THE SALEEBY BROTHERS, by and thru KAMAL E. SALEEBY, Petitioners/Appellees, v. **HIS HONOUR C. ALEXANDER ZOE**, Assigned Judge, June Term, A. D. 1992, Civil Law Court, Sixth Judicial Circuit, Montserrado County, **RACHID KHALIFA**, by and thru OUSSAMA FOUAD KHALIFA, et al., Respondents/Appellants.

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

Heard: November 9, 1992. Decided: February 26, 1993.

1. A final judgment is one which disposes of the case either by dismissing it before a hearing is had upon its merits, or after trial by rendering judgment either in favor of the plaintiff or defendant. An interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question or default arising in the course of a proceeding of a cause but does not adjudicate the ultimate rights of the parties.

2. Every person against whom any 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.

3. An appeal taken from an interlocutory judgment and before the rendition of final judgment cannot under our statute be entertained by the Supreme Court.

4. The Supreme Court will not entertain an appeal from an interlocutory order of a trial court granting a motion after a jury verdict.

5. It is illegal for a court, in connection with an order that is not appealable, to order the curator to maintain the estate in *status quo*.

6. 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.

7. The writ of prohibition will not be granted where the trial court has neither exceeded its jurisdiction nor proceeded by wrong rule.

8. The writ of prohibition is a process which does not concern itself with, or can it

give or interfere with irregularities and errors committed in the trial of cases. This is the function of appeal, or writs of error, and of certiorari, but not of this high prerogative writ; for it busies itself with preventing inferior courts or tribunals from assuming jurisdiction which is not legally vested in them, and it is a purely negative and not an affirmative remedy.

9. Mere error, irregularities, or mistake in the proceedings of a court having jurisdiction does not justify a resort to the extraordinary remedy by prohibition, both because there has been no usurpation or abuse of power, and because there exist other adequate remedies. Whatever power is conferred may be exercised, and , if exercised injudiciously or irregularly, it amounts to an error merely, and not to a usurpation or excess of jurisdiction.

10. If a court is entitled to exercise a discretion in the matter before it, a writ of prohibition cannot control such exercise or prevent it being made in any way within the jurisdiction of the court. It does not affect the jurisdiction that the error or irregularity is palpable or gross. It is nevertheless merely error and not usurpation of power.

11. Although it may sometimes seem like usurpation when the court permits or authorizes some act in the course of a proceeding which is clearly and manifestly erroneous, all such acts amounts to an erroneous exercise of jurisdiction, and not in excess of it, as the term "excess" is understood or applied by both courts and lawyers. Hence the erroneous decision of a jurisdictional question is not ground for issuing a writ of prohibition, since there is an adequate remedy by appeal whether such error are merely apprehended or actually committed.

12. Prohibition will not lie to restrain a trial judge from proceeding with a trial because of an interlocutory ruling. The proper course is to except to the ruling and save such exception for a regular appeal.

13. At any time before trial, any party may, insofar it does not unreasonably delay trial, once amend any pleading made by him by withdrawing such pleading, pay all costs incurred by the opposing party in filing and serving pleadings subsequent to the withdrawing pleading, and substituting the amended pleading.

14. There shall be an answer or reply to an amended pleading if an answer or reply is required to the pleading being made. Service of such an answer or reply shall be made within the time remaining for response to the original pleading or within ten days

after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

15. If an amendment is made in a pleading after the service of a responsive pleading, an amendment may be made within ten days to the responsive pleading if such amendment is necessitated by a new matter added to the opposing pleading, and such amendment to the responsive pleading shall not affect the right of the party making it to make another amendment.

16. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment is deemed to have been interposed at the time the claims in the original pleading were interposed.

17. A plaintiff may withdraw and amend his complaint at any time before trial in accordance with section 9.10(1) and the answer to that complaint, if already filed, may also be withdrawn and amended by the defendant within ten days after the amendment of the complaint.

18. The cases *Singbe v. Powell,* March 1983, *Sheriff v. Carew,* March 1985 and *Citibank v. York* March 1988, are hereby recalled in so far as they are in contradiction to the statutes on amendment of pleading and interlocutory judgment.

