JACOB O. PRATT, Plaintiff-in-Error, *v.* JAMES T. PHILLIPS and His Honor EDWARD J. SUMMERVILLE, Assigned Circuit Judge of the Sixth Judicial Circuit, Montserrado County, Defendants-in-Error.

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

Argued October 15, 16, 1947. Decided December 12, 1947.

1. Ejectment supports the idea of adverse possession. In ejectment questions of both law and fact are involved in such trials of title and therefore should be tried by a jury under direction of the court.
2. Where an applicant for a writ of error has failed to aver that the application is not for a dilatory purpose and the defendant-in-error has not raised the issue, the Court will not deny the writ on said grounds, for courts will not do for litigants what they ought to do for themselves.
3. Notice to the court that the attorney, having been appointed Assistant Secretary of State, can no longer represent the client, is not notice of abandonment of the cause itself.

Defendant-in-error successfully sued plaintiff-in-error in ejectment. Plaintiff-in-error was denied an alternative writ of error by the Justice in Chambers. On appeal to this Court *en banc, petition for writ of error granted.*

B. G. Freeman and *O. Natty B. Davis* for plaintiff-in-error. *H. Lafayette Harmon* for defendants-in-error.

MR. JUSTICE RUSSELL delivered the opinion of the Court.

The majority of us are of the opinion that the writ of error prayed for should issue. Our learned and distinguished colleague, His Honor Mr. Justice Barclay, from whose Chambers this case is before us on appeal, is, however, still of the opinion that the writ should be denied and has couched his reasons in a dissent which he will read and file immediately hereafter.

The application for the writ of error was filed in the office of the clerk of this Court on November 4, 1944 by Jacob O. Pratt, defendant in the court below, against His Honor Edward J. Summerville, the trial judge, and James T. Phillips, plaintiff below. The following errors were assigned:

(1) That James T. Phillips, defendant-in-error, instituted in the court below a suit of ejectment against Jacob O. Pratt, plaintiff-in-error and defendant therein; that the legal issues were heard and disposed of by His Honor Judge Smallwood who ruled the case to trial upon the data that would be submitted after a survey of the land in question had been made by a surveyor who was simultaneously appointed by the court.

(2) That the said case was assigned for hearing by His Honor Judge Summerville and when the case was accordingly called on October 24, 1944 Counsellor Charles T. O. King, counsel for defendant, having been notified of said assignment, filed a notice of his abandonment of the defense for the reason that he was inhibited by public policy from further practicing law before the courts of the Republic of Liberia whilst he served as Assistant Secretary of State of Liberia.

(3) That notwithstanding said notice showed that only the defense by Counsellor King had been terminated for reasons expressed, the lower court upon application of plaintiff's counsel rendered judgment in favor of plaintiff without the aid of a jury and in the absence of defendant.

(4) That this act of the trial court in attempting to so divest defendant of property is in contravention of the law of the land which requires that all questions of fact in ejectment cases must be tried by a jury.

These are the principal reasons upon which plaintiff-

in-error based his application and accordingly prayed that the writ of error be granted in order that the entire records be sent hither and the errors assigned, if found to exist, corrected.*

In answer to the contentions in the application, defendant-in-error contended:

(1) That the clerk of this Court in issuing the alternative writ had commanded the marshal to "summon His Honour Edward J. Summerville and Jacob O. Pratt, defendants-in-error and consequently James T. Phillips was never summoned and therefore is not under the jurisdiction of the Court. That the Writ of error also commanded the defendants-in-error to appear on the 14th day of October, A.D. 1944; when the said Writ of error was dated as being issued on the 13th day of November, A.D. 1944—which was a physical impossibility."

(2) That Counsellor King, counsel for defendant, had filed an abandonment of the cause in the court below, and inasmuch as defendant had neither appeared in person to repudiate this act of his counsel nor had given notice of change of counsel, plaintiff had no alternative but to apply for, and the trial judge had no alternative but to have rendered, judgment in favor of plaintiff since the case had been ruled to trial on the data that should be submitted by the surveyor; that the report of the surveyor has been to the effect that defendant Pratt was occupying a portion of the land called for by plaintiff Phillips' deed; that the defendant had refused to turn over to the surveyor his title deed as per order of court so as to facilitate the survey. Hence the surveyor had no alternative but to make said survey using only the plaintiff's deed and to report accordingly.

