

TROKON INTERNATIONAL, represented by its President and CEO, J. MELVIN PAGE, II, et al., Appellants, v. **HER HONOUR C. AIMESA REEVES**, Presiding Judge, Sixth Judicial Circuit, Civil Law Court, Montserrat County, and **HENRIETTA JOHNSON, et al.**, Appellees

APPEAL FROM RULING OF THE CHAMBERS JUSTICE IN CERTIORARI PROCEEDING.

Heard: December 6, 1999. Decided: December 16, 1999.

1. The trial court must of necessity pass on all issues of law before going to the trial of the facts; and its failure to do so may be reviewed by certiorari.
2. The law provides that summary proceedings will lie only where title is not in issue. Where the issue of title is raised in the pleading, the trial court must determine whether or not title is in fact an issue before ruling the case to trial.
3. Where the issue of fraud is raised in a case, and the case is ruled to trial, the judge must order that a jury be empaneled to pass on the issue of fraud. If on the other hand, such issue of fraud were not held or were not presumed by the judge to be a valid issue, then the judge should so rule. A complete silence of the trial judge on the issue of fraud and whether the case will be tried by a jury or not is an error, which may be reviewed by certiorari.
4. Where the issue of fraud is raised in the pleadings, it is not sufficient that the case is ruled to trial, absent any instruction on the issue to guide the trial, since it is a requirement of the law that fraud, being an issue of fact and requiring proof, must of necessity be tried by a jury.
5. An exception shall be noted by a party at the time the court makes an order, decision, ruling, or comment to which he objects. A failure to note such exception shall prevent a party assigning it as error on review by the appellate court.
6. To benefit from the relief which a motion to rescind a ruling grants, the party filing the motion must first of all announce an exception to the ruling. Failure to announce an exception is sufficient ground to deny the motion.

Appellees filed an action of summary proceedings to recover possession of real property, which is normally tried without the aid of a jury. In response, appellants, occupants of the property, claimed that they obtained their right of possession from Trokon International, co-appellant, who obtained his right of possession from Sally

Johnson, another co-appellant, who had a power of attorney from the original owner of the property. Co-appellants, the occupants of the property, therefore moved for the joinder of Trokon International as party defendant and Sally Johnson also moved to intervene.

At the first call of the case, the motion to intervene was conceded; but without passing on the motion for joinder, the trial judge proceeded to the disposition of law issues and ruled the case to trial. No exception was taken; but subsequent to this proceeding, appellants filed a motion for the trial judge to rescind her ruling on the law issues. The trial judge denied the motion on the ground that the appellant's failure to except to the ruling on law issue was concession and acquiescence and therefore said ruling cannot be the subject of rescission upon their motion. To this ruling, appellants excepted and fled to the Chambers Justice for the writ of certiorari.

The Chambers Justice denied the petition for the writ of certiorari, but in doing so proceeded to pass on issues of fact, such as the issue of fraud, raised in the pleadings and ruled to trial. Appellants took the Chambers Justice's ruling to the Full Bench of the Supreme Court for review.

The Full Bench ruled that the Chambers Justice erred in passing on issues of fact raised in the pleadings and which were subject of trial by the court below; one of such issues was the issue of fraud claimed by appellants. The Full Bench however found that no error had been committed by the trial judge in her refusal to rescind her ruling since appellants never excepted to that ruling on law issues. The Full Bench then observed that to affirm the Chambers Justice, would, on its face, mean that the trial court should proceed to conduct the trial based on the ruling on law issues, which did not address the issue of fraud. The Supreme Court ruled that this would be in violation of the law governing trial of issues of fraud since such trials require a jury and ordinarily a trial of summary proceeding to recover possession of real property does not require the aid of a jury. So the Supreme Court affirmed the ruling of the Chamber Justice, with the modification that in order to comply with the requirements of law that the issue of fraud should be tried by a jury, a jury trial should be conducted if either or both side request for it. The ruling of the Chamber Justice was *affirmed with modification*.

Joseph H. Constance appeared for Appellants. *Tiawan S. Gongloe* and *A. Blamo Dixon* appeared for Appellees.

MR. JUSTICE WRIGHT delivered the opinion of the Court.

This case is on appeal to the Full Bench from a ruling of the Chambers Justice before whom a petition for a writ of certiorari was filed, praying the review of a ruling of the trial court denying a motion to rescind that court's ruling on law issues. The Chambers Justice denied the petition and ordered the trial proceeded with in the court below.

