SIMEON B. COLE, Appellant, *v.* INDUSTRIAL BUILDING CONTRACTORS, Represented by KAMAEL SHAMA ELDINE and RAFIC HATOUM, Appellees.

APPEAL FROM RULING IN CHAMBERS ON APPLICATION FOR WRIT OF ERROR.

Argued May 10, 11, 1966. Decided July 1, 1966.

1. A writ of error is issuable only to a party who has failed for good reason to take an appeal from a judgment, decree, or order of a trial court. The term "good reason" means a disability or other cause over which the party had no control and which actually prevented the party from appearing before the trial court at the time of the rendition of the judgment, decree, or order in question.
2. Absent a clear abuse of discretion, the circuit court's interpretation and application of its rules will not be disturbed by the Supreme Court.
3. It is not an abuse of discretion or a violation of the circuit court rules for a judge to assign a case for trial and render judgment by default after counsel, in protesting denial of a motion for continuance, has indicated abandonment of the case.

On appeal to the full Court, a *ruling* in Chambers ordering issuance of a writ of error in an action of debt was *reversed*.

Samuel B. Cole for appellants. *Bloom Law Firm* (*William O. Kun of Counsel*) for appellees.

MR. JUSTICE MITCHELL delivered the opinion of the Court.

Simeon B. Cole, plaintiff, instituted his action of debt against the Industrial Building Contractors, represented by Kamael Shama Eldine and Rafic Hatoum, Lebanese nationals doing business in the City of Monrovia, Liberia, in the March 1965 term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County. After pleadings rested, the case was continued on motion of the defendants

below, now petitioners, from the June term of the court to its September term. When the court met in its September term according to law, defendants, through their counsel, made another effort to have the case carried forward to the December term on a motion filed on the ground of illness of counsel and submitted a medical certificate which we make a part of this opinion as follows.

"October 11, 1965

"This is to certify that Mr. McDonald Acolatse, has been examined by me today, 11th, 1965. He was found to be suffering from influenza and malaria. He is under treatment and confined to bed.

[Sgd.] "NASSIM S. HAGE,
"Ashmun Street
"P.O. Box 579,
"Monrovia, Liberia."

On the filing of the motion for continuance with the foregoing medical certificate, plaintiff below filed his resistance thereto, but the court hesitated to rule thereon since all such motions are addressed to the sound discretion of the trial judge who, in these error proceedings, is one of the respondents. However, some 16 days after the motion had been filed, Counsellor McDonald Acolatse was seen in and around the Supreme Court and the Circuit Court of the First Judicial Circuit, Montserrado County, which conveyed the impression that he was no longer ill and confined to bed had been stated in the medical certificate of Dr. Hage. The presiding judge then had Counsellor Acolatse invited into his court and, after attending upon other matters, made an assignment of this debt case for hearing on the next day, October 29, 1965, at 12 o'clock noon. Lawyers for both sides being present in court, no objections were made by either side against the hearing. It suffices to mention that the appearance of Counsellor Acolatse at the time indicated that he was restored to health and ready for the trial. On the day assigned for the hearing of the case, Counsellor Acolatse,

representing the defendants below, addressed a letter to the trial judge, the body of which reads as follows:

> "I have the honor to refer to my motion for continuance in the case Simeon B. Cole, plaintiff, *versus* Industrial Building Contractors, represented by Kamael Shama Eldine and Rafic Hatoum, Lebanese nationals doing business in Monrovia, defendants, which motion was filed on the 4th day of October, based upon illness of counsel and strictly in conformity with the statutes and the revised rules of the circuit court controlling motions for continuance on the grounds of illness of counsel, and which motion was duly filed in the office of the clerk of court. Notwithstanding this fact, together with the fact that there are at present over a thousand cases in the civil law court, *it is observed that Your Honor has reassigned said case for disposition of the law issues* for noonday, October 29, 1965.
>
> "Permit me here to mention that in view of my said motion already filed in keeping with law and statutes, coupled with your expressed intention of disgracing me as was made in open court yesterday, October 28, 1965, before more than 12 lawyers, party litigants, as well as the entire jury panel, I fail to see under what condition I would be able to accept of said case tried before you; as such, I am here most respectfully requesting that you shall order the hearing of said case continued to the ensuing December term, as in keeping with law and your sound judicial discretion."

Over the centuries, there have been many wonders in the world. In recent years, the world has been put to panic over space exploration—the walking in space by man and the placing of satellites on the moon by which pictures have been transmitted to the earth. These are some of the great wonders of our time and age. But still, the attitude of Counsellor Acolatse can also be calculated as one of our modern day wonders in the aged history of

our court practice—the first of its kind, as far as we may assume, and one that must be grasped with an iron hand, otherwise judges of subordinate courts may be left with no system of control, our court rules not excepted. It is a bold challenge and an outright disregard for the authority of the court and the law—an anomaly and a dire effort or attempt to take in hand the functions of a judge and dictate the procedure of the court. But it being a true philosophy that the law pays by its own coin, we proceed with this opinion.