* Previous decisions in the same cause: 7 L.L.R. 218 (1941); 7 L.L.R. 276 (undated).

These, in fine, are the contentions of the parties before us in this case.

We will now examine the notice of abandonment as filed by Counsellor King in the court below:

"Charles T. O. King, Counsellor-at-law, of counsel for Jacob O. Pratt, defendant in the above entitled cause, most respectfully motions this Honourable court:–

"1) That having been commissioned by His Excellency the President of the Republic of Liberia as Assistant Secretary of State, and in view of the ruling of the Honourable the Supreme Court of the Republic of Liberia at its April Term, A.D. 1944, prohibiting lawyers who are engaged in the Executive Government from prosecution of [*sic*] their clients in the courts so long as they are engaged in Government Service; he gives notice that he hereby abandons the defence of the above named defendant.

"Respectfully submitted.

"Dated this 20th day of October, A.D. 1944.

[Sgd.] CHAS. T. O. KING,
Chas. T. O. King,
Counsellor-at-law, counsel
For Jacob O. Pratt.

"Filed: This 20th day of October, A.D. 1944. [Sgd.] D. W. B. MORRIS, *Clerk, 6th Jud. Cir. Ct. Mo. Co.*"

To attempt to construe said notice as an abandonment of the cause itself would be unreasonable, for in that case counsel would still be acting as legal representative of defendant, now plaintiff-in-error, quite contrary to the inhibition which he declared had impelled him to file said notice.

Under these circumstances, therefore, after the filing of said notice the defendant himself, now plaintiff-in-error, should have been summoned whenever the cause was assigned, but we have noted that neither in the records nor in the arguments before Court have the defendants-in-error alleged that the plaintiff-in-error had been duly summoned to defend himself since he no longer had counsel at bar.

With reference to the mistakes alleged to have been made by the clerk of the Court in the issuance of the alternative writ, we are of the opinion that defendant, plaintiff-in-error herein, ought not to be made to suffer for this error on the part of the clerk, especially where he had no duty to perform in connection therewith. It should also be noted that the parties that should have been summoned were duly notified, said notice being accepted and returns made thereto. In similar cases this Court has gone on record as supporting this view and has laid down what should be done in the circumstances.

In the case *Jantzen* v. *Freeman,* 2 L.L.R. 167, decided April 12, 1914, His Honor Mr. Justice T. McCants-Stewart, speaking for the Court, said *inter alia:*

> "[A] party should not suffer from the mistake or negligence of an officer of the court in cases where the party has no duty to perform in connection with the record; but such mistake or negligence should be remedied by amendment, or otherwise, so as to promote justice." *Id.* at 171.

The crux of the case, however, would seem to rest upon the manner in which the trial judge finally disposed of the case and rendered judgment, that is to say, without the aid of a jury. The trial judge based his action upon the fact that Judge Smallwood had ruled that the case should be tried on the data which the surveyor would bring in regarding the two pieces of property. The report of the surveyor was that Pratt was occupying a portion of Phillips' land. The judge held that the report

of the surveyor was in the nature of an award by an arbitrator and, since it was not attacked by the defendant, plaintiff-in-error herein, all the court had to do was confirm it and give final judgment accordingly without the aid of the jury. He predicated his authority for so doing upon the opinion rendered by this Court on January 10, 1916 in the case *Roberts* v. *Howard,* 2 L.L.R. 226, 6 Semi-Ann. Ser. 17, involving ejectment, wherein it was held that where the facts are admitted in a case, leaving only issues of law to be determined, it is not error for the court to hear and determine same without the intervention of a jury.

Now we must emphasize here that in the case cited above the facts, as the opinion recites, were admitted, while in the case at bar no evidence has so far been adduced to prove that the facts were also admitted, thus leaving only issues of law to be disposed of. The report of the surveyor we hold to be in the nature of evidence rather than an award. Again, we do not see that the silence of plaintiff-in-error could reasonably be construed as an admission of the facts since it has not been shown that he was summoned to appear after his counsel had given notice that he was inhibited from further practice as a lawyer. Since the matter involved facts, it should have been submitted to a jury.

Defendant-in-error further alleged that plaintiff-in-error refused to turn over to the surveyor his title deed as ordered by the court. If, as the records state, the surveyor was appointed by the court to survey the parcel of land in question and the court ruled that the parties turn their deeds over to said officer, it seems to us not only a reflection on the authority and dignity of the court to say that a litigant refused to obey the court's order, but also a reflection upon the trial judge who permitted it. Where is the inherent power of the court to hold in contempt those who neglect and refuse to obey its mandate?