The facts stated below have been presented by the records in this case. Moses Kawah, acting for Henrietta Johnson, Edward Johnson, Saga Johnson and Robert Johnson, appellees, filed an action of summary proceedings to recover possession of real property against the occupants of a certain property; and these occupants, defendants at the trial court, are also appellants before this Court. Pleadings rested at the reply; but the defendants in the court below also filed a motion for joinder, praying the trial court to join Trokon International, there sublessor, as party defendant; and said sub-lessor is also one of the appellants before this Court. A Mrs. Sally Johnson, one of the appellants before this Court, filed a motion to intervene.

The original defendants, co-appellants, contended that summary proceedings to recover possession of real property was the wrong form of action because title was at issue since they held a sub-lease agreement from Trokon International (as sub-lessor), one of the appellants, who, in turn, held lease agreement (as lessee) from Mrs. Sally Johnson (as lessor), representing Henrietta Johnson, et al. (appellees), by virtue of a power of attorney from them. That is why Sally, Johnson moved to intervene and also that is why appellants, moved to have their lessor, Trokon International, also joined as party defendant.

In their reply, appellees denied that Sally Johnson, coappellant, was their attorney-in-fact and challenged the validity of the power of attorney; they claimed that said power of attorney was fraudulent.

On January 13, 1998 when this case was called for trial in the trial court, counsel for appellees made a submission to the trial court in which the motion to intervene was conceded. Immediately thereafter, the trial court proceeded to entertain argument on the law issues raised in the pleadings, without going into the motion for joinder of party.

Following the arguments, the trial court entered its ruling on the law issues, holding that the issues raised were mixed law and facts and hence all the pleadings were ruled

to trial. No exceptions were taken to this ruling, even though coappellants, who had filed the motion for joinder were present in court and participated in the proceeding.

Co-appellant, who had moved for the joinder of party, subsequently filed a motion praying the trial judge to rescind the ruling on law issues. This motion to rescind was argued on January 19, 1998 and the trial judge entered a ruling on January 28, 1998 denying said motion to rescind on the ground that when the ruling on law issues was rendered on January 13, 1998, the movants for rescission were present and did not announce any exception to that ruling on law issues, which then is to be interpreted as their acquiescence in, or agreement with, said ruling.

Appellants, being dissatisfied with the judge's denial of their motion to rescind, excepted thereto and thereafter on February 10, 1998 filed a seven-count petition for a writ of certiorari. Appellants contended that the issue of title being raised by virtue of a valid sub-lease agreement, and ignored by the trial judge, constituted error. Secondly, appellants contended that the trial judge erred when she failed to rule on the motion for joinder of party prior to ruling the case to trial. Thirdly, appellants contended that the issue of fraud having been raised, a jury trial is required and since summary proceedings to recover possession of real property is usually tried without a jury, said summary proceedings was the wrong form of action. Finally, petitioners contended that the trial judge erred when she refused to rescind her ruling on the law issues in that she did not pass on all the law issues raised in the pleadings before ruling the case to trial of the facts.

Appellees filed a fourteen-count returns to the petition in which they prayed the dismissal of the petition for appellant's failure to pay accrued costs as a condition precedent for the issuance of the writ of certiorari. Further, appellees contended that summary proceedings was the right form of action because Trokon International, co-appellee, from whom the other appellees claimed to hold a sub-lease agreement, was not a party to the suit and also because Sally Johnson, another co-appellee, who leased the premises to Trokon International had no authority to pass any title. Further, appellees contended that appellants were estopped from challenging the trial judge's ruling on law issues which was made in open court in the presence of appellants and they did not except to it. Therefore the judge correctly refused to rescind her ruling.

The Chambers Justice heard arguments in support and denial of the respective positions of the parties and entered his ruling on August 6, 1998, in which he denied certiorari. From the petition for the writ of certiorari, the Chambers Justice identified three issues, namely:

"1. That they, the petitioners, were occupying the subject premises pursuant to a sub-lease agreement and hence summary proceedings to recover possession of real property would not lie;

2. That co-respondent, Moses Kawah, in his reply raised the issue of fraud and that since fraud was raised as an issue, a jury trial was required to determine whether or not fraud was actually and truly committed;

3. That the co-respondent judge denied their motion to rescind ruling."

Also, from the returns, the Chambers Justice identified five issues, namely:

"1. That the petitioners never paid accrued costs in keeping with law and practice governing the petition for a writ of certiorari;

2. That Trokon International Corporation is a complete alien to the properties in question, as said properties do not and can never form part of the Intestate Estate of the late T.O. Dusumo Johnson, from which Trokon International claims to have a leasehold;

3. That during the lifetime of the late T.O. Dusumo Johnson, he transferred title in the subject property to his wife and children and as such the said property cannot be classified and considered as the intestate estate of the late T. O. Dusumo Johnson;

4. That the alleged power of attorney issued to Sally Johnson is void *ab initio* because the late T. O. Dusumo Johnson could not have issued a power of attorney to Sally Johnson to manage the property that he had earlier in 1962 parted with by way of a warranty deed to his wife and children; and

5. That the judge did not err when she denied the motion to rescind on grounds that to be able to move to rescind there must first be an exception taken to the ruling."

