LIBERIA FISHERIES INCORPORATED, by and thru its Managing Director, ROGER MAKLOUF, Petitioner, v. **HIS HONOUR HALL W. BADIO**, Sr., Assigned Circuit Judge, Sixth Judicial Circuit, **MAJOR JIMMY GARLEY**, Sheriff for Montserrado County, **BIRAHIM DIAGNE et al.**, Respondents.

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

Heard: May 17, 1989. Decided: July 14, 1989.

1. An appeal to the Supreme Court from a ruling of a Justice presiding in Chambers is tried *de novo* upon the entire records and not merely those phases of the case presented before the Chambers Justice.

2. Parties ought to be vigilant in protecting their own interests and should superintend the issuance, service and returns of precepts of court.

3. Our Civil Procedure Law requires that all pleadings and other papers required to be served in an action must be filed.

4. Courts must only decide those issues squarely raised in the pleadings and argued during the trial or hearing.

5. Every officer of court is presumed to have done his duty properly unless the contrary is shown.

6. 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 which courts of equity have concurrent jurisdiction. .

7. Where title is in issue, cancellation of the instrument by a court of equity is not sufficient to warrant the issuance of a writ of possession. However, where the right of occupancy, possession or enjoyment is the only issue involved and the instrument conferring said right of occupancy, possession or enjoyment is canceled by a court of equity, said court of equity may, in the same decree, order the re-delivery of the demised premises to the landlord.

8. While a decree canceling a deed does not confer title, that decree invalidates the conveyance made by the deed.

9. The cancellation of deed to real property causes the title to revert to those owning the land before issuance of the deed. To perfect this title, requires an action of ejectment which is triable by a jury.

10. Where prohibition would be ineffectual, it would usually be disallowed as where the act sought to be prevented or restrained is already done.

11. One remedial writ cannot obtain the objects of or substitute for another.

12. Prohibition is a preventive rather than a corrective remedy and is designed to forestall the commission of a further act rather than to undo an act already completed.

A petition for cancellation of a sub-lease agreement was filed by Birahim Diagne in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, on January 11, 1988. The respondent therein having defaulted and upon application of the petitioner in the trial court, the petition was heard and granted, the sublease agreement canceled, and Birahim Diagne was awarded the amount of $11,579.80 as damages plus legal interest. The trial judge ordered the sheriff of Montserrado County to conduct an inventory of the assets of Liberia Fisheries Incorporated, respondent in the cancellation proceeding, to place the same on sale at a public sale to satisfy the judgment, and place Birahim Diagne, petitioner in the cancellation proceeding, in possession of the premises. The inventory was conducted, allegedly without the time allowed by statute, the assets of Liberia Fisheries Incorporated, respondent in the cancellation proceeding, were sold and Birahim Diagne was placed in possession of the premises.

The Liberia Fisheries Incorporated, as petitioner before the Supreme Court, fled to the Chambers Justice for a writ of prohibition, on the principal ground that no writ of summons was served on it and that the judgment entered against it was void *ab initio.* Specifically, the writ of prohibition was prayed for to have the co-respondent judge and other officers of the trial court desist from enforcing the alleged void final judgment. The respondents refuted the allegations laid in the petition and argued that the writ of summons was served and returned served by the sheriff, and that prohibition would not lie because the enforcement of the judgment had been completed, the sale of the assets completed, and the writ of possession served and returned served.

The Justice in Chambers passed upon the petition and ordered the issuance of the peremptory writ of prohibition. On appeal to the Bench *en banc,* the ruling of the Chambers Justice was reversed and the petition for prohibition denied on the grounds that prohibition was the wrong remedial writ chosen by petitioner, since the act or acts complained of had been done and completed several days before the filing of the petition. Further, the Court held that prohibition could not be used to review a final judgment for errors and irregularities allegedly committed during the trial. The Court noted that the prohibition was a preventive and not a corrective remedy and, hence, was not obtainable in the instant case.

Johnnie N. Lewis of the Lewis and Lewis Law Firm appeared for petitioners. *H. Varney G. Sherman,* in association with Brumskine & Associates Law Offices, represented by *Charles Walker Brumskine* and *Theophilus C. Gould,* appeared for respondents.

MR. JUSTICE AZANGO delivered the opinion of the Court.

Since an appeal to the Supreme Court of Liberia from a ruling of a Justice presiding in Chambers is tried *de novo* upon the entire records and not merely those phases of the case presented before the Justice, *Coleman v. Crawford and Stubblefield,* 19 LLR 29 (1968), Syl. 4, it is in this light that we shall proceed to review this case.

On the 11th day of January, A. D. 1988, a petition for the cancellation of a sublease agreement was filed before the Civil Law Court of the Sixth Judicial Circuit, Montserrado County by Birahim Diagne against his tenant, Liberia Fisheries Incorporated, as respondent. The petition was granted and the respondent was found liable to the petitioner in the amount of $11,579.80 (Eleven Thousand Five Hundred Seventy-Nine and Eighty Cents) as damages plus interests. The judge ruled Liberia Fisheries Incorporated to the costs of the proceedings and ordered the sheriff of Montserrado County to proceed to the premises and place Birahim Diagne in possession of said premises and to have sundry items of personalty sold at public auction to satisfy the money judgment.

Based upon the ruling (decree) of the Civil Law Court, the sheriff of Montserrado County allegedly conducted an inventory of the assets of Liberia Fisheries Incorporated on January 11, 1988, the very day on which the Civil Law Court handed down its decree in the cancellation proceeding. The records revealed that on January 14, 1988, three (3) days after the inventory was taken, the sheriff of Montserrado County sold the assets of the Liberia Fisheries Incorporated at a public auction.

According to the sheriffs bill of sale, issued in favor of one Sarah Dunbar and dated January 14, 1988, the following items constituted the first lot of items allegedly sold to Madam Sarah Dunbar: Six desks, ten desk-chairs, two cupboards, two sofas, one conference table, eight conference chairs, seven arm-chairs, six sofas, six filing cabinets, four air conditioners, six tables, two radios, one shelve, one Chevrolet truck - plate #593 and one Mercedes Truck - plate #594-BT, two big trailers and three small trailers, three hundred fifty-one (351) pieces of pellets, one Chevrolet pick-up plate #1237-BT, one compressor, forty (40) empty cooking gas container, three thousand two hundred sixty-one crates, one hundred pieces of timber (planks 2 x 4), one scale, one ladder, five wheel barrows, four fire extinguishers, one crane, two plastic rolls, four air-filters, one four-wheel drive jeep, plate #1758-BC, one sewing machine, and one brother electric typewriter.

The Liberia Fisheries Incorporated, petitioner in this prohibition proceeding, considering the proceeding in the lower court and the acts of the co-respondent judge, His Honour Hall W. Badio, Sr., then presiding over the December A. D. 1987 Term of the Civil Law Court, to be illegal and prejudicial, fled to the Chambers Justice for a writ of prohibition on a five-count petition, praying for the issuance of an alternative writ of prohibition to require the co-respondent judge to desist from enforcing the alleged void judgment rendered on January 11, 1988.

For the benefit of this opinion, we shall restate the petition, substantially as follows:

1. That notwithstanding, no writ of summons in the above entitled cause, out of which this petition grows, was ever served on the petitioner, by and thru its managing director, Roger Maklouf, or any other director of the corporation, by which the Civil Law Court for the Sixth Judicial Circuit could have acquired jurisdiction over said corporation, the Civil Law Court, presided over by Co-respondent Judge Hall W. Badio, Sr. has entertained a default ruling of a petition for cancellation of a sub-lease agreement between the petitioner and Co-respondent Birahim Diagne, rendered a final judgment in favour of Co-respondent Birahim Diagne, adjudging the petitioner liable to the co-respondent in the amount of Eleven Thousand Five Hundred Seventy-Nine Dollars and Eighty Cents ($11,579.80) plus legal interest . . . " and ordering the sheriff to place Corespondent Diagne in possession of the premises and to seize the chattels on the premises owned by the petitioner and have same sold at public a auction to satisfy the judgment of the court.

2. Petitioner submits that as it was never summoned through the service of a writ of summons, either upon Roger Maklouf, managing director of Liberia Fisheries Incorporated, or any other director of the corporation, and the delivery of or a copy of the writ of summons and petition by the ministerial officer of the Civil Law Court, said court not only did not acquire jurisdiction over petitioner, but also the petitioner never had its day in court. It necessarily follows as a matter of law that not only is the final judgment rendered against petitioner void *ab initio* but also the entire proceeding, as a court can render no valid judgment against a party over whom it has not acquired jurisdiction.

3. Petitioner further says and maintains that the final judgment rendered by co-respondent Judge Hall W. Badio, Sr., in the amount of $11,579.80 plus legal interest is further void as damages cannot legally be awarded in a petition for cancellation of a sub-lease agreement. In addition, the co-respondent judge, in an effort to have his void judgment enforced, has ordered the co-respondent sheriff of the Civil Law Court to seize the chattels of the petitioner and to expose same to public auction, which the co-respondent sheriff is attempting to execute.