The gravamen of this appeal is that the appellants, as plaintiffs in the trial court, instituted an action of ejectment against the appellees, defendants in the trial court. In response to the complaint, appellees filed an answer simultaneously with a motion to dismiss. Following a hearing, the motion was denied. Appellees excepted to the ruling and announced an appeal, which again was denied by the trial judge on the grounds that the ruling was interlocutory and, hence, not appealable. Subsequently, the appellees filed a motion requesting the trial judge to rescind his ruling on the motion to dismiss. The motion was heard and denied. Consequently, the appellees petitioned the Chambers Justice for a writ of prohibition to restrain the trial judge from proceeding with the trial, contending that the ruling of the trial judge was not interlocutory. The Chambers Justice granted the writ but the Supreme Court reversed the decision of the Chambers Justice granting the writ, holding that the ruling of the trial judge was interlocutory and hence not appealable. The Court further held that a writ of prohibition will not lie to restrain a judge from proceeding with a trial because of an interlocutory ruling where it is not shown that he proceeded by the wrong rules or exceeded his jurisdiction. The petition was therefore *denied.*

Toye C. Barnard appeared for appellants. *Roger K Martin* appeared for appellees.

MR. JUSTICE HNE delivered the opinion of the Court.

The appellants, as plaintiffs, instituted an ejectment suit against the appellees as defendants in the Civil Law Court for the, Sixth Judicial Circuit. Both parties are lessees of the same lessor, Rachel MacMillian, and later, her Estate after her demise.

Each claims superior leasehold title to the other. The late Rachel MacMillian is claimed to have repudiated and renounced the appellants' lease. In response to the complaint, the appellees, as defendants then, filed an answer and a motion to dismiss the action. After hearing, the trial judge denied the motion. Appellees, then defendants, announced an appeal from the trial judge's ruling denying the motion to dismiss. The trial judge denied the appeal on grounds that the said ruling was interlocutory and, therefore, not appealable. The defendants, now appellees, filed a motion to rescind requesting the trial judge to rescind his ruling and motion to dismiss. This latter motion the trial judge also denied and ruled the case to trial on the law issues. The appellees thereupon filed a petition for a writ of prohibition against the trial judge. The Chambers Justice, Mr. Justice Morris, granted the alternative writ of prohibition.

In the petition for a writ of prohibition, the petitioners, now appellees laid the grounds advanced by them for the writ prayed for in six (6) counts. For purposes of the prohibition, it is our view that two of these counts, that is, counts 5 and 6, merit consideration for the granting or denial of the writ of prohibition. The said counts are as follows:

5. That the motion to dismiss was heard and denied by respondent Judge C. Alexander Zoe; whereupon exceptions were registered by petitioners herein and appeal announced in keeping with the law enunciated by the Honourable Supreme Court of Liberia in the cases *Sheriff v. Carew,* decided October Term, A. D. 1986, in which this Court, sitting en banc, opined that certiorari was the wrong relief following the denial of a motion to dismiss an action; but that the correct relief for a party to avail himself with is appeal. This opinion was confirmed and re-affirmed in the case *Citibank, N. A. v. York,* 35 LLR 101 (1988), decided at the March Term, A. D. 1988. In that case, an appeal was granted and the motion to dismiss was also granted, which the lower court ought to have done. In taking the action, the Supreme Court thereby conclusively held that where a motion to dismiss an action is denied, such ruling

denying the motion is not interlocutory; (Emphasis Ours). Despite those opinions of the Supreme Court of Liberia, cited and brought to the attention of the respondent judge, he still denied petitioners' appeal, thereby attempting to review the Supreme Court of Liberia; what arrogant and contemptuous act and attitude on the part of a subordinate judge; to which second ruling, petitioners again excepted and gave notice that they will take advantage of the statute provided for such circumstances. See copy PE/5 to also form part of this petition.

