EMILE ABI-RACHED, Plaintiff in error, *v.* HON. RODERICK N. LEWIS, Circuit Court Judge, Sixth Judicial Circuit, Montserrado County, and FRED V. B. SMITH, Defendants in error.

ON WRIT OF ERROR TO THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued December 2, 6, 1971. Decided December 22, 1971.

1. Though the statutory formalities governing change of counsel have not been strictly met, where there has been substantial compliance and the substantive rights of no person have been abused, the spirit of the law will be deemed met.
2. Issues of law arising out of a matter must first be decided before the issues of fact therein are tried.
3. The trial of more than one case at the same time by the same judge in any circuit court is prohibited. Hence, in the case under consideration it was error for the circuit judge to have empaneled a jury to hear plaintiff's case while an empaneled jury in another case had not decided the matter before it had been disbanded.
4. A plaintiff may once amend his complaint or withdraw it and file a new one, as long as such action does not unreasonably delay trial. Such procedure applies to a petition for remedial process or other right.

These proceedings arose when the trial court was moved by plaintiff to apply Rule 7 of the Circuit Court Rules because of the absence of defendant or his counsel, who had not substantiated his alleged illness as a basis for continuance. Pursuant to the rule the lower court proceeded to hear plaintiff's case, but not deciding first the issues of law. Furthermore, although a jury had been empaneled for another case it was still considering, the trial court ordered another jury empaneled in the case at issue, to hear plaintiff's case, contrary to the Circuit Court's Rules prohibiting, except in extreme circumstances, two juries simultaneously sitting in one circuit court. After the jury returned a verdict for plaintiff, in an amount not disclosed by the record, defendant's counsel submitted a petition for a writ of error to the Justice

presiding in chambers. At this time, the defendant in the action changed counsel by notification to his attorney, and counsel substituted therafter withdrew the pending petition and submitted a new petition for a writ of error. At the same time, plaintiff in the action moved to dismiss. The full Court considered the merits. *Judgment reversed, case remanded,* to be tried *de novo.*

D. Caesar Harris for plaintiff in error. *M. Fahnbulleh Jones* for defendants in error.

MR. JUSTICE HORACE delivered the opinion of the Court.

Fred V. B. Smith, one of the defendants in error in these proceedings, instituted an action of damages for infringement of trademark against plaintiff in error in the Sixth Judicial Circuit Court, Montserrado County. In the court below the Conger-Thompson Law firm represented the plaintiff, Fred V. B. Smith, and the defendant, now plaintiff in error, was represented by counsellor M. M. Perry of the Dukuly and Perry law association. The only indication of present counsel for defendant in error, Mr. Fahnbulleh Jones, is when the case was called for disposition of the issues of law on January 5, 1971, he was included as co-counsel.

It appears that on the said January 5, 1971, the trial judge, Roderick N. Lewis, one of the defendants in error, was moved to apply Rule 7 of the Circuit Court Rules as revised (1966) because of the absence of counsel for the defendant, which counsel for plaintiff and the trial judge considered an abandonment of the defense of the action.

> *"The issues of law having been disposed of in civil cases* (emphasis supplied), the clerk of court shall call the trial docket of these cases in order. Either of the parties not being ready for trial, shall file a motion

for continuance, setting forth therein the legal reasons why the case might not be heard at the particular term of court; the granting or denying of which shall be done by the Court in keeping with law, and in its discretion. A failure to file a motion for continuance, or to appear for trial after return by the Sheriff of a written assignment, shall be sufficient indication of the party's abandonment of a defense in the said case, in which instance the Court may proceed to hear the plaintiff's side of the case and decide thereon or, dismiss the case against the defendant, and rule the plaintiff to cost, according to the party failing to appear." Rule 7, Circuit Court Rules Revised (1966).

It is interesting to note that the trial judge in applying the rule had not disposed of the issues of law but simply ruled the case to trial on the facts alleged in the complaint because plaintiff's counsel moved him to do so. We should also mention that defendant's failure to appear was not for the trial but for disposition of the issues of law.

Though the record on the point is scanty, it seems that the case was called for jury trial on January 13, 1971, and a verdict was brought in for the plaintiff, awarding him damages. We have no record before us to show what amount was awarded. The trial was held and concluded in the absence of defendant and his counsel.

