (b).

It is therefore the ruling of this court that counts one and two of the plaintiffs resistance be overruled and counts one, two and three of defendants motion sustained. The case of ejectment filed on the 23rd day of May, 1985, is hereby dismissed and the original action of ejectment filed on the 96' of April 1, 1985 is considered STILL PENDING in this Court. And the clerk of this court is hereby ordered to re-docket the said case to be disposed of beginning with the law issues. Costs against the plaintiff. AND IT IS SO ORDERED".

To this above ruling, the plaintiff/appellant was emotionally dissatisfied and announced an appeal to this forum. Not that the appeal was made upon sober reflection on the law and fact before taking the position he did take.

Reference to issue one (1), we muse firstly declare and verify the terminology "PENDING ACTION"; that is to says, when is a case pending. According to authorities, an action is said to be "pending from its commencement as long as it remains undecided. An action is commenced when the complaint is filed, writ issued with intent to serve it and when process has been served on the defendant. BALLENTINE'S LAW DICTIONARY 930 (3rd ed.). An action is no longer pending after a judgment of dismissal has been made and entered, although third parties who had secured an *ex parte* order permitting them to intervene were about to do so. BALLENTINE'S LAW DICTIONARY 25. In other words, the action of ejectment instituted by the plaintiff/ appellant against the defendant/appellee is still pending undecided. There is no showing that a judgment of court has been rendered dismissing the ejectment action filed on the 9 th day of April, A. D. 1985. Here is the judge's ruling on the point.

"It is therefore the ruling of this Court that counts 1 and 2 of the plaintiff's resistance be overruled and counts 1, 2, & 3 of defendant's motion sustained. The case of ejectment filed on the 23rd day of May, A. D. 1985 is hereby dismissed and the original action of ejectment filed on the 9th day of April, A. D. 1985 is considered pending in this Court. And the clerk of this court is hereby ordered to redocket the said case to be disposed of beginning with law issues."

The next issue that comes to mind is whether or not this ruling of the trial judge places finality to the ejectment proceedings before the court. Did it declare the rights and wrongs between the parties. Certainly not. There is yet something to be done. Could we consider the ruling as a judgment from which an appeal would lie before this court by any of the parties who may have been aggrieved thereby? The answer must be in the negative; and if the ruling is not a final judgment, then the ruling must be interlocutory. Could it be reviewed on a regular appeal? The answer is no, because in law the ruling has not decided the cause of action but settled only some intervening matter relating to the cause. The intervening matter thus settled could be brought before this Court by a *special proceeding in certiorari,* requesting this Court to interfere in the matter arising during the progress of the cause or proceeding in the court below, or to protect the property *pendente lite.* Likewise, certiorari would have been appropriate if the interference of this Court or the Justice in Chambers was requested or sought in consequence of the order of the court below to re-docket the case. We hold that the ruling of the trial judge is *Interlocutory* because it was a ruling made pending the cause and before a *final hearing* on the matters of the case. We believe that the ruling of the judge has been mistaken for a *final judgment.* But such was not the case as the ruling did not determine the rights of the parties, either in respect of the whole controversy or some branch of it; instead, the ruling merely ascertained and settled something without which the court could not proceed to *a final adjudication.* The settlement of that matter was obviously preliminary to *a final judgment.* Also, the hearing on the pleadings before Judge Pearson was interlocutory rather than *final* because the position of the trial judge at the time of the hearing was to get the case into such shape that it could in the end be properly heard and finally adjudicated on the merits. It is also an interlocutory ruling because it did not dispose of the cause but reserved further direction for further determination. It was one which required that some further steps be taken to enable the court to adjudicate and settle the rights of the parties. Hence, it was not an appealable judgment. The judge therefore did not commit a reversible error in ruling as he did.

With reference to issues 3 and 4, same being whether or not a party litigant has the right to withdraw his action with reservation to refile prior to pleading being rested in a case, our comments lie with the Civil Procedure Law, Rev. Code 1: 9.10. That section provides that at any time before trial any party may insofar as it does not unreasonably delay trial once amend any pleading made by him, by (a) withdrawing it and any subsequent pleading made by him. Trial in the instant case means before any examination is conducted before a competent tribunal according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such

issue. When a court hears and determines any issue of fact or law for the purpose of determining the rights of the parties, it may be considered a trial. But there are other prerequisites, antecedents, or requirements which must precede the withdrawal process. We shall refer to this point later in this opinion.

With reference to issues 5 & 6 which deal with the authority of the trial judge to order the re-docketing of the plaintiff's first action and the dismissal of the second suit, it is our further view that the judge acted upon a plea in bar which was set up by the defendant. That plea in bar was again raised by the defendant/ appellee in count one of his brief, in which he asserted that "the ruling of Judge Pearson for that matter should be affirmed by this Honourable Court with the modification that the first suit having been withdraw without permission of court, the action should be *barred,* because the ruling from which the appeal is taken is not a *final judgment;* hence is not reviewable by this Honourable Court". In other words, the plaintiff had no ground to maintain the action in the face of the plea. The judge committed no error in passing upon this all important issue in the manner in which he did; for it was a plea in bar set up wholly to defeat the second action. Therefore, where the trial judge found it to be legally sound, it was incumbent upon him to dismiss the second action. It was a plea to the action and hence a proper defense, especially so when it afforded a full and complete answer to the action and barred recovery of the claim asserted in the complaint.