6. Petitioners submit that they and their counsel sincerely and honestly believed that the ruling of respondent judge denying the motion to dismiss and also denying the appeal announced might have been due to inadvertence or perhaps to lack of being abreast of the new interpretations of the law by the Honourable Supreme Court of Liberia. Hence, the filing by petitioners, of a motion to rescind the said ruling of June 23, 1992, so as to avoid fleeing in these Chambers. But that the respondent judge instead of assigning the motion to rescind to be heard first, he has assigned to be heard on the same day different proceedings, namely, the motion to rescind, the motion to intervene and the disposition of law issues on the case. This attitude and conduct of the respondent judge only leads to a reasonable mind to one conclusion and that is, Judge C. Alexander Zoe has already determined not to rescind his illegal and contemptuous ruling of June 23, 1992, and is bent at all cost to entertain and sustain the illegal action of ejectment to the detriment of petitioners herein, by insisting on hearing the said illegal action of ejectment and by adamantly refusing to follow up on the laws that we hereto annexed and marked PE/6 to also form a part of this petition for your Honour's perusal".

The respondents, filed a returns containing eleven (11) counts, four of which we deem to be germane to these prohibition proceedings. The said counts are 4, 6, 7 and 11 which are recited hereunder as follows:

"4. And also because as to count three of the petition, respondents say that the allegations contained herein are the same facts and contentions contained in petitioners' motion to dismiss co-respondents' complaint, petitioners answer as well as in petitioners' motion to rescind. The trial court having passed upon petitioners' motion to dismiss and the motion to rescind, the petitioners should have noted their exceptions and save same for appeal should the necessity arise for the petitioners to go on appeal. The petitioners should not have proceeded by prohibition since prohibition will not lie in such cases. A copy of the co-respondent judge's ruling on the motion to dismiss is hereto attached and marked Exhibit "A" to form a part of this returns.

6. And also because as to count five of the petition, respondents say that the ruling of the co-respondent judge on the motion to dismiss and the motion to rescind are interlocutory and therefore under the law an appeal cannot be taken to the Supreme Court since an interlocutory ruling does not bring a finality to the case. The case *Sheriff v. Carew* cited by the petitioners as a Supreme Court Opinion decided during the October Term, A.D. 1984 does not exist. The closest case is the case *Sheriff v. The Intestate Estate of Senesee Carew* which is found in the opinion of the Supreme Court October Term, A. D. 1986 and is a judgment without opinion. Also the case *Citibank, v. York,* cited by the petitioners decided during the March Term, A.D. 1988 is not analogous to the ejectment case in the court below. The issue of taking an appeal from an interlocutory judgment was never raised in the Citibank case cited by the petitioners. The only issue mentioned by the court in that case is "whether the withdrawal of respondents/appellees' complaint and the subsequent filing of their amended complaint were timely." The petitioners have therefore misled this Honourable Court by citing irrelevant cases in support of their position. The law is clear on the point of interlocutory ruling that an appeal taken from an interlocutory ruling before the rendition of a final judgment cannot be entertained by the appellate court.

7. And also because as to count six of the petition, respondent say that the judge's denial of petitioners' appeal from his ruling on the motion to dismiss and the motion to rescind is legally sound and is not an inadvertence. The judge's ruling is supported by law and the long standing opinions of this Honourable Court".

11. And also because as to the prayer of the petition, respondents say that the petitioners have only prayed for the issuance of the writ of prohibition but have not stated the purpose for which the writ must be issued other than to have it served upon the respondents. They have not asked for any relief."

The Chambers Justice heard the petition and the returns, after which he entered a ruling on the 26th day of August, 1992 in which he granted the petition for prohibition.

The appellants appealed from the said ruling of the Chambers Justice and have come before us for the final determination of the prohibition proceedings.

In their brief and argument before us, the appellants urged before us:

1. That the denial by the judge of the motion to dismiss the action and of the motion to rescind is not a legal ground for the issuance of the writ of prohibition.

2. That the ruling denying the motion to dismiss and the motion to rescind are interlocutory rulings and not a final judgment; that an appeal cannot be taken from an interlocutory ruling; and so the appellees should have noted their exceptions to these rulings and proceeded with the disposition of the law issues.