When counsellor M. M. Perry, for defendant learned of the determination of the case against his client in the court below, he immediately on January 15, 1971, applied in the chambers of Mr. Justice Simpson for a writ of error, which was granted after he posted a bond as provided by statute. When defendants in error were duly summoned and served with copies of the petition for a writ of error, they promptly filed their return and, almost simultaneously, a motion to dismiss. At this time, plaintiff in error, being dissatisfied with the manner in which

his counsel was handling his case, approached counsellor D. Caesar Harris and Dessaline T. Harris, and not the Morgan, Grimes and Harmon law firm, with regard to the further conduct of his case. Plaintiff in error then wrote counsellor Perry to deliver to him the file in the case and informed him that he had retained the services of another lawyer. There is no indication that counsellor Perry protested. On the contrary, the case file was taken to counsellors D. Caesar Harris and Dessaline T. Harris, after having been apparently delivered to plaintiff in error by his former counsel.

It further appears that on March 30, 1971, the new counsel for plaintiff in error filed a withdrawal of the petition for a writ of error previously filed by counsellor Perry, the costs of defendants in error with the withdrawn petition were paid and another petition was filed. From this point on the fireworks begin and intensify. The second petition for a writ of error advances two main points.

> "1. That the trial judge after applying the rule invoked erred by not passing on the issues of law before assigning the case for trial, because aside from the assignment which was made for disposition of the issues of law no other assignment was made.
>
> "2. That the trial judge erred when he interrupted one jury trial which was in progress to empanel another jury to try the case out of which these proceedings grow, without first disbanding the first jury or permitting them to determine the cause before them, which act of the trial judge was in direct contravention of both the statute applying and the rule of court."

Counsel for defendants in error filed what he termed an "amended return" to the petition on November 12, 1971, and on the same day filed a motion to dismiss and an application for advancement of the case on the docket.

In the return defendants in error contended, *inter alia,* that the defendant had improperly substituted counsel, was procedurally incorrect when the first petition was withdrawn and not amended and was further in error when the petition was not submitted to the full court. Furthermore, plaintiff argued that the trial court was correct in ruling defendant to a bare denial and in the course he followed by empaneling a new jury.

As stated before, on the same day of the filing of the petition, defendants in error filed a motion to dismiss which contains substantially the points raised in the return.

In resisting the motion to dismiss, plaintiff in error denied the arguments raised.

Because the returns and motion to dismiss are so interwoven and related to the petition, we decided to deal with the question in its entirety.

Although there are many aspects to the case before us, some issues of which are more or less merely tendentious, we feel that a determination of the issues may be based on the following points:

(1) Did the trial judge err in disposing of the case in the manner he did, first by a trial of the facts without first disposing of the issues of law and, secondly, by empaneling a jury to determine the case when another jury was empaneled on another case?

(2) Was there a violation of the statute relating to change of counsel and whether such violation, if there was one, is sufficient to vitiate these proceedings?

(3) Has the law on withdrawal and amendment to pleadings been violated by the manner plaintiff in error dealt with the petitions herein?

It would seem that the statute governing changes of attorney was not strictly obeyed. Civil Procedure Law, L. 1963–64, ch. III, § 8(2). However, in filing his resistance to the motion to dismiss, plaintiff in error made profert of a letter from him to counsellor Perry.

"Counsellor M. M. Perry, *"March 1, 1971*
The Dukuly & Perry Law Firm,
Benson Street,
Monrovia, Liberia
"Dear Counsellor Perry:

"In the Case: Emile Abi-Rached,
vs.
Fred V. B. Smith
} Action of damages for infringement of trademark

"I feel that you are much too busy to defend me effectively so I have secured another lawyer and I would be pleased if you could give me my file in said case, and oblige.

"I thank you very much for your attention in this case so far.

"Very truly yours,
[Sgd] EMILE ABI-RACHED."

