JUAH WEEKS WOLO, Appellant, *v.* P. GBE WOLO, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued April 20, 21, 1942. Decided May 8, 1942.

1. In equity pleadings where there is no prayer for relief the bill is demurrable.
2. All questions of law raised in the pleadings must first be disposed of by the trial court.
3. The party who pleads last has the legal right to move for dismissal of the cause. The rule of court granting to plaintiff the right to initiate and close all pleadings does not preclude the said defendant from so moving.

Appellant sued appellee to obtain alimony after separation. The lower court held that alimony was barred by a legislative divorce granted appellee. On appeal the Supreme Court reversed on the ground that the divorce was unconstitutional. *Wolo* v. *Wolo,* 5 L.L.R. 423 (1937). Subsequently appellant petitioned in equity for cancellation of deeds. On appeal from dismissal of said petition, *judgment reversed and remanded.*

S. David Coleman for appellant. *H. Lafayette Harmon* for appellee.

MR. JUSTICE BARCLAY delivered the opinion of the Court.

We are in accord with the view that the pleadings of the parties to this action for the most part are faulty and loosely drawn and not in harmony with the acknowledged rules of pleading, but unfortunately this unanimity of view does not run throughout the issues so far brought to our notice by the pleadings, bill of exceptions, and other papers so as to bring about a resultant unified opinion.

Our attention was first drawn to the ruling of the trial judge who, it appears, therein neglected to pass upon several of the important legal issues raised in the pleadings, but selected therefrom only the following points on which he required the parties to cite law:

(1) Whether or not equity can intervene and give relief in any matter or transaction where fraud is not apparent, and

(2) Whether or not a married woman has the legal right to convey to her husband property which she may possess in her own right.

Ignoring the other legal issues appearing in the pleadings of the parties, including that of a departure, his honor the trial judge dismissed the case of petitioner, now appellant, ruling her to pay costs; and it is to this ruling that exceptions were taken and an appeal made to this Court.

It is to be observed that count four of the rejoinder which is attacked as a departure is void of a prayer for relief by dismissal of the action. In fact there is no special or general prayer for dismissal in the rejoinder, which prayer is necessary. Our present distinguished Chief Justice called attention to the necessity of a prayer for relief in the pleadings when speaking to the Court in his opening address delivered November 24, 1941. Said he:

"Pleadings is one branch of the science of law requiring careful and painstaking study; but equity pleadings are still much more difficult. Of these the learned Judge Story whose treatises on equity jurisprudence and on equity pleadings have not been surpassed by any writer on the subject within the hundred years since his death, gives the following admonition in concluding his work on equity pleading:

" 'Upon a careful review of the whole subject the attentive reader will perceive that the task of mastering so complicated a science will require from

him the employment of many hours of deep study, of laborious research, and of undivided diligence. He must give his days and his nights to it with an earnest and unflinching devotion. But the rewards will amply repay him for all his toils. He, who has attained a thorough knowledge of Equity Pleadings cannot fail to have become a great equity lawyer. He need not shrink from the most difficult and complicated engagements of his profession. Nay, he will find, that while many others are willing to rely on their own genius, with a rash and delusive self-complacency, to carry them through the intricacies of a controverted suit, he may far more justly and safely repose on a solid learning, which will secure respect, and a trained and a varied discipline, which will command confidence. To no human science better than to the law, can be applied the precepts of sacred wisdom in regard to zeal and constancy in the search for truth. Here the race may not be to the swift; but assuredly the battle will be to the strong.' [Story, Equity Pleading 762 (10th ed. 1892).]

"Since then there has been a universal demand for the abridgement and simplification of pleadings in general, and of equity pleadings in particular, noted in olden days for their prolixity and complexity; and this demand has been largely forwarded by the institution, first in the United States of America and elsewhere of what is known as code pleadings, as contradistinguished from common law pleadings.

"In spite of this, Shipman, the first edition of whose work on equity pleadings was published after code pleading had become the vogue, and incidentally half a century after Story's death, lays down *inter alia* the following rules:

"'*THE PRAYER FOR RELIEF—The eighth formal part of a bill is called the "prayer for re-*

lief," and consists of a petition or request to the court to decree the appropriate relief.