The appellees, on the other hand, essentially submit in their brief and argument that: "In the case *Larmine v. Banks and Carew,* 33 LLR 3 (1985), March Term, A. D. 1985, this Court, while passing on the issue of whether or not a ruling which denies a motion to dismiss a cause of action is an interlocutory one, held that a ruling on a motion to dismiss an action was a final ruling per se, and not interlocutory ruling. This Court further held that the course open to the movant, upon the denial of his motion to dismiss was an appeal since the same right is available to respondents in the event the motion is granted and the action dismissed. This decision was confirmed in the case *Citibank1V.A. v. York et al.,* 35 LLR 101 (1988), March Term, A. D. 1988, in which an appeal from a ruling denying movant's motion to dismiss the action was upheld by this Honourable Court and upon the hearing of the appeal, same was granted and the action dismissed by this Honourable Court on the strength of said motion. In the *Larmie* case, the certiorari proceedings was dismissed on the ground that same was not the proper relief to pursue upon the denial of a motion to dismiss the action. It follows therefore that Judge C. Alexander Zoe exceeded his jurisdiction and proceeded by wrong rule when he denied the appeal announced by appellees herein, following the denial and dismissal of the motion to dismiss the illegal action of ejectment as stated supra". Second paragraph, page four (4) of appellees' brief.

The issues really before us, therefore, are:

1. Whether the rulings denying the motion to dismiss and to rescind, being interlocutory, can be appealed from.

2. Whether prohibition will lie to restrain a trial judge from proceeding with the trial of a case because of an interlocutory ruling.

In the case *Halaby v. Farhat,* Mr. Chief Justice Grimes, speaking for the Court, sets forth the distinction between an interlocutory and final judgment as follows:

"Confining ourselves first of all to the points advanced in the motion to dismiss, "The difference between an interlocutory and a final judgment has been very clearly set out in all the textbooks on the subject and as taken from Cyclopedia of Law and procedure, may be defined as follows:

A final judgment is one which disposes of the case either by dismissing it before a hearing is had upon its merits, or after trial by rendering judgment either in favor of plaintiff, or defendant. An interlocutory or subordinate point or plea, settles some step, question or default arising in the progress of a cause but does not adjudicate the ultimate rights of the parties. 23 Cyclopedia of Law and Procedure, *Judgments,* ∫ 9, at 672 (1906)." *Halaby v. Farhat,*7 LLR 124 (1940), text at 125.

From the above definition, the rulings denying the motion to dismiss and the motion to rescind clearly determines "preliminary or subordinate point or plea" and "some step, question or default arising in the progress of a cause, but does not adjudicate the ultimate rights of the parties". The rulings are therefore interlocutory.

Under our statute, it is provided that: "Every person against whom any 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, *Judgments Subject to Review.*

In the *case Minus v. Crayton,* this Court held:

"An appeal taken from an interlocutory judgment and before the rendition of final judgment cannot, under the statute, be entertained by the Appellate Court." 1 LLR 73 (1874), Syl. 1.

Elaborating further on the point, the Court said:

> "That no appeal lies from a court of inferior jurisdiction to the Supreme Court until after final judgment has been given. On examination of the record and proceedings in this case, which were excepted to by the appellant, it appears conclusively that the bill of exceptions upon which this appeal was brought was taken before the rendition of final judgment by the Court below, which is contrary to the statute laws of the Republic governing appeals. In this, the appellant is guilty of miscontinuance". *Minus v. Crayton, Id.,* at 74, (1874).

Also, in the *case Ketter v. Dennis,* this Court said: "The Supreme Court will not entertain an appeal from an interlocutory order of a lower court granting a new trial after a jury verdict." 12 LLR 353 (1956).