4. Petitioner further says and maintains that the final judgment rendered by Co-respondent Judge Hall W. Badio, Sr., by which he ordered the co-respondent sheriff to place Co-respondent Birahim Daigne in possession of the premises, subject of the sub-lease agreement, is further void as a petition for cancellation of a sub-lease agreement is not a possessory action as would warrant the issuance and service of a writ of possession.

5. Petitioner further says and brings to the attention of this Honourable Court that since being informed of the default judgment of the petition for cancellation of the sub-lease agreement, its counsel has been unable to inspect the case file, as the clerk's office claims it

has been mailed. Petitioner has therefore relied principally upon the minutes of court in the preparation of this petition."

Respondents appeared and filed in these returns which read substantially, as follows:

1. That as to counts 1 and 2 of the petition, respondents say that petitioner and co-respondent Birahim Diagne executed a sub-lease agreement (exhibit RR/1 hereto) on January 1, 1987, providing (i) no other sub-lease or assignment without the consent of Co-respondent Birahim Diagne's agent; (ii) all taxes and utility bills to be paid by petitioner; (iii) right of re-entry reserved to Co-respondent Birahim Diagne upon thirty (30) days notice for default of the covenants and conditions of the sub-lease agreement by petitioner.

2.That also as to counts 1 and 2 of the petition, on the 14th day of September, 1987, the Articles of Incorporation of the petitioner was revoked by the sovereign Republic of Liberia through its Ministry of Foreign Affairs (the certificate of revocation from the Ministry of Foreign Affairs attached as exhibit RR/2 hereto) and the business registration certificate of petitioner was also revoked by the sovereign Republic of Liberia through the Ministry of Commerce, Industry & Transportation (attached as exhibit RR/3 hereto).

3. That also as to counts 1 and 2 of the petition, respondents submit that as of the 14th day of September, 1987, petitioner was no longer a juridical person and could not transact business in the Republic of Liberia in its name as Liberia Fisheries Incorporated or through any other person such as Roger Maklouf, its former managing director. Respondents contend that a corporation is a legal entity with rights and liabilities in its own name only after incorporation (Associations Law, Rev. Code 5: 2.5) and ceases to have such power and authority to do business in Liberia after the revocation of the Articles of Incorporation which brought it into being (Associations Law, Rev. Code 5:11.3) and the revocation of the business registration certificate, which authorized it to conduct and carry on the particular business (General Business Law, Rev Code 14:4.2)

4. That also as to counts 1 and 2 of the petition, respondents say that Co-respondent Birahim Diagne waited for nearly two months (September 14, 1987 - November 10, 1987) after the revocation of the petitioner's Articles of Incorporation and business registration certificate to see whether petitioner would challenge the acts of the Sovereign Republic of Liberia in court or before any other forum to have petitioner reinstated as a juridical person (legal entity) in Liberia. However, petitioner made no such efforts and so on November 10, 1987, Co-Respondent Birahim Diagne delivered to Roger Maklouf, managing director of petitioner, a letter of his intention to repossess and re-enter the premises subject of this proceeding for reason that petitioner was not and still is not a legal entity in Liberia and for reasons that petitioner has failed to pay taxes and utility bills as required by the sub-lease agreement.

5. On December 4, 1987, Co-respondent Birahim Diagne filed the petition for the cancellation of the sublease agreement and notwithstanding the fact that petitioner was not a legal entity in Liberia, the writ of summons was issued, served on Roger Maklouf and returns made by the sheriff for Montserrado County. The said writ of summons was served by Bailiff George Sherman of the Civil Law Court, with the returns signed by Sheriff Jimmy Garley. Respondents submit that a sheriff return are considered proof of service unless shown to be false, and the evidence to support the claim of falsity of the sheriffs returns must be specifically pleaded and must be clear, cogent and convincing. *Perry and Azango v. Ammons,* 16 LLR 268 (1965).

6. Further to count 5 hereof, this Honourable Supreme Court has considered the returns of a sheriff to service of a court process as *prima facie* evidence of what is contained therein. *Dwalubor v. Good-Wesley et al.,* 21 LLR 43 (1972); *Eitner v. Sawyer et al.,* 26 LLR 247 (1977) and *Donzoe v. Thorpe,* 27 LLR 166 (1978). Indeed, in most jurisdictions, unless the falsity of a sheriffs returns are disclosed by some other portion of the records of court, the truthfulness of the returns cannot be controverted by the defendant by answer or otherwise before judgment, or after judgment by application on motion or other proceedings to have the judgment set aside. 62 AM JUR 2d., *Process, § 177.* Even in these jurisdictions where a return to a service of process is impeachable, clean, unequivocal and convincing evidence is required to overcome its statements and recitals, and the mere preponderance of the evidence in favour of one contradicting a return is ordinarily insufficient. 72 C.J.S., *Process, §* 102(b).

7. Respondents submit therefore that it is not sufficient for petitioner to allege in the petition merely that it was not served but it should aver those facts and circumstances to support the falsity of the returns, which from the face of the petition would warrant an investigation. To merely generally deny service of process and expect the Supreme Court to stay further proceeding in the case or undo whatever has been done in the case is to mock the judicial process. For the sound discretion which is required to be exercised by the. Justice in Chambers must be aroused by such averments in the petition which, from the ordinary perception of the matter, would militate against the truthfulness of the service of the process. However, petitioner's petition is so legally defective as it gives no such detail statement of the basis of the claim of non-service of process but merely a general denial and thereby gives no notice to respondents as to what they are to defend against or notice to Your Honour as to what Your Honour's sound discretion should be based on. Certainly, clear, unequivocal and convincing evidence is based on specific and particularized averments of facts in a pleading and not a general denial of a fact or a general attack on a court record.

8. That also as to counts 1 and 2 of the petition, respondents say that the Civil Law Court for the Sixth Judicial Circuit had jurisdiction over the petitioner by the service of the writ of summons on Roger Maklouf, its managing director and the failure of petitioner to file

answer *ipso facto* supported the entry of a default judgment against petitioner. Section 3.61 of the Civil Procedure Law provides that a defendant shall appear by service of an answer or notice of appearance or the making of a motion, while Section 3.62 of the said Civil Procedure Law provides that appearance shall be made within (10) days after service of the summons or re-summons. Going further, Section 42.1 of the Civil Procedure Law provides that if the defendant has failed to appear, plead or proceed to trial or if the court orders a default for any other failure to proceed, the plaintiff may seek a default judgment against him. These statutory provisions clearly support *Rule 7* of the *Circuit Court Rules* and therefore the default judgment entered against defendant was proper, legal and legitimate.

9. That as to count 3 of the petition regarding the award of $11,579.80 plus legal interest to co-respondent Birahim Diagne by the court below and as also narrated in count one (1) of the petition, respondents say that in equity proceedings such as cancellation of instrument, monetary claims arising out of the instrument ordered canceled, and cancelled, may be awarded by the court. While as a general rule, a court of equity does not entertain an action of damages only, where a court of equity has taken jurisdiction over a subject matter of litigation, it must do complete justice between the parties; and hence, where a right to compensation is established, the court may in its sound discretion order a personal judgment or recovery of judgment. A court of equity may retain the cause for the purpose of ascertaining and awarding damages as something which is incidental to the main relief sought. 27 Am. Jur.2d, *Equity,* ∫ 112. Each and every monetary claim stated by Co-respondent Birahim Diagne and proven at the trial, arose out of the sub-lease agreement sought to be canceled (exhibit RR/5 hereto) and respondents submit that said claim for monetary award being incidental to the main relief of cancellation, the court did not err or proceed by any wrong rule when it awarded Co-respondent Birahim Diagne the amount of Eleven Thousand, Five Hundred Seventy-Nine Dollars and Eighty Cents ($11,579.80) plus legal interest.

10. That further to count 3 of the petition, respondents submit that a decree setting aside a deed (contract) for real property should provide for an equitable accounting (settlement) between interested parties respecting expenditures for repairs and improvements, taxes paid, value of use and occupancy of the premises and other items shown by the record to be proper for consideration by a court of equity. 13 AM. JUR. 2d, *Cancellation of Instruments,* ∫ 66. It was held in the case *Walker v. Galt,* 171 F2d 613, 6 ALR2d 808, that plaintiffs prayer for recission of a conveyance and restoring the parties to "the status quo, and to also insofar as practicable, by way of incidental relief, provide that the plaintiff is entitled to recover from the defendant the full stumpage value of timber removed by the defendant from the land with interest from the date of removal, and the fair rental value of the property during the time the defendant was in possession," was consistent with law.

Under the same parity of reasoning in *Walker v. Galt supra,* it was proper when Co-respondent Judge Hall W. Badio, Sr. in his decree ordered an award of $11,579.80 being outstanding utility bills, real property taxes and realty estate taxes, which petitioner had contracted by the sublease agreement to pay but failed to pay, and which by law constituted a lien on Co-respondent Birahim Diagne's property until paid. Revenue & Finance Law, Rev. Code 36: 13.8.