We feel that although the statute was not strictly adhered to, yet in the face of the letter just quoted, and there has been no denial or protest from any quarter as to its genuineness, nor has counsellor Perry who was original counsel for plaintiff in error protested against the action of his client, the spirit of the law is fulfilled and the error, taking into consideration all the surrounding circumstances, could be considered a harmless one since it in no way affects the substantive rights of either party. Besides, we think it important to mention that Fred V. B. Smith, one of the defendants in error, was originally represented by the Conger-Thompson law firm and we find nowhere in the record before us any connection of counsellor M. Fahnbulleh Jones with the case until *he* announced on January 5, 1971, when the case was called for disposition of the issues of law, that Fred V. B. Smith was represented by the Conger-Thompson law firm, but assisted by him.

We now come to consideration of the actions of the trial judge in the court below. In their returns to the

petition and the motion to dismiss, as well as in the argument of counsel for defendants in error, the position is taken that plaintiff in error was duly notified of the hearing of the case in the trial court. In support of that contention minutes of the court were made profert with the returns.

From the document made profert by counsel for defendants in error, it is clearly seen that the trial judge never entered any ruling on the issues of law. Rather, he concluded that the absence of the defendant and his counsel was tantamount to an abandonment by the unsupported allegation of counsel's illness and so he could order the trial without disposing of the issues of law. This was wrong, because the statutes, as well as numerous opinions of this court, hold that in all matters where there are both issues of law and fact, the issues of law must first be disposed of. This principle admits of no compromise or equivocation.

As for the trial judge ordering a jury empaneled in this case when a jury was already sitting in a case then being tried, a fact which has not been denied, but which defendants in error seek to rationalize by quoting that portion of the statute barring such procedure "Except in circumstances over which there is no control," without showing the circumstances over which there was no control, we feel that the trial judge erred for the rule of court is explicit.

> "A case in which a jury has been empaneled and which is in process of being heard, shall be completed by return of the jury's verdict before the empaneling of another jury in the same division of court; that is to say, in either the criminal or civil division, except in circumstances over which there is no control, the trial of more than one case at the same time by the same judge is forbidden." Rule 39, Circuit Court Rules Revised (1966).

We will now consider the contention over withdrawal

and amendment of pleadings. During the argument before us counsel for defendants in error argued that the statute provides only for withdrawal of a pleading in order to amend.

> "At any time before trial any party may, insofar as it does not unreasonably delay trial, once amend any pleading made by him by:
>
> "(a) Withdrawing it and any subsequent pleading made by him;
>
> "(b) Paying all costs incurred by the opposing party in filing and serving pleadings subsequent to the withdrawn pleading; and
>
> "(c) Substituting an amended pleading." Civil Procedure Law, L. 1963–64, ch. III, § 910(1).

From all that we can gather, it seems that the second petition submitted has been labeled "amended petition," but T. Dessaline Harris thereafter effaced the word "amended" without prior consultation with D. Caesar Harris, who had helped prepare the second petition. Such action, which could have highly prejudiced their client's cause, is not acceptable to this Court and in consequence thereof T. Dessaline Harris is hereby assessed a fine of $50.00.

Having disposed of the counsel's role in the matter of the withdrawal and amendment procedural issue herein, we now turn to the legal issue of the matter. It is true that the statute does not provide for what happens if one withdraws his complaint in order to file a new complaint. We have, however, opinions of this court on the point which must be considered the governing law in the absence of a specific statute. In *Harmon* v. *Woodin & Company, Limited,* 2 LLR 334 (1919) the court spoke on the point by its ruling that a plaintiff may once amend his complaint or withdraw it and file a new one at any time before the case is ready for trial.

It is clear to us, therefore, that counsel for plaintiff in error did not err in the procedure followed. A choice

was available to either withdraw and file an amended petition or withdraw and file a new one.

In view of what has been herein stated, and taking into consideration all the facts and circumstances of the case from the record before us, and in view of the fact that this Court has held in *Logan* v. *James,* 3 LLR 360 (1932), that the object of the writ of error is to review, scrutinize, and correct any error of law committed in the proceedings and during the trial of the case, it is our holding that the motion to dismiss be denied, the writ of error be granted and the proceedings in the court below be vacated. The clerk of this Court is ordered to send a mandate to the judge presiding over the Circuit Court for the Sixth Judicial Circuit, Montserrado County, to resume jurisdiction and try the said cause *de novo,* beginning with the proper disposition of the issues of law. Costs to abide final determination.

Reversed and remanded.