Further, in the *case Robertson v. Morgan,* 9 LLR 71 (1945), Mr. Justice Shannon, speaking for the Court, opined:

"It was improper for a Court, in connection with an order that is not appealable, to order the curator to maintain the estate in status quo". The Court expanded further on its reasoning, as follows:: "The ruling made by the judge on the claims of Edwin A. Morgan for himself and for Alford C. Ruse seems to us to be interlocutory in character and one from which no appeal could lie. What seems to us to be peculiarly strange and unintelligible is the subsequent ruling given by the said judge in the absence of a notice of appeal or of the record of some incident to have accounted for said subsequent ruling. When this fact was brought to the notice of the counsel for appellee during argument, the only thing said counsel could offer was a suggestion that possibly the subsequent ruling of the court was the result of threatening remarks from certain of the objectors, now appellants, who were in court when the ruling on the legal phase of the claims was made and entered.

Under these circumstances, we are left with no alternative but to conclude that the appellants were actually forced by virtue of said subsequent ruling or order to take an appeal, and the intention of the trial judge in this regard is conclusively gathered from the fact of his acceptance and approval of a bill of exceptions when in deed and in truth the record fails to show that a notice of appeal was given and entered. The court refrains from accepting certain unfair imputations and impressions that were sought to be given in the matter, but simply warns judges of the lower courts in the conduct of cases before them to so conduct themselves, that there will be no room for such unfair imputations and impressions which would carry semblance of merit and truth.

It does not at all appear to us that appellants would have elected to bring this matter to this Court on appeal had the trial judge not created the impasse described supra. Obviously appellants would have gone to the merits of the case, in view of the facts involved, because, upon a careful study of the principles of law involved as presented by the parties and in the ruling of the trial judge, there is hardly any difference between the contention of the objectors, now appellants, and the opinion of the said judge". *Robertson v. Morgan,* 9 LLR 71, 75-76 (1945).

Our statute clearly provides the mechanism for the review of an interlocutory ruling. The Civil Procedure Law, Rev. Code 1:16.21, states:

"1. *Certiorari.* 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".

From the foregoing citations, it is well established in our legal system that an appeal cannot be taken from an interlocutory ruling.

In a long line of cases, this Court has consistently held that the writ of prohibition will not be granted where the lower court neither exceeded its jurisdiction nor proceeded by the wrong rule.

In *Fazzah v. National Economy Committee,* reported in 8 LLR 85, 89 (1943), Mr. Justice Tubman, speaking for the Court, said:

"The writ of prohibition is a process which does not concern itself with, nor can it give or interfere with irregularities and errors committed in the trials of cases. This is the function of appeals, or writs of error, and of certiorari, but not of this high prerogative writ; for it busies itself with preventing inferior courts or tribunals from assuming jurisdiction which is not legally vested in them, and it is a purely negative and not an affirmative remedy".

In support of his position, Mr. Justice Tubman quoted from 22 R.C.L., *Prohibition,* section 22, as follows:

`It is well established that a writ of prohibition may not ordinarily be used as a process for the review and correction of errors committed by inferior tribunals. Mere error, irregularity, or mistake in the proceedings of a court having jurisdiction does not justify a resort to the extraordinary remedy by prohibition, both because there has been no usurpation or abuse of power, and because there exist other adequate remedies. Whatever power is conferred may be exercised, and if it be exercised injudiciously or irregularly, it amounts to an error merely, and not to a usurpation or excess of jurisdiction. *A fortiori,* if a court is entitled to exercise a discretion in the matter before it, a writ of prohibition cannot control such exercise or prevent it from being made in any manner within the jurisdiction of the court. And it does not affect the jurisdiction that the . error or irregularity is palpable or

gross. It is nevertheless merely error and not usurpation of power.'

It may sometimes seem like usurpation when a court permits or authorizes some act in the course of a proceeding which is clearly and manifestly erroneous, but all such acts amount only to an erroneous exercise of jurisdiction, and not to an excess of it, as the term "excess" is understood and applied by both courts and lawyers. Even the erroneous decision of a jurisdictional question is not ground for issuing a writ of prohibition, if the court has jurisdiction, since there is an adequate remedy by appeal". 22 R. C. L., *Prohibition,* § 22 (1918)". *Id.,* at 89-90.

The Justice further buttress the view with the following additional quotations:

"If the inferior court or tribunal has jurisdiction of both the subject matter and of the person, prohibition will not lie to correct errors of law or fact, for which there is an adequate remedy by appeal or otherwise, whether such errors were merely apprehended or have been actually committed. 32 Cyc., *Prohibition,* 617 *(1909)."Fazzah v. National Economy Committee,* 8 LLR 85, 89 (1943).