11. That also as to count 3 of the petition, the judgment being legal and legitimate, co-respondent Judge Badio did not err when he ordered the enforcement of the said judgment. Indeed Co-respondent Birahim Diagne was placed in possession of the subject premises and the chattels therein seized and sold at public auction long before the petitioner prayed for a writ of prohibition. As a matter of fact, a Mrs. Sarah Dunbar purchased the first lot of chattels on January 14, 1988; the petition was not filed until January 20, 1988, and the writ of prohibition was not issued until February 20, 1988. Consequently, there was nothing to be prohibited or undone as a writ of prohibition would not apply to upset a judgment already enforced and when nothing is left to be done. The writ of possession had already been issued, served and returns made and the chattels at the premises had been sold to a Mrs. Sarah Dunbar. Further, the premises had long been leased to Mr. Nicolas Formusa, who took possession and was enjoying the premises prior to the filing of the petition and the issuance of the writ of prohibition. Respondents pray Your Honour to take judicial notice of the records in this case. There being nothing pending before the Civil Law Court for the Sixth Judicial Circuit to do, prohibition would not lie. *Sodatonou et al. v. Bank of Liberia, Inc.,* 20 LLR 512 (1971).

12. That respondents say that where a judgment has been rendered by a court, judgment executed and third parties have acquired interest in properties sold under the said judgment, prohibition will not lie as there is nothing else left to be done by the court. Petitioner in such instance could move this Supreme Court by an application for a writ of error, which has a time limit of six (6) months after judgment but not by a petition for a writ of prohibition, which applies only when there is something pending before the court below to be done.

13. That as to count 4 of the petition, respondents say that it is the sub-lease agreement which gave the right of possession, occupancy and enjoyment of the subject premises to petitioner. Upon the cancellation of said sublease agreement by a court of competent jurisdiction, the possession, occupancy and enjoyment of the petitioner terminated and Co-respondent Birahim Diagne had the right of possession, occupancy and enjoyment and therefore entitled to a writ to enable him to exercise his right of possession, occupancy and enjoyment. While some common law countries have a writ of re-entry for such matters where title is not involved in contradiction to a writ of possession, where title is involved, the only writ available in this jurisdiction is the writ of possession. So Co-respondent Judge Badio ordered the issuance of the writ of possession to enable Corespondent Birahim

Diagne to exercise his right of possession, occupancy and enjoyment under the court's decree. For it has been decided by this Honourable Supreme Court that while a decree cancelling a deed does not confer title, that decree invalidates the conveyance made by the deed. *Barbour-Tarpeh et al. v. Dennis et al.,* 25 LLR 468 (1977). Further, cancellation of a deed to real property causes the title to revert to those owning the land before issuance of the deed. *Pratt et al. v. Smith et al.,* 26 LLR 160 (1977).

14. That further to count 13 hereof, respondents concede that where title is involved and required by law to be adjudicated by a jury, a decree of cancellation of a deed is not sufficient to warrant the issuance of a writ of possession because the writ of possession would connote the determination of title, which is a question for the jury. However, where title is not involved and therefore no question for the jury, then the decree of cancellation necessitates the issuance of the writ of possession as said writ of possession would not connote title (a jury issue) but will connote merely possessory right (a non-jury issue). To do otherwise is to handle the case in piecemeal and equity requires full and complete relief and the avoidance of a multiplicity of suits. 27 AM. JUR 2d., *Equity,* §§ 46 & 47. Moreover, where the ground for equitable interposition is disclosed to the court in a cancellation proceeding, the court in disposing of the case may decree transference of possession. And this transference of possession is always done by a court of equity where equitable interposition has been established and there is an indisputable title or there is no real dispute over the title to the property involved in the suit. 27 AM. JUR. 2d., *Equity,* § 62. Consequently, the co-respondent judge did not err when he ordered the issuance of the writ of possession, not as a determinant of title as title to the real property was not an issue, but as a transference of possession which is not required to be determined by a jury.

15. That as to count 5 of the petition, the allegations are false and misleading. Petitioner could not have obtained the minutes of court other than from the court's file as Co-respondent Birahim Diagne would have never given petitioner the records. However, petitioner neither wants to disclose all the exhibits which Co-respondent Diagne submitted at the trial nor does petitioner want to be forced to challenge those exhibits in its petition. So petitioner invented the allegation that the clerk did not allow it to inspect the file and claimed the file was mislaid.

16. That further to count 15 hereof, respondents say that it was incumbent upon petitioner to establish the injury it had suffered. Petitioner in its petition has not attached any of the species of evidence submitted by Co-respondent Birahim Diagne either through a denial of the facts regarding petitioner's non-existence and incapacity to do business or the claims for taxes and utility bills or the right of possession of Co-respondent Birahim Diagne. Petitioner has not even averred that it has evidence which, if it had submitted to the court below, would have caused a different result than what was obtained. What then is the basis of the writ of prohibition, may respondent ask? Is it merely the allegation that the writ of summons

was not served, without any specific and particularized averments to warrant Your Honour's exercise of discretion? Respondents submit that the petition is totally devoid of any merit at all and is intended for the mere purpose of harassment.

17. That respondents say that being a natural person and not being a legal entity in Liberia, petitioner had no capacity to institute this prohibition proceeding as petitioner's Articles of Incorporation and business registration certificate had been revoked by the sovereign Republic of Liberia. For Your Honours to entertain this prohibition proceedings, Your Honours would be reinstating the petitioner as a legal entity and thereby performing a function of the executive branch of government, contrary to the Constitution and the statute laws of Liberia. So respondents move Your Honours to dismiss the petition without delay.

18. That the shareholders of the petitioner have long since acknowledged that petitioner's Articles of Incorporation and business registration certificate has been revoked and so petitioner is not a legal entity with any capacity to sue or be sued and that petitioner has no authority to do business in Liberia. The shareholders of petitioner say in recognition of this that they have organized another corporation by the name and style of International Fish and Shrimps Corporation and that said International Fish and Shrimps Corporation acquired all of petitioner's assets. Now that it is clear that Roger Maklouf, claiming to bring this petition for a writ of prohibition is a renegade who does not have the support or authority of the shareholders or directors of petitioner, said petition ought to be summarily dismissed. In support of the averment of this count, respondents submit three (3) letters dated February 25, 1988, February 28, 1988 and March 3, 1988 (exhibit RR/6 in bulk).

Additionally, Co-respondent Nicolas Formusa tendered separate and individual returns as follows:

1. Because as to the entire petition for a writ of prohibition, co-respondent submits that the petitioner has no legal capacity to sue in that it is neither a corporate entity nor a natural person. Co-respondent says that the Articles of Incorporation and business registration certificate of the then Liberia Fisheries Inc., have been revoked by the Government of Liberia.

2. Because co-respondent is in possession of and operating his business on the premises located on Jamica Road by virtue of a sub-lease agreement entered into by and between him and Birahim Diagne.

3. Because co-respondent has intervened as a matter of right in the prohibition proceeding as the representation of his interest by the existing parties is inadequate and that co-respondent may be bound by your Honour's ruling.

4. And also because co-respondent has intervened as a matter of right in the prohibition proceedings as he is so situated that he will be adversely affected by Your Honour's ruling on the disposition of the property subject of the petition for a writ of prohibition.

5. Because as to the entire petition, co-respondent submits that prohibition will not lie in the case where a final judgment has been rendered, executed and enforced; that is, where nothing remains to be done.

6. Because as to counts 1 and 2 of the petition, co-respondent denies that petitioner was not summoned. Co-respondent submits that petitioner's own Exhibit "A" which Your Honour is most respectfully requested to take judicial notice of, indicates that a writ of summons was indeed served on the petitioner as per the returns of the ministerial officer, but that the petitioner failed and refused to appear as provided by the law. Co-respondent says that the returns of the ministerial officer and the records of the trial court are legally presumed to be correct, and in the absence of a showing to the contrary cannot be disturbed. Co-respondent therefore prays that the said counts of the petition be overruled.

7. And also because as to count 5 of the petition, corespondent says that whether or not damages can be awarded in a cancellation proceeding is not a basis for prohibition, as such an issue can be properly reviewed by a regular appeal or a writ of error. Co-respondent therefore prays that said count of the petition be overruled.

8. "Further to count 3 of the petition, co-respondent denies that the sheriff is attempting to execute the judgment of the trial court. Co-respondent submits that certain assets of the non-existing petitioner, judgment debtor, was purchased at a public auction by one Sarah Dunbar on January 14, 1988, who had since sold said items to co-respondent, who is a bona fide purchaser for value. Co-respondent therefore prays that said count of the petition be overruled.

9. Because as to count 4 of the petition, co-respondent says that although a cancellation proceeding is not necessarily a possessory action, petitioner having acquiesced in the enforcement of the trial court's judgment, and the premises being subsequently sub-leased to co-respondent who is now in possession, petitioner's petition is untimely and, hence, deemed a waiver of whatever right the petitioner might have had. Co-respondent therefore prays that said count of the petition be overruled.

10. Further to count 4 of the petition, co-respondent submits that following the final judgment which canceled the sublease agreement between Co-respondent Diagne and the non-existing Liberia Fisheries Inc., the reversionary interest automatically vested in Co-respondent Diagne, per the sub-lease agreement. Count 4 is therefore unmeritorious and a fit subject for dismissal and co-respondent so prays.