The records before us show that the trial court correctly interpretated Counsellor Acolatse's letters as an abandonment of his defense and proceeded to have the case called and made the following ruling.

> "This morning the court received a letter from Counsellor Acolatse stating that he failed to see under what condition he would be able to accept trial of this case by me since, as the counsellor puts it, I tried to disgrace him yesterday before more than 12 lawyers, parties litigant, as well as the entire jury panel. As far as this letter is concerned, I reserve the right to act at the proper time; but since the counsellor by his letter as well as his absence, has abandoned his clients' defense, we will now apply the rule and abate all of his pleadings from the answer downwards and proceed to hear plaintiff's complaint on the facts. Matter suspended."

Having entered this ruling on the records of the court, plaintiff's counsel made this request of the court, and we quote:

> "At this stage, plaintiff prays this court to grant him an imperfect judgment because of the absence of defendants' counsel and refusal to appear after he had been summoned so to do. He has under our law abandoned his case. The court in ruling on the law issues having abated all of defendants' pleadings, plaintiff moves for an imperfect judgment."

Plaintiff's application in this wise was granted and a jury trial was proceeded with to pass upon the facts. The plaintiff introduced the following instrument whilst testifying in his own behalf, and we quote:

> "For value received, we the officers and members of the Industrial Contractors, probated and registered company within the laws of the Republic of Liberia, jointly and severally promise to pay to Mr. Simeon B. Cole of the City of Monrovia, Montserrado County, and Republic of Liberia, the full and just sum of ($33,000) thirty-three thousand dollars, in coins current within the Republic of Liberia, on or before June 30th, 1964. Upon failure to pay this just debt which we as a company have contracted on the date and time specified, the said Simeon B. Cole is hereby empowered to enter legal action against the said company, jointly or severally in any court of competent jurisdiction within the Republic of Liberia for the recovery of said loan and we hereby waive any and all counterclaims that would tend to hamper the due process of law against any suit instituted for the payment of this just loan.
>
> [Sgd.] "KAMAEL SHAMA ELDINE.
> [Sgd.] "RAFIC HATOUM.
> [Company's seal attached.]"

That was the instrument on which the case was sued out. Notwithstanding the abandonment of the defense by defendants' counsel, there is no showing in the pleadings, or rather in defendants' answer and subsequent pleadings which goes to deny or disclaim the genuineness of this instrument; nor was there any counterclaim set up which might have brought the document into a dispute. Defendants merely alleged in their answer that an interest of 20 percent was required on the loan, which was usury. A complete inspection of the records in the case shows that nowhere in their pleadings did they make profert of any document countering the promissory note on which

the complaint was based, and obviously no oral testimony could explain that specie of written evidence. Hence we can justly conclude that the only aim of the defendants' counsel was to have the case continued from term to term through tricks and false representations, and unduly delay a final determination thereof against law and fair administration of justice.

The trial jury submitted a verdict according to the evidence adduced and the judge rendered judgment on the verdict which required the defendants to pay unto the plaintiff the sum of $33,000. Execution thereof was ordered issued on application of plaintiff's counsel; but before service, defendants found their way into the Chambers of Mr. Justice Simpson on a petition praying for the issuance of the writ of error, which petition alleged in substance as follows:

1. That plaintiff below sued out an action of debt against them on the 25th day of February, 1965, and that the pleadings rested with the rejoinder.

2. That the case was assigned for hearing on the 11th day of October, 1965, but counsel, being sick, filed a motion for continuance of the cause to the December term 1965. Subsequently, on the 28th day of the same month, the respondent judge sent and called petitioners' counsel from the Supreme Court, where he was, and in open court, unmindful of the mutual respect and courtesy existing between the bench and bar, undertook to, in a most unbecoming manner, malign and belittle petitioner's counsel and stated that he would disgrace petitioners' counsel, and thereafter insisted that he remain in court to take the ruling in a case on a motion for new trial, and thereafter assigned the case: Simeon B. Cole, plaintiff, *versus* Industrial Building Contractors, action of debt, for hearing on the next day at the hour of 12 o'clock and, both parties being in court, no other assignment was necessary.

3. That on the next day, as aforesaid, October 29, 1965, petitioners' counsel, knowing that his motion for continuance was undisposed of, wrote to the judge reminding him of the said motion and did not go to court. Whereupon the said respondent judge illegally and prejudicially denied the motion, dismissed defendants' answer and rejoinder and proceeded without passing on the issues raised in the pleadings before submitting the facts of the case to the jury; and his ruling on the law issues was illegal. Therefore, respondent judge erred and acted prejudicially to petitioners' interest in that the said case was never legally assigned, since assignment could not have been made before the disposition of the motion for continuance.