This views find further support in the more recent case of *Lamco v. Flomo,* 27 LLR 52, 58, 59 (1978).

There is absent any showing by the appellees that the trial judge exceeded his jurisdiction. Surely, the trial judge did not proceed wrongly by denying appellees' appeal from the rulings denying the motion to dismiss and the motion to rescind since as we have stated above, the said rulings are interlocutory. Prohibition will not lie therefore to restrain a trial judge from proceeding with a trial because of an interlocutory ruling. The proper course would be to except to the ruling and save such exception for regular appeal.

The appellees support their position with the following cases:

(1) *Larmie v. Banks and Carew,* 33 LLR 3 (1985), (Certiorari) decided March Term, A. D. 1985 (and not 1984 as cited by the appellees); (2) *Citibank v. York,* 35 LLR 101 (1988), decided March Term, 1988, which relied on the case *Singbe v. Powell,* 31 LLR 141 (1983), decided March Term, 1983. It is necessary to look at these cases to see if they are correctly relied on and to determine if they represent any contribution to our judicial system.

In *Larmie v. Banks and Carew,* 33 LLR 3 (1985), Mr. Chief Justice Gbalazeh,

speaking for the Court, said:

"Coming to the first issue as to whether the ruling denying the motion to dismiss was interlocutory, it is imperative that we first enquire as to the object of that motion in the first place, or rather what did said motion seek to achieve if granted? Appellant contends and concedes in his brief that a motion to dismiss is a special pleading different from the other pleadings in the main cause of action. To our minds, what the motion sought to achieve if granted was a dismissal of the entire action before the court without further ado. That means at that point the only course left open to appellant was a regular appeal to a higher tribunal. By this fact it becomes clear that the ruling on the motion to dismiss was a final ruling per se, and not an interlocutory ruling which can be reviewed by a remedial writ of certiorari.

On the other hand, since the motion to dismiss was denied, the course open to the movant/appellant was an appeal also. However, in some cases the movant has a choice to either appeal from the ruling denying the motion or he may treat same as an interlocutory ruling by taking exceptions to said ruling and saving the issue for the regular appeal". (Emphasis Ours).

It is not really clear what this opinion is trying to say: Whether the ruling denying the defendant's motion to dismiss is interlocutory or a final judgment. The appellees however appear to place much reliance on that portion which states: "To our minds, what the motion sought to achieve if granted was a dismissal of the entire action before the court without further ado. That means at that point the only course left open to appellant was a regular appeal to a higher tribunal. By this fact it becomes clear that the ruling on the motion to dismiss was a final ruling per se, and not an interlocutory ruling which can be reviewed by a remedial writ of certiorari." This appears to run counter to our statute and case laws on the point in view of the citations and quotations set forth hereinabove in this opinion on amendment of pleadings, in that whilst it is true that any party may withdraw at any time and refile any pleading previously filed by them, it is mandatory that such withdrawal and amendment should be done within the ten days and no more.

In the case *Citibank N. A. v. York,* 35 LLR 101 (1988), decided March Term, 1988, Mr. Justice Belleh, speaking for the Court, said:

"On January 12, 1987, appellees paid accrued costs to Appellant Citibank and withdrew their complaint and also their reply. On the same day, that is to say, on

January 12, 1987, appellees filed an amended complaint with substantially the same averments as the original complaint and praying for the same general damages of $3million.

On January 22, 1987, Appellant Citibank filed an answer to the amended complaint and simultaneously filed a motion to dismiss the amended complaint and the entire suit. Appellees filed a reply and a resistance to appellant's motion to dismiss. The assigned circuit judge of the Civil Law Court for the March Term, A. D. 1987, on April 3, 1987 ruled denying and dismissing the motion to dismiss. Whereupon appellant excepted to the ruling and announced an appeal to this Honourable Court on a four-count bill of exceptions. (Emphasis ours).