The Chambers Justice addressed each of these issues raised in both the petition and the returns, but for the benefit of this opinion, we shall pass on only those we feel are relevant to deciding this case because some of them were clearly not properly a part of the review on certiorari and should not have formed part of the ruling. The Supreme Court need pass only on those issues it considers meritorious and worthy of

consideration in deciding a case. *Lamco J. V. Operating Company v. Verdier*, 26 LLR 445, 448 (1978).

Appellants contended that title was in issue because they held a sub-lease agreement, and that it was error for the trial judge to fail to pass on this issue and then directly ruled the case to trial when she ruled on the law issues. In dealing with this question, the Chambers Justice delved into the record and held that the property had been deeded to Henrietta Johnson and children by T. O. Dusumo Johnson in 1962 and hence could not be a part of the Intestate Estate of the late T. O. Dusumo Johnson; the Chambers Justice ruled that "it has been established that the power of attorney upon which Sally Johnson-Cole relied to enter into a lease agreement with Trokon International was gotten fraudulently; that said power of attorney was void because T. O. Dusumo Johnson could not issue a power of attorney jointly to Sally Johnson-Cole to administer the property of another." The Chambers Justice thereupon proceeded to and did set aside the lease agreement from Sally Johnson-Cole to Trokon International as well as the sub-lease from Trokon International to the appellants.

With this decision of the Chambers Justice, what else was or is left for the trial court to do? By what means were these conclusion reached on certiorari, when the ruling of the trial judge did not touch on these issues, and as a matter of fact, these were the very issues the trial judge ruled to trial?

It should be noted that the trial has not yet been held for evidence to be produced. Also, we note that appellees, in their reply at the trial court, challenged the genuineness of a power of attorney held by Sally Johnson-Cole; and appellants have contended that only a jury can determine fraud. The question then arises on what basis did the Chambers Justice conclude that "it has been established that the power of attorney was gotten fraudulently"?

The trial judge did not pass on the issue of title raised by appellants and neither did the Chambers Justice. This Court has held over and again that the trial court must of necessity pass on all issues of law before going to the trial of the facts. *Gallina Blanca, S.A., et al. v. Nestle Products, Ltd., et al.*, 25 LLR 116 (1976); *Morris v. Johnson*, 26 LLR 73, 76 (1977). The law also provides that summary proceedings will lie only where title is not in issue. Civil Procedure Law, Rev. Code § 1:62.21. So there was need for a determination as to whether or not title is in fact in issue before the case goes to trial.

On the issue of fraud, the Chambers Justice held that "from the records, the co-respondent judge ruled the case to trial; hence, in the mind of this Court the judge never erred." Again, the trial judge did not address herself to the issue of fraud, as to whether it was valid and upheld or invalid and overruled. If the issue of fraud were upheld or presumed to be a valid issue for determination by the court and ruled to trial, the judge did not order that a jury should be empaneled to pass on the issue of fraud. A complete silence on the issue by the trial judge is an error.

As to this issue of fraud, the Chambers Justice found it sufficient the mere fact that the case was ruled to trial; but we find it insufficient absent any instruction on the issue to guide the trial, because it is a requirement of the law that fraud, being an issue of fact and requiring proof, must of necessity be tried. by a jury. *Beysolow v. Coleman*, 9 LLR 156 (1946); *Nab v. Nagbe and Richards*, 16 LLR 89, 93 (1964). We so hold.

Appellants also contended that it was error for the trial judge to have failed to pass on the motion for joinder of Trokon International, the latter being their sub-lessor. The Chambers Justice did not deal with this issue at all, and this we feel was also an error. Even if it is contended that the lease on which appellants relied, and by extension that too relied on by Trokon International, co-appellant, is fraudulent and void, to be able to make such a determination requires a hearing in which evidence must be produced in support and denial of same at the trial level and affirmed at the appellate level. But it was error for a ruling thereon to have been made for the first time at the appellate level; it is even worse that the issue of fraud being applicable to the case, which formed the basis of the motion for joinder, was decided by the appellate court without the trial court specifically passing on said motion, one way or the other. *Nab v. Nagbe and Richards*, op. cit.

The final issue raised by appellants is that the trial judge erred when she refused to rescind her ruling on the law issues in that she did not pass on all the issue of law before ruling the case to trial. Appellees countered that the said ruling could not have been subject to rescission since it was not excepted to at the time of its rendition in open court; and the trial judge agreed with appellees and denied the motion to rescind. The Chambers Justice affirmed the trial judge. This affirmance of the trial judge by the Chambers Justice is one of the reasons why appellants have come to the Full Bench.