4. That the respondent judge acted illegally and contrary to the statute by rendering judgment by default without having served notice of assignment for the trial of said cause. And his acts were more glaring when he, within a period of less than 3 hours, dismissed petitioners' motion for continuance, abated all their pleadings, empaneled a jury, heard the evidence of the plaintiff, rendered final judgment, and granted execution with instructions that petitioners be imprisoned if the execution were not satisfied—all acts of utter denial of petitioners' day in court and contrary to the law of this Republic.

The preliminary writ was ordered issued by the Justice presiding in Chambers. Respondents filed returns alleging grounds against the issuance of the peremptory writ. The case having been heard by the Chambers Justice, he made his ruling on the 29th day of December, 1965, pertinent portions of which read as follows:

"The main point of contention here now is whether or not the trial judge could have assigned the case for hearing without first disposing of the issues of law and as a supplemental issue, could there be an abandonment of a case pursuant to Rule 7 of the Circuit Court

Rules without first having a disposition of the law issues in accordance with Rule 28 of the Circuit Court Rules and subsequent transfer of the case to the trial docket?

"It is our determination that the rules of court and the statute upon which they are predicated state in clear and unequivocal terms that an assignment may not be had until such time as there shall have been a ruling on the law issues. Therefore any assignment of a case and a determination of said case predicated on said assignment that is ill-founded in law cannot legally be permitted to stand. The rule of court relating to abandonment of defenses prescribes that a party must be deemed to have abandoned his case after placing the case on the trial docket when no motion for continuance has been filed or the party has failed to appear after return by the sheriff of a written assignment. In passing, we should like to make special mention of the fact that neither of these provisions is here applicable since the motion for continuance had been resolved and there had been actual notice of assignment which would then necessitate the returns of the sheriff to place the parties under the jurisdiction of the Court. Therefore, there was legally no abandonment nor any other legal ground for the abatement of plaintiff in error's pleadings in the court below.

"The last point which we find necessary to deal upon has to do with that portion of Section 1231 of the Civil Procedure Law (1956 CODE 6:1231) which states that a writ of error will lie where a person has failed for good reason to take an appeal. The question here is whether or not good reason existed for the nontaking of an appeal by the plaintiffs in error. In this regard, it is our determination that both the alleged assignment and subsequent trial were premature since there had been no prior disposition of the issues of law in accordance with the rules of court and, the law issues

not having been disposed of, a trial could not legally be held.

"We find it difficult to end this ruling without making some specific mention of the attitude of the defendant in error, Judge Joseph P. Findley. A perusal of the records in this case which has been reviewed *supra,* clearly evidenced the fact that the trial judge was extremely anxious to have this matter hurriedly concluded even to the extent of contravening some of the basic tenets laid down in the rules of court for the guidance of both bench and bar. This peculiar action of the judge was brought before this bench when he, a nominal party to the action, proceeded to conduct a most strenuous argument before us in support of the position of not only himself but also that of the real party in interest.

"This court looks with grave disfavor upon such an unbecoming action of a judge who, in accordance with our system of jurisprudence, should at all times be possessed of impartiality and cold neutrality throughout proceedings in which he is involved. It is our hope that we shall not have to make similar utterances in the future.

"In view of the above, the alternative writ of error is hereby made absolute and the clerk of this Court is hereby ordered to send a mandate to the court below commanding that the judgment be vacated and there be a rehearing of the case commencing with the proper disposition of the issues of law by the presiding judge. Costs of these proceedings are ruled against defendant in error. And it is hereby so ordered."

Exceptions were taken to the ruling made in Chambers and defendant in error brought his appeal before the full bench for further adjudication. This has compelled us to review the case. We have exercised that diligence necessary to inspect all of the records brought before us in the case. We have thoroughly reviewed the ruling made

by our colleague in Chambers, but we have not been able to go in complete harmony with his legal opinion. For the moment, we shall first quote the statute on error:

> "A person (hereinafter sometimes called the 'plaintiff in error') who has failed for good reason to take an appeal from the judgment, decree or decision of a trial court, may within six months of the date thereof file an application for a writ of error with the Clerk of the Supreme Court. Such application shall contain the following:
>
> "(a) An assignment of error, similar in form and content to a bill of exceptions. . . .
>
> "(b) A statement why an appeal was not taken.
>
> "(c) An allegation that execution of the judgment has not been completed. . . ." 1956 CODE 6:1231.