11. Because as to count 5 of the petition, co-respondent says that same cannot be given cognizance by Your Honour as the trial court, being a court of record, any declaration or assertion therefrom must be evidenced by the records of the court or a certificate of the clerk of the court. Petitioner having failed to provide any documents to substantiate its assertion makes the count a fit subject for dismissal and corespondent so prays.

12. Because co-respondent says that notwithstanding that petitioner prayed for the issuance of an alternative writ until Your Honour shall have had the opportunity to hear and determine its petition, the Clerk inadvertently caused a peremptory writ to be issued ordering the co-respondent judge to restore the parties to *status quo ante,* which is contrary to the law and practice of this jurisdiction.

These returns were accompanied by a motion to intervene, filed by the same Nicholas Formusa. The motion reads thus:

1. That movant is in possession of and operating his business on a premises located on Jamaica Road by virtue of a sublease agreement entered into by and between him and Birahim Diagne as is more fully shown by a copy of said agreement.

2. That movant may intervene as a matter of right in the prohibition proceedings as the representative of his interest by the existing parties is inadequate and that movant may be bound by Your Honour's ruling,

3. That movant may intervene as a matter of right as he is so situated that he will be adversely affected by Your Honour's ruling on the disposition of the property subject of the petition for a writ of prohibition. All of which movant stands ready to prove."

The Chambers Justice, upon receipt of the petitioner's petition for the alternative writ of prohibition on January 20, 1988 ordered the co-respondent judge to stay all further proceedings in the case pending a conference with the parties. However, according to the writ of possession and the bill of sale of the property auctioned, the judgment had already been executed on January 14, 1988; that is, six days before the petition for the writ of prohibition was filed. The records before us also reveal that on January 21, 1988, petitioner filed a bill of information before the Chamber Justice to the effect that the sheriff of Montserrado County had disposed of petitioner's assets by means of a public auction on January 11, 1988; that is less than the statutory period of ten (10) days notice, and that therefore, the auction by the sheriff was contrary to statute. The Chambers Justice sent another stay order with further instructions that the parties to the cancellation proceedings be rested in *status quo ante* pending the hearing of the petition. This order was again allegedly ignored by the co-respondent judge, His Honour Hall W. Badio, Sr.

It appears from the records presented to us that the first stay order which was issued upon the strength of the petition for the writ of prohibition on January 20, 1988, and the second

order which was issued on January 21, 1988, upon the strength of the bill of information were never served on Co-respondent Birahim Diagne or Nicholas Formusa. Co-respondents Birahim Diagne and Nicholas Formusa argued before us that they never received said stay orders growing out of the bill of information and therefore they neither filed responsive pleadings to said bill of information nor argued it. We note, however, from the records that the two stay orders were served on the co-respondent judge but that he obviously ignored them. We note further that the writ of prohibition itself was issued on the 29th day of February, A. D. 1988, a little over one (1) month after the petition for the writ was filed; that is so notwithstanding the allegations that the corespondent judge had ignored two separate stay orders. This delay in the issuance of the alternative writ of prohibition bewilders us, but we have held repeatedly that parties ought to be vigilant in protecting their own interests, *Gaiguae v. Jallah et al.,* 20 LLR 163 (1971), and should superintend the issuance, service and returns of precepts of court.

At the call of the case for argument, the motion to intervene was conceded by the petitioner. The records also reveal that a motion to dismiss the petition for the writ of prohibition had also been filed. The motion to dismiss and the resistance thereto were argued, ruling thereon reserved, and the case suspended. Then the petition and the two returns were assigned for argument and accordingly argued. The ruling on the motion to dismiss the petition and the two returns were consolidated and delivered. The said ruling reflected the contents of the bill of information despite the fact that the returns to the bill of information were neither filed nor served. In fact, the minutes of this Court are silent as to whether the bill of information was among the papers argued before the Chamber Justice. Our Civil Procedure Law requires that all pleadings and other papers required to be served in an action must be filed. Civil Procedure Law, Rev. Code 1: 8.2(1) and 8.3(1). Given these facts and circumstances, it was a material error for our colleague to have taken cognizance of the averments in the bill of information when, as we have said, the bill of information was never argued before him and no papers were ever served on the respondents. In *Gallina Blanca, S. A. v. Nestle Products, Ltd. et al.,* 25 LLR 116 (1976), this Court held that courts must only decide those issues squarely raised in the pleadings and argued during the trial or hearing.

In any event, here is the concluding portion of the ruling of our distinguished colleague, Mr. Justice Belleh, after listening to the arguments of both parties on the motion to dismiss and the petition for the writ of prohibition:

"WHEREFORE, and in view of the foregoing the petition for the writ of prohibition being sound in law, the same is hereby granted and the peremptory writ ordered issued. The Civil Law Court for the Sixth Judicial Circuit, Montserrado County, not having acquired jurisdiction over the petitioner in the cancellation proceedings, the final judgment rendered in said cancellation proceedings is hereby declared a legal nullity and ordered vacated and the parties in these proceedings are restored to *status quo ante."*

Reverting to the petition for prohibition, the petitioner vigorously maintained that it was not served with a writ of summons, even though while arguing before this Court petitioner said that it could not deny that a writ of summons was issued. It maintained nevertheless that no writ of summons was served on it. Contrary to this contention of petitioner, the records reveal that a writ of summons was issued, served and returned served. Like petitioner, the Chambers Justice simply ruled that a "copy of the writ was not in the file". He then presumed that the writ was neither issued nor served. Of course, no investigation was ordered or had regarding this issue. When asked why petitioner did not obtain a certificate from the clerk of the Civil Law Court and annexed it to his petition to substantiate his allegation that no writ of summons was served, petitioner replied that since its allegation being a negative plea, the burden of proof was on the respondents to show that a writ of summons was issued, served and returned served. While petitioner may be correct in suggesting that the respondents should have attached to their returns copies of the writ of summons and other related documents, the practice in this jurisdiction has been for the petitioner to obtain a certificate from the clerk of court and annex same to his petition showing that no writ of summons had been issued, served and returned served.

The general rule of proof in this jurisdiction is that the burden of proof rests on the party who alleges a fact. Civil Procedure Law, Rev. Code 1: 25.5. The exception is where the subject matter lies peculiarly within the knowledge of the adversary, but it is not applicable here because the proof could have been easily obtained from the clerk of court. Further, every officer of court is presumed to have done his duty properly unless the contrary is shown. *Rasamny Brothers Inc. et al. v. Gardiner,* 24 LLR 530 (1976). The failure and neglect of our colleague, the Chambers Justice, to have had an investigation or order one is a material error which warrants a reversal of his ruling. *MacCarthy v. Gray,* 23 LLR 142 (1974).

The next issue of concern to this Court is whether damages may be awarded as part of a judgment in a proceeding for cancellation of a lease agreement. While it is true that our law states that there shall be only one form of civil action and that the distinction between actions at law and suits in equity and the forms of these actions and suits are abolished, the procedure for the hearing and determination of actions at law and suits in equity remain an entrenched part of our jurisprudence. That is, except for very few actions at law such as special proceedings, all actions at law are tried by a judge with the aid of a jury. On the other hand, except for a few cases, suits in equity are tried by a judge without the aid of a jury. We therefore maintain and affirm the general rule that a court of equity does not exercise jurisdiction over an action where the sole aim of the plaintiff is "damages" and nothing else.

Consistent with the general rule is the fact that where a court of equity has taken jurisdiction over a subject matter, such as an action to cancel an agreement, the court of equity must do complete justice to the parties and where a right to compensation is established, the court of equity may, in its sound discretion, order a personal judgment or recovery of judgment. 27

AM. JUR. 2d, *Equity,* ∫ 112. For example, a court of equity may issue a decree setting aside a contract for real property and at the same time provide for an equitable accounting between the interested parties respecting expenditures for repair and improvements, taxes paid, value of use and occupancy of the premises, etc. 13 AM. JUR. 2d., *Cancellation of Instruments,* ∫ 66. In confirmation of these principles of law, we hold in the case *Benson v. Johnson,* 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. The test is that the damages must be incidental to the main relief sought and it must pertain to the same transaction.

In the instant case, the plaintiff in the cancellation proceeding, co-respondent herein had asked for only the unpaid utility bills and taxes which the agreement required defendant, petitioner herein, to pay. This relief is incidental to the main relief for cancellation of the agreement and to encourage multiplicity of suits by requiring the plaintiff/co-respondent to file a separate action at law to recover obligations due plaintiff/co-respondent pursuant to the terms of the canceled contract is inconsistent with the principles of equity.

The other issue of interest to us is whether a court of equity may order the issuance of a writ of possession in a suit for the cancellation of a lease agreement. This Court has decided in many of our opinions that the cancellation of a deed does not necessarily determine title; only an action of ejectment can do so.

The practice known in this jurisdiction regarding a writ of possession is that they may not be issued in cancellation of title deeds. We confirm and affirm all these rulings and holdings of this Court but we have also determined that this case is distinguishable from all the other cases which have heretofore been decided by this Court.