"'The prayer for relief may be either:

(a) Special, or

(b) General.

"'The prayer for special relief enumerates and asks for the particular relief to which the complainant considers himself entitled.

"'The prayer for general relief asks, in general terms, for such relief in the premises as shall be agreeable to equity.

"'Under a special prayer alone, only such relief will be granted as is specially prayed for.

"'Under a general prayer alone, any relief may be granted, other than an interlocutory order, which is consistent with and grounded upon the allegations of the bill.

"'Under a prayer for both special and general relief, any relief may be given which either prayer alone would justify, except,

"'EXCEPTION—No relief can be granted which is entirely distinct from, and independent of, or inconsistent with, that specially prayed for.

"'The usual and safest course is to pray for both general and special relief. In the federal courts this rule is imperative.

"'If the prayer for relief is omitted, or if the allegations do not entitle complainant to the relief prayed for, the bill is demurrable.' Shipman, The Law of Equity Pleading 220 (1897). See also pp. 130–38.

"'SAME—CERTAINTY.

"'In its statement of the complainant's cause of action, as well as in its prayer, the bill should be framed with sufficient certainty to apprise the defendant of the nature of the case which he is

called upon to meet, and to enable the complainant, upon proof, to obtain both the relief and the discovery sought. The degree of certainty required is, in general, that of certainty to a common intent, as in pleas in bar at common law.

"'*The bill must be certain in its averments of the title or right upon which it is founded, stating all material facts, including the title or interest of the complainant, the interest of the defendant, the property or subject-matter in controversy, and all necessary circumstances of time, place, manner, etc., with reasonable fullness and particularity. General allegations will not ordinarily be sufficient, nor can the complainant set forth his title in the alternative.*' *Id.* at 322–23. See also pp. 230–31.

"This is the notice my colleagues have urged me to give, and I must not fail to add the warning that, hereafter pleadings filed, lacking the requisites herein required, will be denied, with costs against the party whose pleading it happens to be."

It certainly does not appear to us that count four of the rejoinder meets the requirements of the law; and if a count fails in that respect, no matter whether placed in the answer or in the rejoinder, it must be overruled by the Court in accordance with the rules just above cited and in keeping with the warning given by the Chief Justice in his opening address on the subject just above quoted.

Count four in question reads:

"4. And also because respondent says that it does appear from the records in this case, that is to say, from the dates of the deeds of transfer, that petitioner has no right of action, it being about eight years and six months, and not within three years within which a right of action, had any existed, did accrue. Respondent submits that petitioner

evidently is aware that she has no cause of action against respondent and is not therefore careful of what she alleges in a court of equity. And this the respondent is ready to prove."

We have repeatedly expressed and stressed the principle that all questions of law raised in the pleadings must first be disposed of in accordance with our statutes; and where the pleadings are bad and improperly made, this Court has on more than one occasion remanded the case with instructions that the parties replead. See *Reeves* v. *Hyder,* 1 L.L.R. 318 (1897); *Adjavos* v. *Frey & Zusli,* 4 L.L.R. 226, 2 New Ann. Ser. 60 (1934); Ex parte *Massaquoi,* 7 L.L.R. 404 (1942). But in this case it is obvious that the judge in the court below neglected to rule on the important issues of law raised, and from the records in the case it does not appear that the court's attention was called thereto by appellant who seemed to have thought it best to do so on appeal before this Court. It is also obvious that the judge of the court below ignored and neglected to rule on the issues of law raised in a motion and a resistance thereto filed by respondent, now appellee, and petitioner, now appellant, respectively.

Upon referring to the bill of exceptions filed by appellant, which bill contains only two counts, it will be seen that this neglect on the part of the judge is referred to as one of the exceptions to the ruling of the judge on the legal issues.

The said count reads:

"And also because petitioner says that respondent in these proceedings filed a motion to dismiss said proceedings which motion petitioner filed objections to the court entertaining or sustaining and which resistance to said motion embodied grave and important issues of law, but which issues are not embraced in His Honour's ruling, nor have they been disposed of by the lower court, to which petitioner excepts."

So here we see that appellant has herself stated that the

important issues of law raised were not disposed of by the court.