In this connection, comman law defines "good reason" to mean some disability, inability such as illness, or some cause over which the party had no control and prevented his physical presence at the time of the rendition of judgment. This condition did not prevail in the case at bar; rather, counsel's absence was abrupt and deliberate. It matters not what may have been the disregard given him by the trial judge on the previous day; he should have appeared in court—particularly since he had been served with a notice of assignment—conducted his case, endured whatever discourtesy, noted his exceptions, and presented his appeal before this forum. In all cases, this is a court of record and governed by nothing less than the records brought forward for its consideration; and it has in no place been shown to us where the trial judge humiliated plaintiff's counsel, except through the information conveyed in his insulting letter to the judge and his petition for error which, in our opinion, is insufficient to warrant the issuance of the writ of error. Therefore, good reason for failing to take an appeal being absent, error would not lie and the peremptory writ should have been denied. The doors of our courts are not open to be used to baffle

and delay the hearing of matters brought before the courts according to legal procedure. We have not been able to agree with the ruling of our colleague because in the first place, we have not been convinced that good reason prevailed to entitle plaintiffs to a writ of error under the circumstances. In the second place, our colleague has mainly relied upon Rules 7 and 28 of the Revised Rules of the Circuit Court. We will now direct our attention to these rules. Rule 7 in pertinent part, reads as follows:

> "The issues of law having been disposed of in civil cases, the clerk of court shall call the 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 reason 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 returns by the sheriff of a written assignment shall be sufficient indication of a 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."

The rules of court are those which direct the practice of our courts, yet they are subject to application according to the circumstances at the time when the discretion of the judge is recognized as the criterion on the application. Where an abuse is not apparent, this Court will always uphold such action, being mindful, as was said in *Roberts* v. *Roberts*, 1 L.L.R. 107, 109 (1878), that every court is "the guardian of its own records and master of its own practice."

Applying the rule in question, it is not possible for resident judges to dispose of all of the law issues in cases pending before their respective circuits before the meeting

of the next ensuing terms of court; nor is it possible for any assigned judge to complete the disposition of law issues during the 10 days in which he is required by law to work in Chambers before the regular meeting of the session of the Court over which he is assigned to preside; nor can a judge be mandated on the cases he is to hear and those he is not to hear to any particular term of Court; yet it is possible that a case in which the law issues have not been disposed of may be assigned for hearing. In that instance, he exercises his discretion under the rule as master of his own practice, and his act as such becomes unquestionable. No lawyer is authorized to dictate to a judge what cases he is to hear or he should not hear; that would be in contravention of practice and law. The application of Rule 7, therefore, in so far as it refers to the case at bar, is void; and hence we shall pass on to Rule 28, which reads thus:

> "The clerk shall enter upon the ordinary docket of the court all matters filed in his office, and whenever the pleadings are concluded and issue joined in any suit, he shall notify the judge thereof, who shall assign a day for passing upon issues of law and hearing all cases not dismissed on questions of law, whether or not the counsels previously notified are present. All cases which are proper to be tried by jury shall be transferred to the trial docket. The clerk of court shall five days before the meeting of the trial session, make out the trial calendar and furnish the judge a copy thereof."

This is the second rule relied upon by our colleague in Chambers which, in our opinion, does not harmonize with the circumstances surrounding the case at bar. This is a case for which assignment was made in open court for hearing on the next day; and this was done in the presence of counsel for both sides. This is a case where there was no disability on the part of either of the attorneys representing the parties in litigation. The law issues in the case had not been heard; but if plaintiffs' counsel had ap-

peared on the day of assignment, these issues of law would have been disposed of by regular hearing before a consideration of the issues of fact. However, in view of counsel's utter disregard of the assignment which counsel was in knowledge of, it is our majority opinion that the trial judge was left with no alternative than to abate plaintiffs' pleadings in ruling and direct the case to a jury trial on the facts laid in the complaint; and this is elementary and needs no academic reading into the law to interpret the rule. It was not necessary to dispose of the law issues and transfer the case to the trial docket before the meeting of the session of the court before the judge could be authorized to make an assignment thereof; nor is a judge restricted to any particular case or cases in making his assignments. According to our concept of the law, he did not err in making his assignment before the law issues had been passed upon. To lay down such a hard and fast rule would mean that judges of subordinate courts in civil matters would be completely incapacitated in dispatching the business of the courts as speedily as time permits. This Court has held in *Pearson* v. *Turner*, 2 L.L.R. 8 (1908), that failure of parties to appear either in person or by counsel is an abandonment of cause.

In *Roberts* v. *Roberts*, 1 L.L.R. 107 (1878), this Court said at 1 L.L.R. 109:

> "'A court may change its practice without written rules, and when the question is whether it has done so, its own solemn adjudication is the best evidence.' The question then being on the practice of the court and not a law of the land, the court did not err in its ruling."