In *Ruling Case Law* we find that, "It is a general prin-

ciple that a disobedience of any valid order of the court constitutes contempt, unless the defendant is unable to comply therewith." 6 *Id. Contempt* § 15, at 502 (1915).

Judge Bouvier states that:

> "Contempts of court are of two kinds: such as are committed in the presence of the court, and which interrupt its proceedings, which may be summarily punished by order of the presiding judge; and constructive contempts, arising from a refusal to comply with an order of court. . . ." 1 Bouvier, Law Dictionary *Contempt* 651 (Rawle's 3d rev. 1914).

Inasmuch as the court had inherent power to enforce its order, we cannot accept the alleged refusal of plaintiff-in-error to turn over to the surveyor his title deed as a ground for divesting him of his property except by the law of the land. Indeed, we must question the validity of the survey and the subsequent report thereon. We are amazed that the surveyor was able to determine who was the trespasser when he had only one of the deeds in his possession and therefore was unable to compare their respective dates of issuance, probate, and registration.

In the case *Reeves* v. *Hyder,* 1 L.L.R. 271 (1895) this Court held *inter alia:*

> "Ejectment . . . supports the idea of adverse possession, hence a trial of the legal titles of the contending parties. It being a mixed question of both law and fact, the statute provides that such trial is to be by a jury, with the assistance and under the direction of the court. . . ." *Id.* at 272; *Harris* v. *Locket,* 1 L.L.R. 79 (1875).

Our distinguished and learned colleague who is dissenting is quite insistent on the point that since under Rule of this Court all applications for writs of error require that the applicants aver that they did not apply for the writ for the mere purpose of delay, and that inasmuch as said averment is missing from plaintiff-in-error's application in the case at bar, this Court ought *sua sponte*

to dismiss the case for noncompliance with said rule; and he gave as his authority citations from the common law. Rules of Sup. Ct. IV, 3, 2 L.L.R. 663. We too are deeply committed to a uniform practice and procedure in our courts of justice, but in our zeal to accomplish this end we must not be unmindful of the precedents this Court has set and the interpretations it has given in its rulings from time to time.

It is an established rule coeval with the establishment of our judicial system that the common law of the United States and England is the common law of Liberia in such matters where our statute law is silent; but where provision is made in the laws of this country, then the statute must prevail. This Court long ago laid the basis for our rejection of the point upon which our learned colleague is insisting. In the case *Clark* v. *Barbour,* 2 L.L.R. 15, 1 Ann. Ser. 17 (1909), the Court declared that it was the province of the court to decide issues only when raised in the pleadings and not within its province to raise the issues. In their answer, defendants-in-error failed to attack this alleged defect in the application and hence we are of the opinion that this Court could not, consistent with the doctrine laid down in the above-cited case, raise said issue and dismiss the case, for courts will not do for litigants what they ought to do for themselves.

In view of what we have said above, we have no alternative but to grant the application of plaintiff-in-error and order the writ to issue, commanding that a certified copy of the records of the court below in the case be sent hither for the correction of any errors that may appear therein; costs are ruled against defendants-in-error; and it is hereby so ordered.

Petition granted.

MR. JUSTICE BARCLAY, dissenting.

My disagreement with the conclusions arrived at by my distinguished and esteemed colleagues in granting

the petition for a writ of error being of such a fundamental nature, I have deemed it necessary and proper to prepare and file this dissenting opinion.

On November 4, 1944 plaintiff-in-error filed a petition praying for the issuance of a writ of error. Accordingly and in accordance with our method of procedure the chief clerk of this Court was instructed by the Justice presiding in Chambers to issue and have served an interlocutory writ ordering the trial judge and the opposing party to appear on a certain date and at a certain time named in the said instructions before the Justice presiding in Chambers to show cause, if they so desired, why the writ of error prayed for should not be granted.

Defendant-in-error Phillips in his returns attacked the said writ as being materially defective and prayed that the petition be denied for the following reasons:

(1) That the summons required the marshal to notify His Honor Edward J. Summerville and Jacob O. Pratt to appear on October 14, 1944 to show cause why the writ prayed for should not be granted.