We do not attach importance to counts 1, 3, and 4 of the bill of exceptions which relate to some aspects of the ruling of the trial judge to appellant's motion to dismiss as well as appellant's attack on the jurisdiction of the Civil Law Court as it relates to this case.

Count two (2) of the bill of exceptions reads:

2. That Your Honour erred when Your Honour ignored the Supreme Court opinion in *Singbe v. Powell,* action of ejectment, march A. D. 1983 Term, decided July 6, 1983, and overruled movant's contention that the withdrawal and amendment of the complaint and reply were irregular and violative of law and so said amended complaint should be dismissed.

Substantially, the contention of the appellant/movant is that the withdrawal and amendment of the complaint were irregular and violative of law; therefore, said amended complaint and reply together with the entire action of damages should be dismissed.

The issue presented therefore is whether the withdrawal of respondents/appellees' complaint and the subsequent filing of their amended complaint were timely.

The controlling factor in respect to the withdrawal and amendment of pleadings is that whilst it is true that any party may withdraw at any time and refile any pleading previously filed by them, it is mandatory that such withdrawal of an amendment should be done within the ten days period and no more.

In the instant case, the records reveal that the action of damages was filed by

respondent/appellees on December 13, 1986. The records further show that when appellant/ movant was served with the writ of summons together with copy of respondents/appellees' complaint, appellant/ movant Citibank filed its answer along with a motion to dismiss within the statutory period of ten (10) days. We observe further from the record that respondents/appellees filed a motion to strike out appellant/ movant's reply on January 5, 1987, one day after the statutory period of ten (10) days.

Appellant/movant then filed a motion to strike out respondents/appellees' reply for reason that same had been filed without the statutory period of ten (10) days. Respondents/appellees then conceding the soundness of appellant/ movant's motion in law to strike out respondents/appellees' reply, paid accrued cost, withdrew their complaint and reply and filed an amended complaint.

While it is true that it is the right of any party to withdraw and refile in keeping with section 9.10 of the Civil Procedure Law, it is also true that where a party elects to withdraw and the refile an amended pleading after the statutory period of ten (10) days provided for withdrawal and amendment of pleadings, such withdrawal and refiling of amended pleadings must be construed as cross violation of section 9.10 aforesaid. In the case *Singbe v. Powell,* 31 LLR 141 (1983), action of ejectment, March Term, A. D. 1983, this Court held that a party desiring to withdraw and amend a pleading may do so within ten days'. Also, in the case *US.T.C. v. King,* reported in 14 LLR 579 (1961), text at 581-582, this Court held as follows: "Every reply and subsequent pleading including a reply to a cross claim shall be filed and served not later than ten days after service of the pleadings to which it responds unless additional time therefor is granted in accordance with the provisions of section 9.10.

It is our considered opinion therefore that the question of undue delay could possibly apply if, after all the pleadings under the statute had been exhausted, the ten days allowed for filing a responsive pleading to the one last filed had expired. The party intending to amend would claim an extraordinary right, if the period of the time allowed by law had passed or elapsed, in which case the enjoyment of such a right could only be available by leave of Court".

In keeping with the statutory provisions and the opinions of this Court quoted supra, it is our holding that the contention of appellant/movant as contained in count two of the bill of exceptions is well taken for the reason that the respondents/ appellees' withdrawal, amendment as well as the refiling of the amended complaint were in violation of our law; hence same was without statutory time as contemplated by law.

The judgment is hereby reversed and the motion to dismiss the entire action is hereby granted".

This runs in opposite direction with our statutory provision on amendment of pleadings. The statute states:

Section 9.10. *Amended Pleadings:*

"1. 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 by him by:

a. Paying all costs incurred by the opposing party in filing and serving pleadings subsequent to the withdrawn pleadings;

b. Substituting an amended pleading.

2. *Pleadings in Response to Amended Pleadings.* There shall be an answer or reply to an amended pleading if an answer or reply is required to the pleading being amended. Service of such an answer or reply shall be made within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer unless the court otherwise orders.