All of these authorities taken together in our consideration of this appeal have left us without an alternative conclusion. No court can be dictated to by a party or his counsel as to the time and term in which a case may be heard nor as to the correct procedure—these are the province of the Supreme Court when regularly brought for-

ward; and when not brought in the manner conforming to law, the law will not permit us to give a hearing. It is only the duty of the counsel to safeguard the interest of his client in any litigation; and where he wantonly fails to avail himself of these rights, as has happened in this particular case, the court will not give him that which he has not rightly earned in consequence of his negligence. His motion for continuance having been resolved, as he knew, it was an absurdity and an evil design to have written the trial judge in the manner in which he did. In so doing, he not only abandoned his cause but exposed himself to be held answerable in contempt. Hence, in our opinion, there was no extraordinary rush with the trial by the court below because there was no necessity for another assignment after the cause or rather, his defense had been abandoned. We still maintain the view that the dignity of the court is not in the sight of the law greater than the liberty of the citizen; but when that dignity is not abused, it must be protected against all abusive infringements. Moreover, from the law controlling, we are not convinced that the grounds laid in petitioners' petition are sufficient to warrant the issuance of the peremptory writ of error, and on those grounds we have disagreed with the ruling made by our colleague.

Another aspect of this case which it would appear that our colleague did not take into consideration involves the doctrine of estoppel. Defendants' counsel having abandoned his defense at the trial of the case, was to all intents and purposes estopped from seeking error to cure his own negligence. In *Foreign Missions Board of the National Baptist Convention, Inc.,* v. *Horton*, 3 L.L.R. 132, this Court said at 3 L.L.R. 141:

> "Estoppel . . . precludes a person from asserting a fact by previous conduct inconsistent therewith."

Hence under no condition was petitioner's counsel entitled to profit through his wrongful acts.

We have already traversed in this opinion the question

of the application of the rule of court with regard to the disposition of the law issues. We have also expatiated on the law which relates to an abandonment of a defense in court. We have considered the question of the legal right vested in the court to abate the defendant's defense, as in the case at bar, where he abandons his defense in a clandestine attitude. We have further treated on the insufficiency of petitioner's application for the issuance of the writ of error. And, lastly, we have explored the doctrine of estoppel. We have made a comprehensive review of the ruling of our colleague in Chambers ordering the peremptory writ issued, and we have examined all of the records brought forward in the case. We have not arrived at a unanimous decision to uphold the said ruling by affirming the same; hence we are agreed in this majority opinion that we cannot harmonize our legal views with the said ruling of our colleague which is the subject of this appeal. Therefore, it is our opinion that the ruling which is the subject of this appeal be, and the same, is hereby reversed. The peremptory writ of error is hereby denied with costs against the petitioners and the clerk of this Court is hereby ordered to send a mandate to the court below, ording it to proceed to enforce its judgment. And it is hereby so ordered.

Ruling reversed.

MR. JUSTICE SIMPSON, dissenting.

This case is based upon an application made to the Chambers Justice during the October 1965 term of this Honorable Court for the issuance of an alternative writ of error to be subsequently made absolute predicated upon sundry alleged errors committed by the trial judge in the court below.

I am certain that the majority opinion has touched upon most of the issues, if not all. I have found myself unable to append my signature to a judgment reversing the ruling that is here being appealed from.

The application for the issuance of the alternative writ of error included propositions to the effect that the trial judge erred when he permitted and had a hearing of the case without having issued a notice of assignment or made a definitive determination of a motion for continuance as filed on the 12th of October, 1965. In our ruling in Chambers, we sustained the position taken by the trial judge in respect of both the notice of assignment and the motion for continuance. However, there was another assignment of error which we felt contained sufficient substance in law to permit the issuance of the peremptory writ of error. Let us now give a careful examination to what we have considered the pivotal issue in the matter at bar.

The judge, in the presence of counsel for both parties, made an assignment of the case for the following day at 12 o'clock noon. The records do not reveal the particular purpose of the assignment as made by the judge for the 29th, that is to say, the judge did not mention whether the trial assigned for the following day would be the trial of the facts or the trial of the issues of law raised in the pleadings which, incidentally, were voluminous in scope and had raised several pleas in bar.

The first question here is that of endeavoring to determine what the judge meant by the use of the word "trial." Was the trial to be the trial of the facts or the trial of the issues of law? In all probability if a regular notice of assignment had been issued, it would have succinctly stated the type of trial intended by the judge. In the absence of this intention being made manifest, the reasonable assumption, in our view, is that the judge intended to abide by the statutes extant on trial procedure, the existing rules of court, and the innumerable opinions of this Court handed down in pursuance thereof.

Irrespective of the aforementioned, my colleagues have sustained the position of the trial judge upon the premise that a letter addressed to the trial judge dated October 29,

1965, constituted a novelty in our procedure and that, therefore, the judge was correct in dismissing the pleadings filed by present appellee as defendant in the court below and finding that he had abandoned his defense. I have carefully refrained from using the word "abated" because generally, in law, the word is never used to connote total extinguishment of a right; it is generally employed to connote a postponement or suspension of the right to assert a particular claim. It is contended that failure of the defendant to be in attendance upon court when specifically required so to do constituted an abandonment of his defense, and therefore all of his pleadings were abated.