Further referring to issues 3, 4, and 5, we note that it is an established general principle of law that amendments of pleadings are favorably regarded and liberally allowed in order that the real controversy between the parties may be presented and the cause decided on the merits. However, amendments which are unfairly prejudicial to the adverse party will not be permitted. 71 C.J.S., *Pleading,* § 275. In the instant case, the defendant/appellee had attacked the plaintiff/appellant in the answer to the original action regarding the issue of the illegal filing and irregular commencement of the action, especially as it related to the case being venued in the May and June Terms respectively. In addition, the defendant had contended that his occupancy of the house in question was based on the agreement of November 16, 1968, which agreement, he said, had not been abrogated. He had maintained that it was upon that agreement that he and his family moved into the house, subject of this suit. Also, he had argued that the agreement of July 3, 1979, did not provide for three (3) months' notice prior to termination or the payment of three (3) months' salary in lieu of such notice; and he had averred that the agreement of July 3, 1979, did not in any way refer to termination of his employment based upon or due to "dishonorable and justifiable cause" It is our opinion that those issues having been raised by the

defendant/appellee, amendments will not ordinarily be allowed, if they would radically change the issues or introduce now issues. The right of a litigant to amend his pleadings cannot operate so as to abridge the right of a court in maintaining its judicial functions. 71 C. J. S., *Pleading,* ∫ 275. Moreover, law writers and their interpreters have held that:

"Statutory provisions conferring the right to amend pleadings or fixing the terms by which the right may be exercised are remedial and are to be construed so as to give effect to their intent.

On the other hand, it is not the purpose of such provisions to confer new or additional benefits on one who has been guilty of neglect, or to grant benefits additional to those enjoyed by the litigant, but merely to saves a party from the penalty of his negligence by restoring the ordinary rights he has lost. Although rules of court may contemplate that leave to amend shall be freely given, it is not their purpose to allow amendments under any and all circumstances. A statute with respect to amendments should not be so applied as to nullify the operation of another statute.

A general power of amendment under practice acts and rules of court does not permit abrogation of substantive common law principles and a statute providing for the allowance of amendment in furtherance of justice requires that the rights of both parties be considered; it does not authorize the furtherance of the interests of one litigant at the expense of the other." 71 C.J.S., *Pleading,* ∫ 276.

The plaintiff has argued that as there was no application for pendency of the action or for summary judgment, the trial court had no authority to say that the action withdrawn was still considered pending, etc.; that to accept this trend of procedure and allow same to be sustain would mean restricting litigants rights and liberty, and forcing them to remain in court against their will; that the courts would be given power to dictate to litigants what causes they should maintain, so as to please the courts and the adversaries; that plaintiff/appellant, having legally withdrawn the first action, including the summons and the complaint, the said action was legally withdrawn, and therefore it was bitterly wrong for the trial judge to hold that the said action was still pending, in preference to the latter action; and that courts should only pass upon issues raised and brought before them, and not select causes of action for the parties, as in the case at bar.

In response to the foregoing arguments, we re-emphasize that amendments, as

applied to pleadings, is the correction of some error or mistake in a pleading which is before the court. 71 C.J.S., § 276, page 585. We note also that as a general rule:

"The court cannot as a general rule make an amendment to the pleadings of its own motion, nor is it required to do so, although it may suggest, allow or direct an amendment to be made in a proper case. However, the power of the court in the furtherance of justice on its own motion to amend the pleadings to conform to proof or to order such an amendment or to regard the pleadings as so amended, has been recognized and it has been held that the court has power to make, on its own motion, an amendment which it may make on motion of the parties. 71 C.J.S., *Pleading,* § 278.

Finally, whilst it is true that a party ordinarily has an absolute right to have his pleading filed if it is tendered in due time and in a proper manner, yet the sanction of the judge is required prior to the filing of the said suit. Moreover, while we further hold it to be true that in general withdrawal of a pleading removes it from consideration and leaves the issues in the same status as though the withdrawn pleading had never been filed, in other words the status of a particular pleading is the same as though it had been originally or fast filed, yet pleadings ordinarily cannot be withdrawn without leave of court, the matter being largely within the discretion of the court. An application to withdraw a pleading should therefore be made with due diligence in good faith, and for proper reasons. 71 C. J. S., *Pleading* § 420.

In other words, the general rule is that where a party to an action has pleaded, his pleadings ordinarily cannot be withdrawn without leave of court being first obtained. Moreover, whilst it is also true that leave to withdraw a pleading will usually be given where the other party will not be prejudiced, the matter is largely within the discretion of the trial judge. In the instant case, the trial judge, not having committed any error that could be reviewed on appeal under the circumstances, his ruling is hereby confirmed and affirmed to all intents and purposes. Since neither party has been prejudiced thereby, the Clerk of this Court is hereby ordered to send a mandate to the court below with instructions that it resumes jurisdiction over the cause of action, proceed to dispose of the law issues in the pending case, and rule the case to jury trial. Costs to abide final determination of the case. And it is hereby so ordered.

Judgment confirmed.