It does not appear in the records that the judge's attention was called to his omission to rule on the motion and the resistance thereto nor does it appear that his attention was called to his omission to rule on the other important issues of law which he should have done under the rule laid down by this Court in the case of *Sodjie* v. *Tartimeh,* 2 L.L.R. 362 (1920). In *Sodjie* v. *Tartimeh* it was held on page 363 that generally the court should dispose of the issues of law before trying the facts, but if it does "[D]epart from the general rule and the party affected thereby fails or neglects . . . [to act thereon] at the proper time during the trial, . . . [said party] will be presumed to have waived the points of law raised in his pleading." Also, in *Anderson* v. *McLain,* 1 L.L.R. 44, decided in 1868 this Court *inter alia* laid down the following rule:

> "For it is very clear that if there should be a neglect to demand a decision on any law question raised in the pleadings by any party, such a neglect is in the eye of the law a waiver of such right. The same rule applies if a decision be given on any question so raised and no exception be taken to it by the party aggrieved thereby. For by such a neglect a party loses every legal advantage growing out of such questions on an appeal." *Id.* at 45.

But let us see whether the appellee had a legal right to make a motion and, if so, when and with what object a motion should be made. In the case *Veldkamp* v. *Coffee,* 1 L.L.R. 232 (1890) it was held that motions, except motions to the jurisdiction which may be made at any time before final judgment, should be made before the pleadings are read and failure to do so amounts to laches.

In the case *Gould* v. *Gould,* 1 L.L.R. 389 (1903) this Court laid down the rule as follows:

> "On this point this court says the judge below erred in his ruling, and is of the opinion that the party who pleads last has the right, legally, to motion the court to dismiss. The rule of court granting to plaintiff the right to begin and close all pleadings, does not preclude the defendants from petitioning the court to dismiss a cause for manifest error in the pleading, provided the defendant is in a position to move first, for it is evident that the plaintiff will not motion for the dismissal of his own cause. . . ." *Id.* at 390.

Since a motion to dismiss was in order and since it is clear on inspection of the pleadings that appellee filed the last pleading in the case, appellee was in the position first to file a motion to dismiss the action for manifest error in the pleadings.

The judge of the court below omitted to pass on the motion and its resistance. Appellant, then petitioner, having brought this fact to the notice of this Court in her bill of exceptions, we do not believe that such an important dereliction of duty on the part of the judge in the court below should be overlooked by us without a remand of the case, unless we ignore the questions raised in the pleadings, which questions appellant did not demand the trial judge to pass upon as she should have in keeping with the rule just cited in the cases of *Sodjie* v. *Tartimeh, supra,* and *Anderson* v. *McLain, supra.* In this event the question of a departure and other important issues would be considered waived.

But it is clear to all of us that the pleadings were unscientifically drawn, and from the ruling of the judge it is obvious that he did not pass on the question of a departure nor did he pass on several other important issues of law. Why then in the face of such grave errors committed by the court below should this Court pass particularly on the question of a departure in the pleadings, which question has with other important issues not been touched by the trial judge?

This action is in equity, and regarding equity the following is expressed:

> "Equity as defined in American jurisprudence is that branch of remedial justice formerly administered by the English High Court of Chancery, in the exercise of its extraordinary jurisdiction, as limited, modified and extended by American statutes, rules of court, and judicial construction to meet the requirements and exigencies of our ever changing modern civilization. It is sometimes said to be the application of natural justice. It owes its origin and existence to the extreme rigidity of the ancient rules of common law." 1 Whitehouse, Equity Practice § 1, at 1 (1915).

Now a succinct review of the facts in the case will show that appellant, at one time the wife of appellee, in January of the year 1929 executed four transfer deeds in favor of her said husband which deeds she did not see fit to question until the year 1937, after there had been a legislative divorce, when she filed an action for cancellation of said deeds stating *inter alia* in said petition that the deeds were executed in consideration of the love and affection she had for her said husband. But on inspection of the copies of the deeds made profert of by appellant it appears thereon that the transfers were made for a valuable monetary consideration. The case has been in court since 1937, appellee having subsequently died. Appellee within legal time filed an answer containing fourteen counts including demurrers and traverses. The plea of limitation was not mentioned in said answer. Important issues of both law and fact were undecided by the trial judge. The copies of the deeds filed by appellant herself were in certain aspects contradictory to other assertions in her said petition, for example, in the matter of the consideration for the deeds. In addition, appellant states in the body of the petition that on the sixteenth day of January, 1926 she executed the deeds when the deeds themselves were made profert in 1929.