(2) That the said notice of summons shows on its face that same was issued under seal of court on November 13, 1944, yet required the defendant-in-error to appear on October 14, 1944, which is an impossible date for their appearance since defendants-in-error were required to appear the month before said notice to appear was issued.

(3) That the marshal was required to make his returns one month before the notice of summons to be served by him was issued.

(4) That Pratt's counsel filed an abandonment of the defense of the case on behalf of his client, and defendant, now plaintiff-in-error, did not at any time repudiate the act of his counsel or give notice of change of counsel, and said application for a petition did not show that the said counsel was

not authorized to file the abandonment of the cause which he filed.

(5) That defendant, now plaintiff-in-error, having abandoned the defense, the only issue to be decided was the issue of the survey so as to determine whether or not he was occupying the land covered by the title deed of the plaintiff, now defendant-in-error. The plaintiff in such a case could legally waive trial by jury and have the court render final judgment.

The returns of the judge showed that the wife of plaintiff-in-error informed the court of the lunacy of plaintiff-in-error, and for that reason the writ prayed for should not be granted. The returns of the judge further showed and made the following statement of facts of the case:

"That His Honour R. F. D. Smallwood who decided the law issues raised in the pleadings ruled the case to trial on a single question, that is, whether or not, Jacob O. Pratt defendant, now plaintiff-in-error was operating on the lands of James T. Phillips, plaintiff, now defendant-in-error as alleged in the complaint. That to the end of arriving at a conclusion on this point, Judge Smallwood appointed Dr. Joseph F. Dunbar, a licensed Government Surveyor, to survey the land in question. Both parties were required to tender their respective title deeds to the surveyor, and they were also permitted to obtain the service of any other surveyor to associate himself with Dr. Dunbar in the survey. Plaintiff Phillips tendered his deed to Dunbar the surveyor, but Pratt refused and failed to surrender his deed to the surveyor. That . . . the surveyor Dunbar repaired to the area whereat the land is situated and after making a survey gave a certificate to the court that the land which Pratt the defendant was operating on is a portion of the land

owned by Phillips as shown by his title deed. That thereafter the case remained open for some months without defendant Pratt, now plaintiff-in-error filing any objections to the certificate given by Surveyor Dunbar by way of challenging the corrections of the survey. Hence during the September Term of the court A.D. 1944 when this case was reached on the trial docket counsel for plaintiff pointed out that in face of defendant not having filed any objections to the survey although he had several months in which to do this there was no opposing evidence to said certificate and therefore requested the court to give final judgment of the conclusion of the facts shown in the surveyor's certificate."

The judge in his returns further pointed out that defendant, now plaintiff-in-error, was guilty of the following laches:

(1) He failed to give the surveyor appointed by the court a deed under which he claimed title when requested by the surveyor to do so.
(2) He failed to be present at the survey.
(3) Although he had several months in which to file objections to the survey he neglected to do so. The situation then became one where even if plaintiff-in-error had retained other counsel to come into court in his interest, such counsel, not having any facts to oppose the surveyor's certificate, would have been unable to put in a defense.

It is to be remembered that there are certain preliminary requisites under the law to be met or performed, failure or neglect to do which, since they are jurisdictional as declared by this Court in several previous opinions, precludes us from assuming jurisdiction.

Upon an inspection of the petition and the affidavit attached thereto in support thereof, a violation of Rule IV subsection 3 of this Court is glaringly apparent in that

the material averment, *"that he does not apply for the writ . . . for the mere purpose of delay,"* is conspicuously absent from the affidavit. 2 L.L.R. 663. (Emphasis added.)

The majority holds that since no attack was made on said affidavit by either of the defendants-in-error, the Court should not raise the issue *sua sponte*. In this I have disagreed with my esteemed colleagues for I have always held that this Court should insist on a uniform method of procedure. In the case at bar, it is my opinion that the observance of the Rules of Court should be enforced by the Court itself, whether the violation is brought to our notice by opposing counsel or not, otherwise the rule could be made ineffective by agreement or by tacit understanding of counsel not to attack its violation. Otherwise the Court, adhering to the idea that it should not of itself raise the issue of the violation of its rules, would find itself in the unenviable quandary of seeing its rules disregarded with impunity and of being helpless to enforce them.

In support of my position I quote *Cyclopedia of Law and Procedure:*

> "The Court may of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel, recognize the want of jurisdiction, and it is its duty to act accordingly by staying proceedings, dismissing the action, or otherwise noticing the defect, unless the petition be reformed where it can be done." 11 *Id. Courts* 701 (1904).