On this issue the Chambers Justice held that "to benefit from the relief which a motion to rescind a ruling grants, the party filing the motion must first of all announce an exception to the ruling; failure to announce an exception is sufficient

grounds to deny the motion." We are in full concurrence with the Chambers Justice on this issue, as same is supported by law and common reason.

Our Civil Procedure Law provides that "an exception shall be noted by a party at the time the court makes any order, decision, ruling or comment to which he objects. Failure to note an exception to any such action shall prevent assigning it as error on review by the appellate court." Civil Procedure Law, Rev. Code §1:21.3.

The basic question to answer in this appeal is whether or not certiorari would lie. To answer this question, we take recourse to the law controlling and to the records in this case. "Certiorari is a special proceeding to review and correct decisions of officials, boards, or agencies acting in a judicial capacity, or to review an intermediate order or interlocutory judgment of a court. Civil Procedure Law, Rev. Code § 1:16.21. The records from the trial court, which contains the trial judge's ruling on law issues, reflect that counsels for both parties were present in court when the trial judge entered her ruling on law issues ruling the case to trial. The records are devoid of any exception to this ruling.

Certiorari, being a proceeding to review and correct an intermediate order or interlocutory ruling, and it being a requirement that for a ruling to be subject of review, it must have first been objected to by way of noting an exception thereto at the time the said ruling is made, and since the records in the instant case are devoid of appellants announcing any exception to the trial judge's ruling on law issues though they were present, then it must be concluded that said ruling on law issues is a settled part of the record in this case and cannot be subjected to review as an error on certiorari.

It must be noted however that the ruling on law issues is not what is being reviewed in this certiorari proceeding; but rather, it is the trial court's ruling which denied appellants' motion to rescind the ruling on law issues. It must be remembered that there was no exception to the ruling on law issues, while there was however an exception to the ruling on the motion to rescind; and therefore, what is being reviewed for correction is not the error, if any, in the ruling on law issues, but rather, errors in the ruling on the motion to rescind. The question to answer therefore, is whether or not the trial judge committed any error in her denial of appellants' motion to rescind her ruling on law issues.

The trial judge held in ruling on the motion to rescind that since there was no exception to the court's ruling on law issues, then there was no reason to rescind it,

because the failure to except to said ruling on law issues meant that the parties agreed to it and accepted it. We agree with the Chambers Justice's affirmance of the trial judge's ruling denying the motion to rescind, and we hold that there was no error by the trial judge in denying the motion to rescind.

Since there was no error in the denial of the motion to rescind, then we agree that certiorari will not lie. Having thus held that no error exist, the next thing will be to order that the trial court resume jurisdiction and proceed with the trial as ordered in the ruling on law issues. However, it cannot be ignored that the pleadings have been ruled to trial, meaning that all the issues in all the pleadings have to be decided by the court; it also must be noted that one of the issues raised in the appellee's reply is fraud by appellants in obtaining their power of attorney on which they have relied for their respective lease and sub-lease agreements. It must further be noted that fraud is triable by a jury; and also that this is an action of summary proceedings to recover possession of real property, which is usually tried without a jury.

We now determine that were this Court to proceed to give full effect to the ruling on law issues on its face, a trial in the court below would be clearly violative of the law controlling fraud. And so, as much as we are in agreement with the Chambers Justice that certiorari does not lie, yet we are constrained to modify his ruling only to provide that the trial should be conducted with the aid of a jury to determine the issue of fraud, if the parties or any one of them so desires and requests.

WHEREFORE, and in view of the foregoing, it is the decision of this Court that the ruling of the Chambers Justice be and is hereby affirmed but modified to provide for a trial by jury at the request of the parties or any one of them. Since the trial court did not pass on the motion for joinder of party and it being a part of the pleadings and record in the case file, which have all been ruled to trial, and also because during argument before this Court appellees conceded that they were of the belief that the joinder had already been granted and that Trokon International was already part of the case and they would not object to same, then the trial court will therefore resume jurisdiction and proceed to the trial of the case on its merits, permitting Trokon International to join and participate in the trial as a party defendant, along with Madam Sally Johnson-Cole in defense of the original defendants, who derive their claim to the premises from Sally Johnson-Cole through Trokon International.

The Clerk of this Court is hereby ordered to send a mandate to the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, commanding the judge therein presiding to resume jurisdiction and proceed with the trial of the main suit on the

merits and to join Trokon International as party defendant and finally dispose of the issue of fraud with the aid of a jury, which must be specifically demanded by the parties, or any one of them. Costs to abide final determination. And it is hereby so ordered.

Certiorari denied; ruling affirmed with modification.