We believe that it would be inequitable to ignore the rights of the respective parties and to remand the case with instructions to enter an imperfect judgment in favor of petitioner, now appellant, as contended by our highly esteemed colleague, the Chief Justice.

Had the trial judge ruled on the motion and its resistance and on the other legal issues, particularly the departure which our esteemed Chief Justice especially desires to stress, and were it not for the bad and unscientific method of pleading adopted by the parties in the case and the precedent already established by this Court in such cases and under such circumstances, there would not perhaps be any cause for a difference in opinion by the Justices on this Bench, for then we would have seen our way to harmonize our views with our learned colleague. But in the case of *Ajavos* v. *Frey & Zusli,* 4 L.L.R. 226, 2 New Ann. Ser. 60, which involved a bill in equity for the cancellation of a certain memorandum of agreement, decided by this Court December 21, 1934 under almost similar circumstances, where it appeared and counsel for the parties frankly admitted the pleadings were unscientifically drafted and hence presented for the consideration of the court a confused mass of irregularities rather than definite, certain, and clear-cut issues, this Court confirmed the precedent already well established when it said:

> "We have therefore decided to reiterate in substance the opinion expressed in the case *Pelham* v. *Pelham,* 4 L.L.R. 54, 1 Lib. New Ann. Ser. 57, to the effect that the case should be remanded with instructions to permit the plaintiff, having complied with the statute laws governing amendments of pleadings, to withdraw the complaint on record and file a new one, other pleadings to follow in like manner; that inasmuch as mistakes appear to have been made by both parties in the respective pleadings, each should pay his own costs; but the government tax fee

and the costs of the officers of the court should be equally divided between the two parties. . . ." *Id.* at 227–28.

"A court of equity cannot obtain jurisdiction, try the cause, nor grant relief without proper pleadings, in writing, and the extent of the jurisdiction of the court is determined by the contents of the pleadings. All the pleadings should be characterized with certainty, clearness, and conciseness, in order that the point or points in controversy may be evolved and distinctly presented for decision." 21 Corpus Juris *Equity* § 374, at 366 (1920).

In the light of the above we are of the opinion that it would be equitable for the ruling of the judge in the court below to be reversed and the case remanded to the court from whence it came with instructions that the parties be required to replead and, inasmuch as the pleadings in the main are unscientifically drawn, both parties being at fault therein and in other respects, each should pay his own costs; the government tax fee and the costs of the officers of this court be equally divided between the two parties; and it is so ordered.

Reversed.

MR. CHIEF JUSTICE GRIMES, dissenting.

That a majority opinion, delivered by one of a plurality of judges hearing a case, is often a compromise between those concurring therein is a proposition which, as far as this Justice is aware, is universally conceded. And, moreover, it seems to be as generally accepted as orthodox that upon the shoulders of the Chief Justice, more than upon any other one of his colleagues, rests the responsibility of endeavoring to so harmonize the conflicting views, which often obtain after the submission of a cause, as will reduce dissenting opinions to a minimum provided always that that can be done without calling

upon any member of the Court to sacrifice any principle about the correctness of which he feels strongly convinced.

For the reasons above given it has always been a source of regret to me when I have felt it necessary to dissent, the more so as the records of this Court show that no Justice who has sat upon this Bench since the creation of this Court in 1848 has filed even a tenth of the minority decisions which it has been my lot to leave on record. I console myself, however, with the satisfaction I feel that each such dissent has followed an earnest, but unsuccessful, effort to reach unanimity, and with the even greater gratification that each such dissent has been the result of deep conviction of the correctness of the principle in each such dissenting opinion enunciated.