Under the common law, there are two basic types of interests in real property; the freehold estate and the less than freehold estate. The freehold estates are fee simple, fee tail and life estates and each of these freehold estates involve issues of title. On the other hand, the less-than-freehold estate are those estates which only confer right of possession, enjoyment and occupancy and the commonest in this jurisdiction are leases and assignments. Where title is in issue, we confirm and affirm that cancellation of the instrument by a court of equity is not sufficient to warrant the issuance of the writ of possession. The reason is that the determination of title is an issue required to be tried by a jury and not by a judge alone. We hold, however, that where the right of occupancy, possession or enjoyment is the only issue involved and the instrument conferring said right of occupancy, possession or enjoyment is cancelled by a court of equity, said Court of equity may in the same decree order the re-delivery of the demised premises to the landlord. 27 Am. Jur. 2d., *Equity,* ∫∫ 46, 47 and 62. Therefore, the trial judge did not err when he ordered the issuance of the writ of possession,

not as a determinant of title as both plaintiff/co-respondent and defendant/petitioner did not claim title but merely as a transference of possession for a re-delivery of the demised premises to the landlord.

We held in the case *Babour-Tarpeh et al. v. Dennis,* 25 LLR 468 (1977), that while a decree cancelling a deed does not confer title, that decree invalidates the conveyance made by the deed. We also held in the case *Pratt et al. v. Smith et al.,* 26 LLR 160 (1977), that cancellation of a deed to real property causes the title to revert to those owning the land before issuance of the deed. To perfect this title requires an action of ejectment which is tried by a jury. Civil Procedure Law, Rev Code 1: 62.1. However, to perfect a right of possession, occupancy and/or enjoyment of a demised premises 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 the agreement which confers the original right of possession, occupancy, and enjoyment only. Civil Procedure Law, Rev. Code 1: 62.1 and 62.2. Therefore, there is no rationale for requiring two separate and distinct actions or suits 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 was canceled.

The next issue of concern to this Court is whether prohibition would lie to correct any alleged prejudicial acts of the respondents or to undo what has been done by the respondent judge under the circumstances of this case. We pause here to recapitulate the essential facts in the case. We observe from the records that the writ of summons was issued on December 4, 1987, based upon a judge's order issued by the co-respondent judge on the same December 4, 1987, commanding the petitioner herein to file its answer on or before December 14, 1987, and to appear and show cause why the petition should not be granted. The sheriffs returns was made on the same December 14, 1987 that the writ of summons had been served on the petitioner's general manager, Roger Maklouf. Trial was held on January 11, 1988, and the decree of cancellation issued the same January 11, 1988. On January 14, 1988, the decree was enforced and completely executed notwithstanding the requirements of the Civil Procedure Law, Rev. Code 1:44.41(2) requiring a ten-day notice before the public auction. We have on several occasions frowned upon cases being decided in lower courts with uncharacteristic haste. *Giko v. Giko,* 22 LLR 155 (1973). But the petitioner herein cannot enjoy the benefit of this holding for two (2) reasons, stated as follows:

Firstly, the circumstances of the public auction were contained in the bill of information filed on January 21, 1988, but never served on the co-respondents and never argued in open court before the Chambers Justice. That bill of information is therefore a legal nullity for the reasons stated *supra.* Secondly, the decree having been fully executed on January 11, 1988, prohibition was not the proper remedy. According to Section 16.21(3) of the Civil Procedure

Law, Rev. Code 1, prohibition is a special proceeding to obtain a writ ordering the respondent judge to refrain from further pursuing a judicial action or proceeding specified therein. The writ will not lie to correct errors or irregularities committed in a trial. *Fazzah v. National Economic Committee et al.,* 8 LLR 85 (1943); neither can it be used to prohibit acts already completed. Indeed where prohibition would be ineffectual, it would usually be disallowed as where the act sought to be prevented or restrained is already done. 22 R. C. L., page 8, par. *7; Fazzah Brothers v. Collins et al.,* 10 LLR 261 (1950).

The remedy available to petitioner because of the circumstances of the auction, if any at all, is the application for the writ of error because petitioner, according to it, did not have its "day in court" and was not present at the time of rendition of the decree to enable it to except and announce an appeal therefrom. For if judgment has already been executed, and nothing is left for the court to do, only the writ of error, issuable within six (6) months after rendition of final judgment may be invoked to review the matter. Civil Procedure Law, Rev. Code 1: 16.21 and 16.24.

This issue and the plea of a better writ were raised by Corespondent Birahim Diagne in counts 11 and 12 of his returns to the petition but was never passed upon by our distinguished colleague. We sustain said counts 11 and 12 of said returns and submit that pursuant to the Civil Procedure Law, Rev. Code 1: 11.6(2), petitioner should have sought a voluntary discontinuance of the Prohibition proceedings after petitioner became aware that the auction took place and the decree was fully executed six (6) days before he filed the petition for prohibition. And upon obtaining said discontinuance, the application for the writ of error could have been made. We need not reiterate the law that one remedial writ cannot obtain the objects of or substitute for another.

The final issue involves the order of the Chambers Justice for the enforcement of his ruling notwithstanding the exceptions thereto by the respondents, the announcement of an appeal to this Court *en banc,* and the granting of said appeal by him. The Civil Procedure Law, Rev. Code 1: 51.20, provides:

"On announcement of an appeal by a defendant, no execution shall issue on a judgment against him nor shall any proceedings be taken for its enforcement until final judgment is rendered, except that on an appeal from an order dissolving an order granting a preliminary injunction, such preliminary injunction shall remain in force pending decision on the appeal".

This prohibition proceeding does not fall within the exception nor does it fall within other exceptions provided by law such as debt cases where the amount is not in dispute, filiation/child support proceedings or *alimony pendente lite* proceedings. The Chambers Justice therefore erred when he ordered his ruling enforced notwithstanding the announcement of an appeal to this Court *en bane*.. We believe that since the statute is very clear with respect to

the duties and functions of the remedial writ of prohibition, we will be legislating if we, at this point in time, order the granting of the writ of prohibition to review the errors of a trial judge, particularly in a case like the one at bar where the trial judge had rendered his judgment and the said judgment has already been enforced.

In respect of the law of the writ of prohibition, this Court has said:

1. Writ of prohibition is a proper remedial process to restrain an inferior court from acting beyond its jurisdiction, or if it has jurisdiction from proceeding by improper rule, different from those which ought to be observed at all times. *Parker v. Worrell,* 2 LLR 525 (1925). This is not the situation in the instant case. Further, this Court has held that for every act of commission or of omission contrary to law, there is an appropriate remedy, for one injury cannot legally be applied to another. So assuming that the auction was illegal or without legal authority, prohibition is not the cure for the remedy.

2. Prohibition prevents inferior courts or tribunals from assuming jurisdiction not legally vested in them. It cannot correct errors and irregularities committed in a trial, for adequate and complete remedy therefor lies in appeal, writ of error, or certiorari. Prohibition extends only to restraining a tribunal from usurpation and cannot be used to substitute for an appeal. *Fazzah v. National Economic Committee et al.,* 8 LLR 85 (1943).

The argument of petitioner's counsel that prohibition will lie since the trial judge rendered an erroneous and prejudicial judgment adjudging the petitioner/appellee liable to the co-respondent in the amount of $11,579.80 (Eleven Thousand Five Hundred Seventy-Nine Dollars and Eighty Cents) plus legal interest as damages cannot legally be awarded in a petition for cancellation of a sub-lease agreement, and that said cancellation proceeding not being a possessory action, could not warrant the issuance and service of a writ of possession, cannot be sustained under prohibition proceedings. The remedy therefore is cognizable under the provision and interpretation of the statutes referred to *supra.* Some of the other contentions of petitioner and respondents in this proceeding, which warrant the attention of the Court, are:

1. On January 14, 1988, three (3) days after the rendition of the final judgment, Co-respondent Diagne was placed in possession of his premises and the properties contained therein sold at a public auction for the purpose of recovering the costs of court and the $11,579.80 claimed by Co-respondent Diagne as unpaid property taxes and utility bills. But Sara Dunbar was never joined as a party respondent in this prohibition proceeding.

2. That it was not until the 29' day of February, A.D. 1988, that the Clerk of the Supreme Court issued and served on Co-respondent Nicholas Formusa the peremptory writ of prohibition after the judgment had been rendered fully enforced and executed in keeping with law as far back as January 14, 1988, in which the petitioner claimed that the writ of

summons which emanated from the court below was never served on Roger Maklouf, the petitioner's managing director or any other director of petitioner and that a judgment had been entered against petitioner cancelling the sub-lease agreement and awarding $11,579.80 (Eleven. Thousand Five Hundred Seventy-Nine Dollars and Eighty Cents to Co-respondent Diagne.