There are three things here now for us to focus our attention upon as a precondition to a determination of the ultimate issue. First, what constitutes an abandonment? Second, how are pleadings abated so as to nullify their legal effect? And third, does a letter to a judge that may savor of a contemptuous nature constitute a proper ground for the complete dismissal of pleadings in direct contravention of the plain provision of the statue, the wording of the rules of court as made in pursuance of the statute, and the several pronouncements of this Court in confirmation and application of the statute extant and rules of court predicated thereupon?

What constitutes abandonment in law? To set this issue in its proper context, let us have recourse to a portion of Counsellor Acolatse's letter to Judge Findley:

> "I am here most respectfully requesting that you shall order the hearing of said case continued to the ensuing December term, as in keeping with law and your sound judicial discretion."

The word "abandonment" has been authoritatively defined as follows.

> "Relinquishment of a right to have property with the intentions of not reclaiming it or resuming its ownership or enjoyment.

"Of rights. The relinquishment of a right. It implies some act of relinquishment done by the owner without regard to any future possession by himself, or by any other person but with the intentions to abandon." BOUVIER'S LAW DICTIONARY (Rawle's 3rd Rev. 1914) *Abandonment.*

"The abandonment of property necessarily involves an act by which the possession is relinquished, and this must be a clear and unmistakable affirmative act indicating a purpose to repudiate the ownership; the mere relinquishment of the possession of a thing is not abandonment of it in the legal sense of the word, for such an act is not wholly inconsistent with the idea of continuing ownership. Abandonment consists of two elements—act and intention. The act of relinquishment of possession or enjoyment must be accompanied by an intent to part permanently with the right to the thing; otherwise there is no abandonment." 1 AM. JUR. 7 *Abandonment* § 9. (See also, *Annotation, Admissibility in evidence of withdrawn superseded, amended or abandoned pleadings, as containing admissions against interest.* 52 A.L.R. 2d 516.)

Abandonment is thus invariably defined as consisting of more than an act; the overt act must coalesce with the *animus non revertendi* of the person abandoning. Now, where one writes and plainly makes a request for a postponement, does this request constitute an abandonment where there is lack of specific intention to abandon? In the absence of any specific stipulation or action legally cognizable tending to show abandonment, is it possible for a judge to construe a request for a postponement to mean an abandonment? Is abandonment, in such an instance, legally imputable to the person who has requested the continuance?

The judge held that the defense of the defendant in the court below had been abandoned and hence the pleadings were abated. Realizing my limitations, both mental and

physical, in my ability to do legal research, all endeavors on my part to find a situation wherein pleadings are said to have abated to an extent where the abatement spoken of is tantamount to the extinguishment of a legal right have proved abortive. Our search was able to uncover only the following in respect of the abatement of actions at law:

> "The overthrow of an action caused by the defendant pleading some matter of facts tending to impeach the correctness of the writ or declaration, which defeats the action for the present, but does not debar the plaintiff from recommencing it in a better way." BOUVIER'S LAW DICTIONARY (Rawle's 3rd rev. 1914) *Abatement and Revival (Of Actions at Law).*

The above has shown that a whole set of pleadings are generally never abated in a manner that precludes an individual from coming back into court after submitting to dilatory pleas that have given rise to the abatement of a particular action.

Is it legally possible for the purportedly contemptuous letter of Counsellor Acolatse to constitute an abandonment of his defense to cause an abatement of his pleadings to the extent that the issues of law squarely raised in the pleadings are ignored and the trial had solely upon the complaint as filed? The majority opinion has held that there was in fact a ruling by the trial judge on the issues of law and thereupon proceeded to quote the purported ruling of the trial judge. Let us for a moment look at this supposed ruling and inquire as to whether or not the mere ascribing of the appellation: "Court's Ruling on Law Issues," *per se*, constitutes a ruling on the issues of law as raised in the pleadings. In other words, can an assertion by the judge constitute the substantive act as required by both the statutes and the rules of court? A recourse to this purported ruling shows the following:

> ". . . since as the counsellor puts it, I tried to disgrace him yesterday before more than 12 lawyers, parties litigant as well as the entire jury panel. As far as this letter is concerned [meaning the insulting letter ad-

dressed to the judge by Counsellor Acolatse] I reserve the right to act at the proper time. . . ."

This statement of the judge clearly shows that it was not the letter of Counsellor Acolatse that caused the judge to make a determination that there had been an abandonment of defense; instead, it was the failure of Counsellor Acolatse to be present, as was overtly shown by his absence, together with his statement in the letter that he would not be present. The judge then went on to say that the pleadings were abated. This, in our view, does not constitute a ruling on the law issues but, instead, is a purported excuse for a failure to rule thereon as required by law and rule of court.

This position is difficult to harmonize with Rule 28 of the Circuit Court Rules which makes it mandatory that there must be a disposition of the law issues whether or not counsel previously notified are present.