Without further prelude I must now say that in my opinion the judgment given by the court below in this case should be reversed and the case remanded with instructions to record an imperfect judgment in favor of petitioner, now appellant, because the law emphatically and unequivocally prescribes that upon such a state of facts as those that have been argued before us at this bar in this cause that is the only possible thing that can legally be done.

Let us then look at the facts before discussing the relevant points of law:

Appellant, then petitioner, on June 8, 1937 filed in the equity division of the Circuit Court for the First Judicial Circuit a petition containing two counts, praying the said court to cancel four deeds therein referred to, copies of which were filed as exhibits to the said petition.

The appellee, then respondent, on the nineteenth of the same month filed an answer containing fourteen points, some of which are demurrers, some traverses, but none of which, be it observed, raised any plea of limitation.

Notwithstanding the foregoing, the fourth plea of appellee's rejoinder to the appellant's reply submitted the following:

"4. And also because respondent says that it does appear from the records in this case, that is to say, from the dates of the deeds of transfer, that petitioner has no right of action, it being about eight years and six months, and not within three years within which a right of action, had any existed, did accrue. Respondent submits that petitioner evidently is aware that she has no cause of action against respondent and is not therefore careful of what she alleges in a court of equity. And this the respondent is ready to prove."

As this plea of limitation had not been first raised in the answer, appellant in the second count of her surrejoinder demurred as follows:

"2. And also because petitioner says that the Rejoinder of the Respondent is further bad and defective, in that statutory rules of pleading the statute of limitation, which is a plea of confession and avoidance, require that said plea should have been pleaded in his Answer; failing to do so and pleading said plea in his Rejoinder after denying the law and facts in joining issue with petitioner's petition in his Answer, makes him guilty of a DEPARTURE in his pleadings. For the Statute Law of Liberia declares: 'Every Answer and Reply must contain a distinct, intelligible and sufficient Answer in writing to the complaint or reply to which it purports to be an answer or reply, or to such parts thereof as it professes to answer, and must not depart from the grounds taken in the former answers or replies to the same party, or judgment shall be given for the other party.' Respondent having by said plea departed from the ground taken in his former answer, petitioner prays that this Honourable Court will dismiss both Answer and Rejoinder of respond-

ent, and grant a decree in her favour in keeping with the above cited statute, cancelling said deeds. And this petitioner is ready to prove."

With the attack thus made upon appellee's pleadings in the second count of the surrejoinder of appellant I am in full accord because:

"The rule against departure is evidently necessary to prevent the retardation of the issue. For while the parties are respectively confined to the grounds they have first taken in their declaration and plea, the process of pleading will, as formerly demonstrated, exhaust, after a few alternations of statement, the whole facts involved in the cause; and thereby develop the question in dispute. But if a new ground be taken in any part of the series, a new state of facts is introduced, and the result is consequently postponed. Besides, if one departure were allowed, the parties might, on the same principle, shift their ground as often as they pleased; and an almost indefinite length of altercation might in some cases be the consequence." Heard, Principles of Pleading in Civil Actions, 303–04 (1880).

The rule that there shall be no departure in pleadings is wisely placed by most, if not all, writers on the science of pleadings at the end of the list of do's and don't's because it is, as it were, the copestone of the whole structure, the object of which is to bring the litigants to issue at the earliest possible time. A departure is defined as having taken place "when, in any pleading, the party deserts the ground that he took in his last antecedent pleading, and resorts to another." *Id.* at 297. That is the common law definition. Our statute on the subject, by which, in the event of any difference or ambiguity, we are bound, is not only less ambiguous but also more emphatic, reading as follows:

"Every answer and reply, must contain a distinct, inteligible [*sic*] and sufficient answer in writing, to

> the complaint, answer or reply to which it purports to be an answer or reply, or to such parts thereof as it professes to answer, and *must not* depart from the ground taken by the former answers or replies to the same party, or judgment *shall* be given for the other party." Stat. of Liberia (Old Blue Book) ch. VI, § 5, 2 Hub. 1542. (Emphasis added.)