Judge Bouvier states the same principle as follows:

> "The fundamental question of jurisdiction, first of the appellate court, and then of the court from which the record comes, presents itself on every writ of error and appeal and must be answered by the court whether propounded by counsel or not." 2 Bouvier, Law Dictionary *Jurisdiction* 1761 (Rawle's 3d rev. 1914).

In the case *Harmon* v. *Republic*, 4 L.L.R. 195, 2 New

Ann. Ser. 24 (1934) involving a writ of error in an action of escheat, this Court *inter alia* enunciated the principle as follows:

> "Rule IV, 3, of the Revised Rules of the Supreme Court of Liberia provides that
>
> " 'Any person wishing to bring a writ of error before this court shall file his assignment of error with the clerk of this court and shall verify the same, alleging in his affidavit of verification that he does not apply for the writ of error for the mere purpose of delay. . . . Said assignment of errors shall be considered and dealt with as a bill of exceptions. Immediately upon the granting of an application for a writ of error the clerk of this court shall issue the same, and the party shall deliver it to the marshal, or a deputy marshal for service upon the party against whom the writ is obtained.' . . .
>
> "The rules and practice of the Court are the law of the Court. This is a legal maxim. Every court is the guardian of its own records and master of its own practice. *Roberts* v. *Roberts,* 1 L.L.R. 107, 109 (1878).
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> "This being so, plaintiff-in-error should have observed and followed same in its entirety, and failure so to do renders said writ of error void for want of jurisdiction; therefore defendant-in-error's motion to dismiss the petition for the writ of error is legally founded. . . ." *Id.* at 196.

It is a remarkable coincidence that in the *Harmon* case cited above it was Counsellor Brownell, then Solicitor General of Liberia, who made the motion to dismiss the writ of error, pointing out in the following words the violation of the Rule of Court:

> "1. Because the defendant in error says, contrary to the rule of the court prescribing how writs of error are to be obtained, the petition filed in these proceedings has not been supported by an affidavit

> of verification setting forth that petitioner 'does not apply for the writ of error for the mere purpose of delay,' which averment is essential and a prerequisite to the procurement of a writ of error." *Id.* at 195.

In that instance Counsellor Harmon who was on the opposite side lost out. In the case at bar it is Counsellor Brownell who now violates the rule by omitting the averment above-mentioned, which averment he in the former case contended was essential and a prerequisite to the procurement of a writ of error. This Court supported that contention in the *Harmon* case.

Next to be considered is the notice of summons which is to place defendants-in-error within the jurisdiction of the Court. With a summons so materially defective I fail to see how the defendants-in-error, though apparently summoned and appearing, can legally be held, especially where said appearance attacks so strongly the defects in the summons and where, upon inspection, the attack is found to be absolutely true and is undefended by plaintiff-in-error. A defendant does not waive objections to the summons by appearing in order to attack it.

It is contended by my learned and distinguished colleagues that in a case of this nature since the error was made by the clerk of Court the Court should order an amendment of the summons and proceed, on the principle that no party should be made to suffer because of the acts of the court. While that contention might apply in some instances, I do not consider it applicable to writs or notices of summons so materially defective, since the summons is the very basis upon which a defendant is brought within the jurisdiction of the court. This is particularly true in a case such as this where the summons was attacked by the opposing party and was allowed to remain from November, 1944 until October, 1947 undefended and uncorrected by plaintiff-in-error.

In the case *Moore* v. *Gross,* 2 L.L.R. 45, decided in

the year 1911, this Court held through Mr. Justice McCants-Stewart that:

> "While a party cannot be held responsible for an immaterial error or omission made by a clerk of court in transcribing the records on appeal, yet material errors and omissions in the preparation of the record on appeal resulting from the neglect of the party to the action, or his counsel, are ground [*sic*] for the dismissal of the appeal." *Id.* at 46.

In the case *McAuley* v. *Laland,* 1 L.L.R. 254 (1894) this Court held on page 255 that "while we must admit the binding force of the legal maxim that 'the acts of the court should prejudice no man,' we are of the opinion that the acts of the court should be carefully distinguished from the unauthorized, unlawful or neglectful actions of its officers or of the parties to the suit." In the *McAuley* case it was held on page 254 that "it is the writ of summons or notice served upon the appellee and the returns thereto made, which give the court jurisdiction over the case." In my opinion the correct procedure would have been to withdraw and refile at the expense of the erring clerk, since the former process was void.