3. Amendment of pleadings already filed in the case of amendment of pleading to which it responds. If an amendment is made to a pleading after the service of a responsive pleading, an amendment may be made within ten days to the responsive pleading if such amendment is necessitated by the new matter added to the opposing pleading, and such amendment to the responsive pleading shall not affect the right of the party making it to make another amendment under paragraph 1 of this section.

4. Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment is deemed to have been interposed at the time the claims in the original pleading were interposed".

The *Citibank v. York* case relied on the case *Singbe v. Powell,* decided March Term, A. D. 1983. In the *Singbe* case, the plaintiff withdrew his complaint and filed an amended complaint two months after the defendant filed his answer. Mr. Justice Smith, speaking for the Court in the said case, held that the withdrawal and amendment not

having taken place within ten days after the filing of the answer, such withdrawal and amendment of the complaint was violative of the statute and the case was dismissed on that ground.

This action by the Court in our view misapplies the Civil Procedure Law, Rev. Code 1:9.10(3), relied on in that case, which reads:

"3. Amendment of pleading already filed in the case of amendment of pleading to which it responds. If an amendment is made in a pleading after the service of a responsive pleading, an amendment may be made within ten days to the responsive pleading if such amendment is necessitated by the new matter added to the opposing pleading, and such amendment to the responsive pleading shall not affect the right of the party making it to make another amendment under paragraph 1 of this section".

The reading of this sub-section really is that an amendment of a responsive pleading already filed must be done within ten days, and that such amendment will not preclude a further amendment of such amended responsive pleading if the necessity arises. Simply stated, a plaintiff may withdraw and amend his complaint at any time before trial in accordance with section 9.10(1) and the answer to that complaint, if already filed, may also be withdrawn and amended by the defendant within ten days after the amendment of the complaint.

The right of the defendant to once withdraw and amend his answer will not be extinguished by the fact that he was forced by the plaintiff to amend the answer already filed by him when the plaintiff amended his complaint.

The *Singbe* case misapplied section 9.19(3) when the plaintiff's case was dismissed for untimely withdrawal and amendment of his complaint, the same as was done in the *Citibank v. York* case which relied on the *Singbe* case. The *U.S. T C. v. King* case, in which the *Citibank* case attempted to find support, is not analogous to the latter case. Both *Singbe* and *Citibank* disregarded the "relation back" principle stated in Section 9.14(4), which reads:

`4. Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth of attempted to be set forth in the original pleading, the amendment is deemed to have been interposed".

Still incongruous is the effect of the *Citibank v. York* case when the Court entertained

the appeal from the interlocutory ruling denying the defendant's motion to dismiss and decided the case on a reversal of the interlocutory ruling. This is in conflict with our statute and case law, especially Rev. Code 1:51.2 quoted earlier in this opinion and the case *Robertson v. Morgan* also cited earlier in this opinion. Section 51.2 provides that an appeal to the Supreme Court must be from a final judgment and *Robertson v. Morgan* deals with an interlocutory judgment not being appealable.

The Chambers Justice in the present prohibition proceedings granted the writ of prohibition and ordered the issuance of the peremptory writ. In so ruling, he placed reliance on the *case Sheriff v. Banks and Senesee Carew* decided March Term, 1985.

In view of our earlier discussion of the said case hereinabove, we think such reliance is misplaced. Coming to the three cases discussed hereinabove, viz;

1. Singbe v. Powell, decided March Term, 1983

2. Larmine v. Banks and Carew, decided March Term, 1985; and

3. Citibank v. York, decided March Term, 1988.

These cases project an unclear if not confusing pattern in our jurisprudence when it comes to the amendment of pleadings and the appealability of interlocutory judgments. To have them remain on our law books will not lead to a progressive and healthy trend in our law and practice in this jurisdiction. Worse still, the cases will not promote the substantive rights of parties litigant. We therefore recall these three (3) cases.

In view of all what we have said and the law controlling, we find ourselves at variance with the ruling of the Chambers Justice. It follows then that his ruling must be and the same hereby is reversed. The Clerk of this Court is ordered to send a mandate to the court below in keeping with this opinion. Costs against the appellees. And it is hereby so ordered.

Judgment reversed