According to said statute it is my well-considered opinion that no court of justice is left with any sort of option or discretion in the event any such issue is raised. Its bounden duty, plainly and unequivocally prescribed, is to ascertain whether or not a departure has taken place and to give an imperfect judgment for the party whose demurrers upon said ground are sustained. Moreover it seems to me absolutely clear that the statute mandatorily orders that an imperfect judgment shall be rendered against the faulty pleader as a penalty for the delay, expense, and inconvenience caused by his failure or neglect to observe rules plainly prescribed. This neglect causes a suit to be unduly protracted, as in this case by the shifting of the defense of appellee and by the judgment of my distinguished colleagues that entirely new pleadings should be filed.

During the argument counsel for the defense relied upon the following: "The rejoinder may set up any defense to the replication not inconsistent with the plea, but there must be no departure. . . . But there is no departure where the rejoinder consists merely of a more minute and circumstantial restatement of the ground of defense set up in the plea." 31 Cyc. of Law & Proc. *Pleading* 268 (1909). Said argument called forth from this Bench the question: "Can you show from the reply any matter therein for the first time alleged which elicited the plea of limitation in your rejoinder?" Counsel answered that the same was elicited by the eighth count of the reply which reads as follows:

"8. And also because petitioner says that count 2 of her petition is not bad and defective for impertinence as alleged by respondent in count 6 of his Answer, because said letters are pertinent to the issues, they having a tendency to show and to prove that petitioner made a request for the retransfer of said property in keeping with respondent's fair promises and assurances and his evasive reply thereto, for the information and consideration of the Court. Wherefore petitioner prays that said Answer be dismissed. And this the petitioner is ready to prove."

Such a reply as that to said question from one of the most astute members of this Court can be dismissed with no further comment save that it is indeed very farfetched and intended to elude the straight question put to counsel.

Spontaneously and unanimously we seem to have agreed at the outset not, at that time, to discuss the question of whether or not three years was the period of limitation fixed by our statute for the acts complained of in the appellant's petition; but it was as unanimously conceded that the plea of limitations relevant to the subject then taken under consideration, without any of the disabilities which temporarily suspend the operation of said statute and with none of the acknowledgments which extend the time from which the statute of limitations begins to run, was a good plea in bar. That being so it must, if at all, be pleaded in the answer and not elsewhere, especially as our statute provides that: "7. If the defendant have really several answers to the complaint, he may avail himself of them all, separating them by commencing each new answer with the words, 'And also because.' " Stat. of Liberia (Old Blue Book) ch. V, § 7, 2 Hub. 1541.

On the other hand if, in my opinion, he has for some reason or other neglected to raise in his answer any issue upon which he desires to reply, he cannot legally do so in

a rejoinder or any subsequent pleadings, but must withdraw and amend the first answer, under the risk of being penalized for a departure.

I observed with a certain amount of astonishment that my learned colleagues concurring in the majority opinion devoted a considerable amount of their valuable time to a motion and the objections thereto filed in this suit after the pleadings had been rested. To file motions in lieu of pleadings was a practice which, although frequently resorted to in certain counties of this Republic, never was in vogue in Montserrado County except in the rare instances where one who had commenced practicing elsewhere in Liberia later changed his place of abode and entered the practice in Montserrado County. The object of such a motion seemed to have been to "take a short-cut" to the attention of the court, and to try to obtain a decision on some point the pleader considered vital before his adversary could get his chance to have the court see the strong points on the side of the latter. This method ignores the fact that every demurrer in every pleading is in itself a motion to dismiss since our statute permits any pleader both to demur and to plead, which statute is in derogation of the common law which compels one either to demur or to plead. Stat. of Liberia (Old Blue Book) ch. V, § 1, 2 Hub. 1540. This my colleagues concurring in the majority opinion have to all intents and purposes admitted, as evidenced in the excerpt from *Anderson* v. *McLain,* 1 L.L.R. 44 (1868), quoted herein at page 42.

Such an effort mutually to outmaneuver one another is avoided if, once the pleadings have been rested, they are ordered argued, methodically starting from the one last filed and proceeding systematically so far as may be necessary in inverse order. Moreover, if the points raised in the motion had already been raised in one of the pleadings the motion would be redundant; and if, on the other hand, the point had not been raised before

in some part of the pleadings it would undoubtedly be a departure.