In *Cyclopedia of Law and Procedure* the principle is stated in the following manner:

> "In case process is made returnable to a day which is not a legal return-day it is bad, as where it is made returnable at a wrong term or a time when no term is to be held, or at a day out of term. In like manner where the date fixed for return is an impossible one, or is a day past, the process is void. . . ." 32 *Id. Process* 432 (1909).

In my opinion these are jurisdictional issues which cannot be overlooked by the Court. These questions in the past have always been held by this Court to be jurisdictional issues upon which cases have been invariably dismissed. Being jurisdictional issues they should have been first complied with in accordance with law, a failure

or neglect of which should be sufficient to warrant the Court in denying the petition.

Coming now to the question of the abandonment of the defense by plaintiff-in-error's counsel because of his inability to continue representing his client due to his appointment as Assistant Secretary of State, and to the contention that plaintiff-in-error, then defendant, did not have notice of the assignment of the case, I again disagree with my esteemed colleagues who have taken the position that it was the duty of the Court to notify defendant Pratt, plaintiff-in-error herein, of the abandonment of his defense by his lawyer. In my humble opinion it was the duty of Pratt's attorney to notify his client of his inhibition.

I quote from *Ruling Case Law:*

> "Even though an attorney clearly has good cause for retiring from a case, it is his duty to give his client reasonable notice before withdrawing, and he should not abandon it on the eve of the trial, without giving his client a reasonable opportunity of resorting to other assistance. . . ." 2 *Id. Attorneys at Law* § 30, at 958 (1914).

Apparently, from what has been brought out in the records, Counsellor King was still representing defendant Pratt, plaintiff-in-error herein, to all intents and purposes when surveyor Dunbar filed his certificate, since it is stated in the returns of the judge, and not contradicted by the opposing party, that after the certificate of the surveyor was filed several months elapsed before the case was reached on the trial docket, and that up to that time no objections had been filed to the report of the surveyor. And no objections were made to the appointment of the surveyor as an officer of the court to go into the area in dispute and discover the real owner of the land in accordance with the survey and the deeds. Plaintiff-in-error refused or neglected to present his title deed to the surveyor when requested and absented him-

self from the survey. He also failed to object to the report of the surveyor, which report was the only issue upon which the whole case hinged in accordance with the ruling of His Honor R. F. D. Smallwood. In my opinion this silence of defendant, now plaintiff-in-error, was tantamount to an admission of the correctness of the survey and of his acquiescence therein and, as the trial judge rightly stated, the procurement of another counsel at that stage in the face of the negligence of defendant, now plaintiff-in-error, in protecting his rights under the law, would have meant that said new counsel, not having any facts to oppose the surveyor's certificate, would have been unable to put up a defense. Moreover, from the records I gather that the notice of abandonment was not filed until the case was assigned for hearing with the knowledge of King who until then still represented his client. Parties should not expect the Court to do for them what they should do for themselves.

In my opinion, therefore, there being no disputed facts, we should apply the principle established in the case *Roberts* v. *Howard,* 2 L.L.R. 226, 6 Semi-Ann. Ser. 17 (1916), involving ejectment, that where the facts are admitted, leaving only issues of law to be determined, it is not error for the court to hear and determine same without the intervention of a jury.

In our statutes it is provided that, "The trial of all mixed questions of law and fact, shall be by jury, with the assistance, and under the direction of the court, unless where the court could try question, if one of mere fact." Stat. of Liberia (Old Blue Book) ch. VII, § 3, 2 Hub. 1542. What is meant by the latter clause of that section, "unless where the court could try question, if one of mere fact"? Here is a case with only a single question to be decided which the jury under the circumstances could not decide even if it went on the land in dispute. Hence it is that Judge Smallwood, aware of that fact, appointed a technician, Surveyor Dunbar, to

go on the spot as an officer of court to make the necessary survey and report to the court. What then was the use of a jury, especially where the correctness of the report of the surveyor was unchallenged? In my opinion therefore this case falls within the latter clause of the statute quoted above, being a question of fact which the court could decide without the intervention of a jury.

Viewing the case from every angle as above set out, I find myself in disagreement with the conclusions and opinion of my highly esteemed colleagues, and hence have refrained from attaching my signature to the judgment in this case.