3. That even though the writ of prohibition contained five (5) counts claiming that the writ of summons from the court below was never served on Roger Maklouf, the petitioner's managing director or any other director of petitioner and further that a judgment had been entered against petitioner cancelling the sub-lease agreement and awarding $11,579.80 to Co-respondent Diagne, said claims are not strictly laid out in the petition to warrant its granting by this Honourable Court. Hence, prohibition will not lie since the writ of summons was accordingly served on the petitioner, but it failed to appear when the case was called. Therefore, the default judgment is valid and binding on both parties, since the court below had jurisdiction over the case and the appellee entirely.

4. That prohibition will not lie, same not being the correct remedy in the instant case. In that, the proceeding in the court below have already been finalized after the rendition of the ruling had been enforced and executed by the court below. Therefore, the Chambers Justice was without the pale and scope of the law and also erred when he ruled that there was no summons issued and/or served on the parties and we do not know how he arrived at such conclusion."

5. Co-respondent Nicholas Formosa filed a motion to intervene, returns and motion to dismiss. The motion to intervene was conceded by appellee. The motion to dismiss was argued but no ruling was made. Then the petition and the returns were assigned for argument and argued. From the ruling of the Chambers Justice declaring the judgment null and void *ab initio* and his issuing of the alternative writ of prohibition, respondents announced an appeal.

The Marshal of the Court was unprecedentedly ordered to enforce the judgment of the court instead of the customary practice and procedure of sending a mandate to the court below for the enforcement of the judgment. Further, notwithstanding the announcement and granting of the appeal, the Marshal was ordered to enforce the judgment pending the appeal, in violation of the Constitution and the Civil Procedure Law, Rev. Code 1: 51.20.

6. Prohibition will lie since the trial judge of the court below rendered his erroneous and prejudicial judgment in which he adjudged the petitioner/appellee liable to the Co-respondent Diagne in the amount of $11,579.80 plus legal interest, which judgment is further void as damages cannot legally be awarded in a petition for cancellation of a sublease agreement, same not being a possessory action as would warrant the issuance and service of a writ of possession.

7. On January 20, 1988, the petitioner filed a petition for a writ of prohibition contending that no writ of summons in the entitled cause was ever served on the petitioner. Therefore, by law and right under the statute, the Civil Law Court for the Sixth Judicial Circuit had no jurisdiction over said corporation. Hence, the Civil Law Court, presided over by the co-respondent judge, His Honour Hall W. Badio, Sr., had no right to have entertained a hearing of the petition for cancellation of the sub-lease agreement between the petitioner and Co-respondent Birahim Diagne, and to have rendered a final judgment in favor of Co-respondent Birahim Diagne, not only cancelling said sublease agreement, but also adjudging the petitioner liable to the co-respondent in the amount of $11,579.80 plus legal interests and ordering that the co-respondent be placed in possession of the premises and ordering that the chattels on the premises owned by the petitioner be seized and sold at a public auction to satisfy the judgment of the court.

8. Even though on January 21, 1988, the Justice presiding in Chambers sent another stay order to the co-respondent judge, His Honour Hall W. Badio, Sr. with further instructions that the parties to the cancellation proceeding be restored to *status quo ante* pending the hearing and determination of the petition for a writ of prohibition, that order was also ignored by the co-respondent judge, His Honour Hall W. Badio, Sr. Following the issuance of the alternative writ of prohibition and service upon the respondents named in the petition, one Nicholas Formusa filed a motion to intervene. While the motion to intervene was still pending, he also filed returns and a motion to dismiss.

Separate returns were also filed by the original respondents to the petition for a writ of prohibition. In deciding the issues raised in the petition and returns, as well as the motion to dismiss the resistance thereto, the Chambers Justice ruled that the Civil Law Court did not acquire jurisdiction over the person of petitioner, respondent in the petition for cancellation of a sub-lease agreement. Indeed, besides the fact that neither of the two returns filed carried a copy of the alleged writ of summons attached, the best evidence upon which the case admits of, an inspection of the original file of the Justice presiding in Chambers revealed that there was no writ of summons emanating from the Civil Law Court which could have regularly brought the petitioner under the jurisdiction of the Civil Law Court in the cancellation proceeding.

9. The Chambers Justice, His Honour James K. Belleh, was within the pale and scope of the statute when he granted the alternative writ of prohibition since in deed and in fact the co-respondent judge had grossly erred when he rendered his final judgment on the same day of the purported trial, awarded damages against petitioner in the cancellation proceeding, and ordered the assets of the petitioner sold at public auction in satisfaction of the judgment, contrary to the statute controlling. Hence, prohibition will lie, especially so since the trial judge did not have any authority and/or jurisdiction to award damages or to order the assets

of the petitioner to be sold at public auction, all of which, being in violation of law, were null and void.

10. The petitioner had the legal capacity to come by prohibition proceeding, same being the correct remedy, especially so, that they grew out of a suit instituted by Co-respondent Birahim Diagne against the petitioner; for, assuming that the Articles of Incorporation of the petitioner were revoked by the Republic of Liberia through the Ministries of Foreign Affairs and Commerce, Industry & Transportation, Section 11.4 of the Associations Law which is applicable, provides for a winding-up period of three years which winding-up period of three years had not expired. Prohibition will therefore lie.

After a careful analysis and review of all the documents produced before us, the only issue before this Honourable Court for further consideration is whether the Chambers Justice erred when he ruled that prohibition will lie? It is this issue that governs all the other pleadings. According to the Civil Procedure Law, Rev. Code 1: 16.21(3), 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.

Moreover, this Honourable Court has held on many occasions that the purpose of prohibition is to restrain further judicial actions or proceedings specified in the writ obtained, and is not designed to review discretionary decisions on the part of a judicial officer". *Wilson v. Kandakai et al.,* 21 LLR 452 (1973).

We have observed with great concern that the judgment of the co-respondent judge was rendered on the 11 day of January; A. D. 1987 and that barely three (3) days after the trial and the rendition of the mentioned judgment or ruling, the assets of the petitioner were placed on public auction. By conclusion of law and fact, the entire proceeding was finally terminated and therefore, there was nothing left to be done by the trial judge. We have also observed from the review of the records adduced at the trial that the co-respondent judge committed other errors which could have been corrected. But the question is, can prohibition perform the function of a writ of error, appeal, or certiorari? Besides, we are of the strong opinion that this Honourable Court, being a Court of precedence, is bound to base its rulings and activities on the decisions and precedents set by our predecessors. We have at no time found the Court engaging in legislation and we have not seen or read any opinion of this Court where the remedial process of prohibition has been granted to review the errors of a trial judge after the rendition of judgment.

While we are in agreement with the legal maxim that the writ of prohibition is designed to prevent what may remain to be done as well as to undo what has illegally been done, *Ayad v. Dennis,* 23 LLR 165 (1974), the Court nevertheless takes the view, regarding all of the contentions of petitioner, that where prohibition would be ineffectual, it will usually be disallowed as here the act sought to be prevented is already done, or where, if the act was

performed, it would be void and could not affect the rights of the party. This is certainly true to the extent that where the proceeding in the lower court has ended, and the court has nothing further to do in pursuance or in completion of its order, or where it has dismissed the proceeding, prohibition is an ineffectual remedy. 22 R. C. L., p. 8, par. 7 (1918); *Fazzah Bros. v. ollins and Central Industrial, Ltd., 10* LLR 261 (1950).

In the instant case, there is nothing remaining to be done by the trial court, especially so when the sheriff of the Civil Law Court on the 14th day of January, A. D. 1988 declared that:

"WHEREAS on the 11th day of January, A. D. 1988 judgment was rendered by the Civil Law Court for the Sixth Judicial Circuit against the Liberian Fisheries, Inc. in the case: *Birahim Diagne, Petitioner v. Liberia Fisheries, Inc., Respondent,* petition for the cancellation of a sublease agreement entered into by and between petitioner as sub-lessor and respondent as sub-lease was cancelled and made null and void and respondent was adjudged liable to the petitioner in the total amount of $11,579.80 (Eleven Thousand Five Hundred Seventy-Nine Dollars and Eighty Cents); and

"WHEREAS on the same said 11th day of January, A. D. 1988, an inventory of the personal properties and chattels of the respondent left in the subject demised premises were taken by the sheriff for Montserrado County and a public auction conducted on the 14th day of January, A. D. 1988, at the herein demised premises; and

WHEREAS a Sara Dunbar was the highest bidder for the first (1st) Lot of items at the public auction for the amount of $14,000.00 (Fourteen Thousand Dollars),

Now, therefore, in consideration of the amount of $14,000.00 (Fourteen Thousand Dollars) paid to me the undersigned and delivered, the receipt of which is hereby acknowledged, I do hereby sell, convey, bargain and transfer to the said Sarah Dunbar all the personal properties and chattels herein below.

The items having been auctioned to the tone of $14,000.00 (Fourteen Thousand Dollars) as is indicated by the declaration of the sheriff of Montserrado County, prohibition would not lie. Further, a writ of prohibition will not lie to prohibit acts already completed. *Coleman et al. v. Cooper et al.,* 12 LLR 226 (1955).

Prohibition is a preventive rather than a corrective remedy and is designed to forestall the commission of a future act rather than to undo an act already completed. Further, prohibition is not the remedy when the writ sought is to correct errors or irregularities in such courts or tribunal when the relief then lies in appeal, writ of errors, or certiorari. *Gaiguae v. Jallah et al.,* 20 LLR 163 (1971).