With the inauguration of the circuit court system in 1912 and with the unification of the practice of all those courts under the aegis of this Court, the practice of filing motions in lieu of pleadings gradually became so increasingly obsolescent that by this time I had considered it not only obsolete but also a terrible anachronism.

I agree with my esteemed colleagues that the pleadings in this case are, in the main, unscientifically drawn, that they are in many instances bad because of duplicity and in other instances bad because they are lacking in certainty, that there are contained therein pleas in confession and avoidance which fail to give color, and that many of them are pleaded without reference to the rule that all pleadings should be pleaded in due order. But nevertheless we differ on two points which I consider fundamental:

In the first place, if, as in this case, from any part of the pleadings a triable issue can be shown to have plainly and definitely emerged to which no demurrer has been filed, then I conceive it to be our bounden duty, no matter how imperfectly pleaded, to decide that issue and not dismiss all the pleadings with an order to replead, as my colleagues have just ordered done. Nor will I, at this stage, allow myself to be drawn into a discussion of the merits of the case or of the pleadings which my colleagues and I have all agreed were unscientifically drawn, partly because I am opposed to considering simultaneously issues of law and issues of fact but more especially for reasons which are more fully dealt with in the next principal reason for this dissent to which I am now about to address my attention.

And this brings us to the second reason for this dissent. Upon suggestions of this Court and with the acquiescence of the parties litigant, the argument at this bar was confined to one point, namely, was there a departure com-

mitted in the pleadings or not. No other question was argued, no other has been during the argument submitted to us, and no other in my opinion should be considered. There are, it appears to me, numerous other attacks upon the correctness of other parts of the pleadings which would seem to stand out like a leopard's eyes on a dark night, inviting settlement and stated with sufficient clarity to have warranted our attention; but the argument was, as aforesaid, limited to the one issue of departure. And words fail me in which adequately to express how strenuously I have consistently opposed, since my elevation to this Bench, any effort on the part of this Court to decide a question not orally argued before and duly submitted to this Court. I have always felt that judges who show impatience at hearing the oral arguments of parties litigant and take the pleadings and settle the issues without any argument, have arrogated to themselves an amount of superior knowledge and self-assurance I have never had the conceit to feign. True it is that there are two schools of thought on the subject, one maintaining that the briefs and records having been submitted it is a waste of time to hear oral argument. But the Honorable John W. Davis, at one time Solicitor General of the United States of America and afterwards Ambassador to the Court of St. James, in a lecture delivered before the Association of the Bar of the City of New York on October 22, 1940, appears to be partial to the view of Lord Coke. And it is largely on that account and to repress, to some extent at least, a growing tendency in this jurisdiction to come to decisions without hearing oral argument, that I had read on the opening day of this term Mr. Davis' said lecture in which the discussion is embodied, the relevant portion of which is as follows:

> "Says Lord Coke, 'No man alone with all his uttermost labors, nor all the actors in them, themselves by themselves out of a court of justice, can attain unto a right decision; nor in court without solemn argu-

ment where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of justice and right'. Agreeing with this pious sentiment, we lawyers sometimes think nevertheless that 'God moves in a mysterious way, his wonders to perform'. Judge Dillon in his lecture on the Laws and Jurisprudence of England and America, declares that as a judge he felt reasonably assured of his judgment where he had heard counsel and a very diminished faith where the cause had not been orally argued, for says he 'Mistakes, errors, fallacies and flaws elude us in spite of ourselves unless the case is pounded and hammered at the bar'. Chief Justice Hughes is on record to the effect that 'The desirability of a full exposition by oral argument in the highest court is not to be gainsaid. It is a great saving of the time of the court in the examination of extended records and briefs, to obtain the grasp of the case that is made possible by oral discussion and to be able more quickly to separate the wheat from the chaff'. With all this most judges, I think, will agree, always provided that the oral argument is inspired as it should be with a single and sincere desire to be helpful to the court." 1 Association of the Bar of the City of New York, Committee on Post-Admission Legal Education Lectures, 1940–42, Lecture 19, pp. 4–5.

For the reasons above expressed I have withheld my signature from the judgment remanding this case to the lower court to replead, and have taken the utmost pleasure in preparing and filing this feeble dissent to the decision by the majority of my brethren.