In this regard, the case of *Pearson* v. *Turner,* 2 L.L.R. 8 (1908), has been referred to. We do not feel that that case is at all applicable to the issue at bar. In the present case, we are concerned with the nonappearance of counsel for disposition of the law issues in the trial court under Rule 7 of the Revised Rules of the Circuit Court. In the *Pearson* case, the abandonment spoken of was predicated upon the failure of counsel to appear in the Supreme Court which is governed by an entirely different set of rules. My colleagues have also referred to the case of *Roberts* v. *Roberts*, 1 L.L.R. 107 (1878). A recourse to that opinion shows that the reference made thereto in the majority opinion herein constitutes a quotation within a quotation; however, this Court held in the next sentence and we quote:

> "The question then being on the practice of the Court, and not a law of the land, the court did not err in its ruling."

It therefore follows that where the rule of court being changed conflicts with the law of the land, this "may" be error. We have quoted above Section 620 of the Civil

Procedure Law which prescribes a distinct order of trial; and though a court, being master of its rules, may change the same at any given time, where the change conflicts with a statutory provision, then the court must have assumed a legally incorrect position. Especially where the change of the rule is made subsequent to the act complained of and is to give effect to such act, this change, in our view, has the substantive effect of altering the statute, since a negative act may, because of its totally negative concept, proceed to give a positive effect that affects not the adjective law but the substantive application of law. This we fervently assert in virtue of the fact that subordinate courts, unlike the Supreme Court, are creatures of the Legislature and, therefore, may not prescribe rules of conduct that contravene express wordings of legislative enactments.

What has our law to say on this score? Rule 7 of the Circuit Court Rules states the following:

> "The issues of law having been disposed of in civil cases, 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 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. In no instance might a case be continued beyond the term for which it is filed and set down for trial, except upon a proper motion for continuance; provided, however, that should the busi-

ness of the court be such that a particular case is not reached during the session such case or cases shall be continued as a matter of course. Clearing the trial docket by the disposition of cases shall be the foremost concern of the judge assigned to preside over the term."

From the above rule, it is seen that where issues of law have been disposed of and there is a failure to file a motion for continuance or to appear for trial after return by the sheriff of a written assignment, the court may then proceed to hear the plaintiff's side of the case and decide thereon. It follows that the disposition of the issues of law as required in the first words of the said Rule 7 constitutes a *sine qua non* or condition precedent to the invocation of the "abandonment of the defense" clause as found in a subsequent portion of the same rule. Therefore, since the abandonment can never precede the ruling on the law issues, it follows as night follows day, that the law issues cannot be abated because of an abandonment.

What further do these circuit court rules hold in respect of the issues at bar? Recourse to Rule 28 gives us the following:

"The clerk shall enter upon the ordinary docket of the court all matters filed in this office, and whenever the pleadings are concluded, and issue joined in any suit, he shall notify the judge thereof, who shall assign a day for passing upon the issues of law and hearing all cases not dismissed on question of law, whether or not the counsels previously notified are present. All cases which are proper to be tried by jury shall be transferred to the trial docket. The clerk of court shall, five days before the meeting of trial session, make out the trial calendar and furnish the judge a copy thereof."

A careful look at this rule shows that the judge is required to assign a day for passing upon the issues of law and hearing all cases not dismissed on questions of law,

whether or not the counsels previously notified are present. This, therefore, clearly shows that whether or not a counsel has signed a notice of assignment and this notice has been returned served, or said counsel has in open court been apprised of an assignment, the trial judge has a mandate to dispose of the issues of law and his failure so to do constitutes prejudicial error.

Our next question here would be: Why were these rules made in the manner in which they were? This causes us to turn to our Civil Procedure Law, paying special attention to Sections 313, 592, and 620, in successive order as enumerated:

> "When the pleadings raise questions both of law and of fact, the court shall determine all issues of law before it tries the questions of fact." 1956 CODE 6:313.
>
> "The court shall try:
>
> "(a) All questions of law only; and
>
> "(b) All actions in which the right to trial by jury has been waived in accordance with the provisions of section 591 above." 1956 CODE 6:592.
>
> "At any trial all issues of law raised by the parties shall be disposed of first. Thereafter questions of fact shall be tried, by the jury (unless jury trial is waived). The plaintiff's witness shall first be examined and then cross-examined. Then the defendant's witnesses shall be examined and cross-examined. The plaintiff may then call witnesses to rebut any new fact brought out by the defendant's witnesses; and the defendant may thereafter call witnesses to rebut any new fact made by the plaintiff's rebuttal witnesses." 1956 CODE 6:620.