Application of the foregoing principles of law to the facts of this case leads to the conclusion that at the time of the filing of the petition for a writ of prohibition, the respondents had

fully and completely performed and carried into effect all the acts complained of by the petitioner.

In view of these pronouncements and other legal authorities, we take the position that petitioner should have resorted to other remedies as pointed out in this opinion, which would have been most appropriate, plain, speedy and adequate than to wait until judgment of the lower court had completely been enforced and then submitted an application for a wit of prohibition. Any act now taken by this Court would in our view be ineffectual. The ruling of the Chambers Justice should therefore be and the same is reversed and the prohibition denied.

The Clerk of this Court is hereby ordered to send a mandate to the court below informing it as to the effect of this judgment. The ruling of the Chambers Justice is hereby reversed and the peremptory writ of prohibition is denied with costs against petitioner. And it is hereby so ordered.

MR. CHIEF JUSTICE GBALAZEH *dissents.*

I have refrained from appending my signature to the majority opinion in this case because I am convinced that the said majority judgment was arrived at by misinterpretation of the controlling laws regarding the writ of prohibition as are applicable to the facts and circumstances of this case. I also believe that this is a deliberate attempt on the part of the majority to close its eyes to the truth. However, here are the hard facts culled from the trial records and certified to this Court under seal for study and evaluation in accordance with the due process of law and the practice in this jurisdiction.

On the 1st day of January, 1987, the co-respondent, Birahin Diagne and the petitioner, Liberia Fisheries Incorporated, executed a sub-lease agreement pursuant to which Co-respondent Diagne sublet and demised to petitioner a building located on Jamaica Road, Monrovia, Liberia. The Liberia Fisheries was organized under Liberian law on the 23 rd day of August 1983, by Jamil S. Mohammed, Roger J. Maklouf, Dr. Aref Kasas, Ali Thorlu Banguara, Sanussi S. Dean and Patrick A. Sheriff, with Jamil S. Mohammed as the majority shareholder. On the 14th day of September, 1987, petitioner's Articles of Incorporation were revoked by the Government of the Republic of Liberia through the Ministry of Foreign Affairs. The Ministry of Commerce, Industry and Transportation also revoked the business registration certificate of the petitioner. The reasons given for the revocation are: that petitioner violated the *Liberian Maritime Law* by discharging crew on the high seas and by abandoning other crew members in the Republic of Sierra Leone. The majority shareholders, Jamil S. Mohammed, who owned 57.5% of the total shares of petitioner, was found to have misrepresented his identity, in that the said Jamil S. Mohammed was in fact Jamil Said, a Sierra Leone National allegedly involved in subversive activities against the Government and sovereign People of the Republic of Sierra Leone.

Thereafter, the co-respondent wrote informing the petitioner of his intentions to re-possess and re-enter the demised premises, on grounds that the Articles of Incorporation of the petitioner had been revoked and its certificate of business registration withdrawn. Therefore, he said, he could not do business with a nonexisting entity. Moreover, the co-respondent's request was base on the fact that petitioner had defaulted on the terms, condition and covenants of the sublease agreement by failing to pay taxes and utility bills on the demised premises.

When the co-respondent did not hear from the petitioner, he filed a petition for the cancellation of the said sublease agreement on December 4, 1987. No answer was filed by the petitioner. Neither did the petitioner appear in court on the 11th day of January1988, when the said case was called for hearing. Under the pretext that a writ of summons was earlier served on the petitioner, and because of the alleged failure of the petitioner to appear in court on the 11th day of January, 1988, a judgment by default was entered in favor of Co-respondent Diagne. Three days after the rendition of the said default judgment, that is, on the 14th day of January, 1988, the co-respondent was placed in possession of the premises and the properties — trucks, cars, offices, equipment, etc. — contained thereon were sold at a public auction held for the purpose of recovering the costs of court and the $ 11 ,5 7 9 . 8 0 damages claimed by the co-respondent and awarded by court. That amount consisted of overdue and unpaid taxes, utility (light and water) bills plus interest.

As a result of the foregoing acts, the petitioner fled to the Chambers Justice for a writ of prohibition for the following reasons, to wit:

"That the writ of summons was never served on Roger Maklouf, appellee's (petitioner's) managing director or any other director of appellee and that the judgment had been entered against appellee cancelling the sublease agreement and awarding $11,579.80 to Co-Appellant Diagne. Appellee contends further that it never had its day in court and the judgment is invalid and void *ab initio* because the court never acquired jurisdiction over appellee. That the award of $11,579.80 plus interest is void in that damages cannot legally be awarded in cancellation proceeding. Appellee maintained that the repossession of the demised premises by Appellant Diagne upon the orders of the judge is also void because the petition for cancellation of a sub-lease agreement is not a possessory action to warrant the issuance and service of the writ of possession.

Upon receiving the petition for an alternative writ of prohibition on January 20, 1988, the Chambers Justice ordered the co-respondent judge to stay all further proceedings below in the case pending a conference with the parties. But to the contrary, this order was refused by the co-respondent judge as he proceeded to enforce the judgment against petitioner. As a result of the refusal, the petitioner herein filed a four-count bill of information informing the Chambers Justice in essence that the sheriff of said court has disposed of petitioner's assets

by means of a so-called public auction on January 14, 1988, without first allowing for the statutory period of ten (10) days notice; and therefore, the said public auction conducted by the sheriff was contrary to statute.

Based upon the said information, on the 21st day of January, 1988, the Chambers Justice again sent another stay order with further instructions that the parties to the cancellation proceeding be restored to the *status quo ante,* pending the hearing of the petition. This order was also ignored by the co-respondent judge, His Honour Hall W. Radio, Sr.

When the case was called for hearing before the Chambers Justice, both parties argued strongly maintaining their respective positions in the petition, returns, motion to dismiss and its resistance. From the contentions of the parties, the Chambers Justice ruled thus:

"That the petition for the writ of prohibition being sound in law, the same is hereby granted and the peremptory writ ordered issued. The Civil Law Court of the Sixth Judicial Circuit, Montserrado County not having acquired jurisdiction over the petitioner in the cancellation proceeding, the final judgment rendered in the said cancellation proceeding is hereby declared a legal nullity and ordered vacated and the parties in these proceedings are hereby restored to *status quo ante."*

To this ruling, exceptions were noted and appeal announced to the Full Bench of this Court sitting in its October Term, A.D. 1988.

From the study of the contentions of the parties, I have the following issues which have claimed my attention, and they are:

1. Did the trial judge, His Honour Hall W. Radio, Sr., on the 11th day of January A. D. 1988, acquire jurisdiction over the petitioner herein, respondent in the cancellation proceeding?

2. Whether or not prohibition will lie when it can be shown that the trial judge proceeded by wrong rules to arrive at a judicial conclusion?

3. Whether or not after the purported final judgment on the said 11th day of January, A. D. 1988, there was anything statutorily left to be done by the court to bring the matter to a judicious conclusion?

In an attempt to address myself to the burning issues raised herein and to state my reasons for disagreeing with the majority opinion, I shall commence with the first issue which reads: Did the trial judge, His Honour Hall W. Badio, Sr., on the 11th day of January A. D. 1988, acquire jurisdiction over the petitioner herein, respondent in the cancellation proceedings? The answer is a big NO.

The Civil Procedure Law, Rev. Code 1: 3.3, provides as follows:

"After proper service of summons a court may exercise personal jurisdiction over a person in the following actions: (a) to annul a marriage or for divorce, if the marital status is subject to adjudication in Liberian courts; (b) affecting the possession of, interest in, or title to, real or personal property within Liberia..."

Moreover, this Court held in the case *Williams v. Horton and Bull,* 13 LI,R 444 (1960) that: "It is mandatory that a defendant be given notice of the nature of the action." In spite of the statutory provision and the case law quoted *supra,* the records in the instant case showed that no summons was served on the petitioner, as respondent in the trial court. This means that the petitioner was never given notice or legally brought under the jurisdiction of the trial court as required by the statute. Therefore, whatever judgment was entered against the said defendant is a legal nullity, and void.

In further looking at the issue of personal jurisdiction, we find in the Civil Procedure Law, Rev. Code 1: 3.42, the following provision: "The person serving the process personally shall make returns as to service thereof to the court promptly and in any event within the time during which the person served must appear..." From a careful perusal of the entire records in the case at bar, there are no returns to the writ of summons by the sheriff who allegedly served the summons on the petitioner. Notwithstanding, a judgment by default was rendered against the petitioner. As a result of the repeated disregard of known law, as stated *supra,* I am constrained to disagree with the majority; particularly when my learned colleagues completely ignored the gross violations of our statutes by the trial court and maintained that prohibition will not lie merely because, in their view, the petition for the writ of prohibition was filed late. I maintain that such a void judgment should not be confirmed.