Much has been said here about the interpretation of Rule 28 as quoted *supra.* It has been argued that when the court is in term time, no need exists for transferring a particular case from the ordinary docket to the trial docket; however, the Civil Procedure Law has this to say about the placing of actions upon the trial calendar:

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shall provide by rule for the placing of actions upon the trial calendar:

"(a) Without the request of the parties;

"(b) With request of a party and notice to the other parties; or

"(c) In such other manner as the Courts may deem expedient." 1956 CODE 6:593.

Predicated upon the above, it is reasonable to infer that, in or out of term time, the transfer from the ordinary docket to the trial docket must be had.

This Court has made several pronouncements on the question of ruling on issues of law prior to the trial of the facts. In *Togai* v. *Johnson*, 12 L.L.R. 176 (1954), this Court said at 12 L.L.R 177:

> "The pleadings went as far as the rejoinder; and upon motion filed by plaintiff to dismiss the rejoinder, the Judge heard the motion, ruled out the rejoinder, and tried the case on its merits without disposing of the other issues of law raised in the pleadings. That was on June 18, 1952, Judge Wardsworth presiding. On that day he commenced hearing the evidence, but not having completed same, adjourned the case. There is no record to show what happened between June 18, 1952, and August 16, 1954; but on the latter date Judge R. I. Holder, who had been appointed to succeed Judge Wardsworth, called the case, and ignoring Judge Wardsworth's ruling, commenced the case from the pleadings, dismissing the complaint and action. Hence this appeal.
>
> "Judge Wardsworth having ruled the case to trial on its merits, it was improper for his successor, Judge Holder, to take up the case anew ignoring the ruling of his predecessor. His only duty was to hear the entire evidence and render such judgment as to him was in accordance with law and the evidence presented to him in a regular and legal way.
>
> "Since, however, the record shows that Judge

Wardsworth neglected to dispose of the issues of law raised in the answer and reply, we have decided to reverse the judgment and remand the case with instructions to the trial court to resume jurisdiction and fully pass upon the law issues raised in the pleadings before hearing the facts should it become necessary so to do."

The case closest to the one at bar and almost on all fours to this case is *Johns* v. *Johns*, 11 L.L.R. 312 (1952). In the *Johns* case the Court had this to say at 11 L.L.R. 315:

"The points to be passed upon and settled herein are therefore as follows:

"1. Whether the trial judge was correct when, after denying the motion of petitioner for a continuance, in the absence of both petitioner and his counsel, he proceeded to hear and grant an application by respondent for judgment by default, and, after granting same, made it perfect by admitting written evidence offered by respondent.

"2. Whether the final judgment rendered below was valid in view of the Circuit Court's refusal to pass upon the issues of law presented in the answer of the petitioner in the cancellation proceeding.

"We shall consider these questions in reverse order. On divers occasions we have rebuked circuit judges for deciding issues of fact before disposing of the issues of law raised in the pleadings. Our statutes controlling trials in civil cases are unequivocal and mandatory on this point. Whenever an answer filed by a party raises issues of law and fact, the issues of law must be adjudicated before the issues of fact may properly be tried; and any departure from this rule constitutes gross error. We are therefore of the opinion that the trial judge erred in the first place when he entertained an application for judgment by default before passing upon the issues of law raised in the answer of the petitioner. This position became even more untenable when, after granting the application for judgment by

default with the issues of law still undecided, the trial judge proceeded to perfect the said imperfect judgment on evidence offered by respondent, and thereafter rendered a final decree which this Court regards as a nullity."

In view of the above, in our estimation, there is but one other provision of law that must be considered in a determination of whether or not error will lie, and this has to do with the provision of the first paragraph of Section 1231 of our Civil Procedure Law which provides that:

"A person (hereinafter sometimes called the 'plaintiff in error') who has failed for good reason to take an appeal from the judgment, decree, or decision of a trial court may within six months from the date thereof file an application for a writ of error with the clerk of the Supreme Court."

The words here that we should focus our attention upon are: "who has failed for good reason to take an appeal. . . ."

Did the plaintiff in error here have a good reason for not taking an appeal? The *Johns* case, just quoted, also involved a writ of error. A motion for continuance had also been filed and the court held that it was error for the judge to go into the facts before ruling on the law issues. It follows, therefore, that where the trial is prematurely had and the judge thereafter on the same day abates the pleadings of the defendants, conducts a trial in which a verdict is directed, proceeds to render final judgment, and subsequently orders the issuance of an execution, and on the same evening, within 4 hours from the time of the commencement of the trial of the action, orders the defendants incarcerated in the common jail in an action of debt, this constitutes good reason for not taking an appeal.

In closing it should be stated that we in no wise condone or sanction the actions of lawyers that are of the tendency to belittle the dignity of the court. However, when such actions occur, the judge presiding, for the duration of his

term time, has the right to summon the particular lawyer to show cause why he should not be held in contempt. A personal feud between a judge and a lawyer should never be used to defeat the ends of justice and deprive parties litigant of property rights without due process of law.

For these reasons I have seen it fit to file this dissenting opinion.