Concerning issue number two, i.e., whether or not prohibition will lie when it can be shown that the trial judge proceeded by wrong rules, and in my judicial opinion, I believe that prohibition will certainly lie because this Court, being a court of precedents, has held in several earlier opinions that:

"A writ of prohibition is the proper remedial process to restrain an inferior court from taking action in a case beyond its jurisdiction; or having jurisdiction i he court has attempted to proceed by rules different from those which ought to be observed at all times." *Parker v. Worrell,* 2 LLR 525 (1925).

This Court has also said:

"A writ of prohibition not only prevents whatever remains to be done by the court against which the writ is directed, but gives complete relief by undoing what has been done." *Fazzah Brothers v. Collins and Central Industries, Ltd, 10* LLR 261 (1950).

This Court has further said:

"The writ of prohibition is designed to prevent what remains to be done as well as undo what has illegally been done." *Ayad v. Dennis et al.,* 23 LLR165 (1974).

This Court has held additionally 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." *Boye v. Nelson et al.,* 27 LLR 174 (1978).

In the instant case, there is no evidence that the petitioner was ever brought under the jurisdiction of the trial court. Yet, the trial court judge disobeyed the orders of the Chambers Justice outrightly and proceeded to enforce the void judgment against petitioner. Furthermore, a review of the records showed that the application for default judgment was made on the 1 1 day of January A. D. 1988, when the summons was allegedly issued, and that the judgment was rendered on that day despite the fact that the case was not an ejectment action. The trial judge nevertheless proceeded to cancel the sublease contract and at the same time put the co-respondent in possession of the subleased property. I have on the basis of the foregoing concluded that the issue of property is involved and that therefore the trial judge ought to have observed the constitutional provision which guarantees to each citizen the right to the acquisition, protection and defense of property. Additionally, the trial judge should have taken note of the earlier holding of this Court which stated that:

"Where a defendant in an action of ejectment is returned summoned, but failed or refused to appear, the plaintiff is not thereby, as in other cases immediately entitled to judgment by default. The statutes also provide that there shall be placed upon the property, the subject of the action, copies of the summons and re-summons as further assurance that the defendant or defendants will have due notice of the pending case." *Karnga v. Williams et al.,* 10 LLR 114 (1949).

Furthermore, the Civil Procedure Law, Rev. Code 1: 42.6, clearly states that "On an application for judgment by default, the applicant shall file proof of service of the summons and complaint..."

Contrary to those precedents and statutes, there is no showing in the records before us that the applicant for default judgment herein had shown the proof of service, or that the trial judge observe all the necessary steps in order to grant petitioner sufficient time to protect and defend its interest, which act is contrary to established rules and the statutes of this Republic. Another point which has forced me not to append my signature to the majority opinion is the fact that the default judgment was rendered on the 11th day of January, A. D. 1988, and the so-called public auction was carried out on the 14thday of January, A. D. 1988, three (3) days after the rendition of the default judgment. The so-called public auction was conducted in clear violation or the statute controlling auction. The statute provides: "A

printed notice of the time and place of the sale shall be posted at least ten (10) days before the sale in three (3) public places in the town or city in which the sale is to be held..." Civil Procedure Law, Rev. Code 1: 2.37.

Even more serious is that the records do not show that there was any bill of costs issued, taxed, served and returns made thereto. How then did the court reach the conclusion that the judgment debtor was unable to satisfy the judgment? Moreover, who identified the petitioner's properties that were sold at public auction? The records further show that the judgment sought to be satisfied by means of the purported public auction carried out was $11,537.80. The proceeds from the so-called public auction was about $14,000.00. There is nowhere in the entire records where it has been shown that the trial court proceeded in keeping with the Civil Procedure Law, Rev. Code 1: 44.44, which provides that:

"After deduction and payment of fees and expenses, the sheriff making a sale pursuant to an execution or order shall distribute the proceeds *pro rata*to the judgment creditors who have delivered executions against the judgment debtor to the sheriff before the sale, which executions have not been returned... *Any excess shall be paid over to the judgment debtor."* (Emphasis mine).

The question now is, where is the excess of about $2,420.20? Has it been paid over to the judgment debtor or is it still in the possession of the court? Again, from a careful perusal of the entire records, there is no bill of costs and there is no evidence of a writ of execution ever being issued, served and returned served by the ministerial officer who allegedly carried out the execution. In the absence of all of these documentary evidences, the majority still maintained that there is nothing left to be done by the lower court, and that therefore prohibition will not lie. Given the foregoing irregularities I do not see myself under any condition agreeing with the majority, and I strongly maintain that there are still a whole lot of things which remain to be done.

Consequently, because of these violations of known rules and laws mentioned *supra,* I have further declined to agree with the majority, but especially in view of the following earlier holding of this Court:

"Though generally a writ of prohibition will only issue before judgment to stay proceedings, the rule needs not apply where judgment has been taken by default or jurisdiction is lacking upon the face of the record. "A writ of prohibition will issue in an ejectment action where judgment has been taken by default, when the defendant has not been properly served in the action and jurisdiction over him, was consequently lacking in the lower court." *Koroma et al. v. Parker Paint Company Inc.,* 23 LLR 133 (1974).

This Court also held in the case *Dweh v. Findley et al.,* 15 LLR 638 (1964), 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 an act adversely affects the rights of the petitioning party. Although prohibition is usually used as a remedy where tribunal has unwarrantedly assumed or exceeded its jurisdiction, it will also lie where a tribunal has proceeded by rules contrary to, or different from those which regularly obtain in the disposition of such cases." Further to the case at bar, it is clear and convincing that the trial judge did not observe any of the regular rules that ought to have been observed. Admittedly, the records showed that the petitioner was never statutorily brought under the jurisdiction of the court. Therefore, I am of the considered opinion that prohibition will lie to undo that which has already been done illegally.

Even though the majority has argued and maintained that prohibition will not lie because the petitioner waited until all the necessary steps were completed, and therefore nothing was left to be done which could have been prohibited, I opine that the late making of the application for prohibition is not a sufficient ground for us to close our eyes to these glaring violations of the established rules and precedents set by this Court, as by so doing we will certainly be creating a judicial waterloo where, in spite of all irregularities, people will cling to one technical point and thereby convince us to dismiss an entire action.

The next issue which has constrained me from appending my signature to the majority opinion is the attitude adopted by the majority to completely ignore the behavior of His Honour Hall W. Badio, Sr., the trial judge. The records reveal that the trial judge was ordered on two occasions not to enforce the judgment and to stop all further proceedings into the case at bar, but despite these mandates, the said trial judge refused and proceeded. Yet, the majority is saying that the trial judge should go unpunished in spite of the gross insubordination shown to the Chambers Justice. What a paradox! This Court is under the constitutional duty to "make rules of courts for the purpose of regulating the practice, procedures and manner by which cases shall be commenced and heard before it and all other subordinate courts..." Referring to Article 75 of the 1986 Constitution of Liberia, in spelling out the duties and responsibilities of judges, this Court, in another case, held:

"The judge of a court is not merely an officer, but he is also elevated to a dignity. As such, he is dedicated and consecrated to the adjudication of the rights of litigants, and hence, must avoid any course of conduct which could cause his impartiality to be questioned."

Moreover, this Court has in like manner held that:

"Trial judges should follow strictly both in the spirit as well as in the letter all opinions given by this Court as one of the most potent means of unifying the practice." *Richards v. McGill and McGill-Hilton,* 6 LLR 81 (1937).

These basic duties and responsibilities having been violated, I insist and maintain that the said Judge Badio should not go unpunished. Furthermore, I maintain that if we encourage

such attitude from judges of inferior courts, we would help expose the dignity, authority and respect of this Honourable Court to public ridicule.

Another salient and most important issue which the majority completely ignored is the failure of the petitioner, as lessee, to pay utility bills and government taxes being used as grounds for the institution of cancellation proceeding against the petitioner corporation. According to Article 11 of the sublease agreement, "the parties hereto agree that upon default by the sub-lessee in the payment of the rent, the sub-lessor shall have the right to re-enter and repossess said premises..."

The sub-lessor would have only had a cause of action against the defendant provided the said defendant had defaulted in the payment of his rent, and not for utility bills and government taxes.

The only legal entities which had a cause of action against the petitioner were the Government of Liberia for taxes; the Liberia Electricity Corporation for light bills; and the Liberia Water and Sewer Corporation for water and sewer bills. The sub-lessor had no such similar authority, because the sub-lessee had paid and honored his rental obligations on the 9th day of January, 1987, as per the sublease agreement.

Moreover, it has been commonly held that one who goes to equity must go with clean hands. Contrary to this, prior to the expiration of the period paid for by the sub-lessee, the sub-lessor instituted cancellation proceeding against the sub-lessee in order to re-enter and re-possess the said leased premises; while at the same time the advance rental paid by the sub-lessee was still in the possession of the sub-lessor. The trial judge, without taking judicial notice of the holdings in the case *Ware v. Republic,* 5 LLR 50 (1935), proceeded to grant the cancellation and to allow the sub-lessor to reenter and repossess the leased premises.

Because of the foregoing facts and circumstances, I am in total disagreement with the majority and have therefore filed this dissent, maintaining that the ruling of the Chambers Justice should have been affirmed with the modification that the case commences anew with the service of the writ of summons.