committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment."

Mr. McCormack's argument relies on the words " in substitution for or in addition to " which appear there, but not in the proviso to our section 119, and is that consequently there cannot be counts in an information filed here unless the original charge, on which the accused was committed for trial, is also included in it. With all respect, that 1933 English proviso has nothing to do with the proviso to our section 119.

Our section and our proviso are self-contained, and quite clear, and in no way dependent on an English Act for the elucidation of their meaning. Here an information cannot be filed for an offence unless there has been a preliminary inquiry thereinto and the accused has been committed for trial. But if that has been done, then under the proviso an information " can be filed for any offence founded," etc., as set out above. " Any offence " is clear enough and means any offence. There is no reason to read it as if it were " any offence in addition to but not any offence in substitution for that on which he was committed for trial," which the argument would have us do.

For these reasons we answered each question in the negative.

[COURT OF APPEAL]

JONATHAN O. SOURIE . . . . . *Petitioner/appellant*

v.

SAHR W. G. CAPIO . . . . . *Respondent/respondent*

PAUL L. DUNBAR . . . . . *Petitioner/respondent*

v.

GEORGE W. MANI . . . . . *Respondent/appellant*

[Civil Appeals 23/62 and 24/62]

Election Petition—Application for striking out of petition for failure to comply with Rules 15 *and* 19 *of House of Representatives Election Petition Rules* (*Laws of Sierra Leone*, 1960, *Vol. VI, p.* 407)*—Whether rule* 16 *of House of Representatives Election Petition Rules alternative to rule* 15*—Meaning of "Notice" . . . of the nature of the proposed security . . ." in rule* 15*—Whether petitioner complied with rule* 19*—Electoral Provisions Act* (*No.* 14 *of* 1962), *ss.* 60, 62.

These were two appeals from decisions of different judges in election petitions in the Supreme Court. In each case, respondent applied for an order that the petition be struck out for failure to comply with rules 15 and 19 of the House of Representatives Election Petition Rules. In *Sourie* v. *Capio*, the court (J. B. Marcus-Jones J.) granted the application, while in *Dunbar* v. *Mani*, the court (Bankole Jones Ag.C.J.) dismissed it. Since the facts were the same in both cases, only *Sourie* v. *Capio* was argued on appeal.

On the day petitioner presented his election petition, he applied for an order as to security for costs pursuant to section 60 of the Electoral Provisions Act. Within 10 days, petitioner served on respondent a notice of such application, to which was attached a copy of the petition verified by affidavit. Respondent applied for an order that the petition be struck out on the ground of non-compliance with rules 15 and 19 of the House of Representatives Election Petition Rules. Rule 15 provides: "Notice of the presentation of a petition and of the nature of the proposed security as hereafter provided for in rule 20, accompanied by a copy of the petition shall be served by the petitioner on the respondent within 10 days after such presentation. . . ."

Held, allowing the appeal in *Sourie* v. *Capio*, (1) that, having regard to the fact that the Electoral Provisions Act, 1962, made rule 15 partly inapplicable in its present wording, petitioner complied substantially with the intention of the rule, namely, to tell respondent that an election petition has been presented, to give him a copy of it and to let him know what has been done about security; and

(2) That, in the circumstances of the case, the affidavit of service was filed within the time specified by rule 19.

The court (Ames Ag.P.) said, obiter, that rule 16 was not alternative to rule 15 but, rather, supplemental to it.

The court dismissed the appeal in *Dunbar* v. *Mani*.

Zinenool L. Khan for the appellant in Civil Appeal 23/62 and for the respondent in Civil Appeal 24/62.

Berthan Macaulay for the respondent in Civil Appeal 23/62 and for the appellant in Civil appeal 24/62.

AMES AG.P. These two appeals are from decisions of different judges in the court below in election appeals. In each of them, at a stage in the proceedings, the respondent applied for an order that the petition be struck out for failure on the part of the petitioner to comply with rules 15 and 19 of the House of Representatives Election Petition Rules. (I shall call them the rules.) In the one (*Sourie* v. *Capio*) the application was successful and the order was made. In the other (*Dunbar* v. *Mani*) the application was unsuccessful and was dismissed. The circumstances in each case were the same and only the appeal in *Sourie* v. *Capio* was argued, and in *Dunbar* v. *Mani* that argument was adopted and not repeated all over again. I propose to do the same in this judgment, and give my reasons for my opinion as to how *Sourie* v. *Capio* should be determined, and then without repeating my reasons give my opinion as to how *Dunbar* v. *Mani* should be determined.

I start with *Sourie* v. *Capio*.

An argument of Mr. Khan, for the petitioner/appellant, was that rule 16 of the rules was alternative to rule 15, and that, therefore, a petitioner could either serve on the respondent a notice of presentation and so on as mentioned in rule 15 or else serve the petition itself in one of the methods set out in rule 16 (by, so he argued, showing the original and leaving a copy, as if it was a writ). In my opinion, that is completely wrong. I read rule 16 as supplemental to rule 15, and where it, and any other rule which does the same, refers to service of the petition, it means service of the notice of presentation mentioned in rule 15.

The very nature of the procedure in election petitions shows this to be so. It is quite different from that of an ordinary action started by a writ of summons. The latter starts inside the court and issues out of it. The writ is

then served on the defendant, by being shown to him and his being given a copy. The writ is not returned to the court, but an affidavit of service is filed. A writ is prepared by the plaintiff or his solicitor, but it cannot be served before it has been issued out of the court, because until issued it is not a writ.

On the other hand, an election petition starts, not by something issuing out of the court, but by something, namely, an election petition, coming into the court, called in the rules its presentation. When there, it stays there, and the master has to give a receipt for it (r. 2). It cannot be served before its presentation, because it is not at that stage an election petition. It only becomes such upon its presentation. It cannot be served after presentation because it has to stay in the court. Consequently, what has to be done is what is set out in rule 15, and notice of presentation of the petition " and of the nature of the proposed security . . ." accompanied by a *copy* of the petition has to be served on the respondent; and how that may be done is set out in rule 16.

So rules 15 and 16 are not alternative.

The present law as to elections and election petitions is the Electoral Provisions Act, 1962, which was enacted in April of this year, although deemed (by its section 1) to have come into operation on October 14, 1961. The recent General Election was held under the provisions of this Act, and several election petitions have been presented under its provisions. Its section 62 (1) provides for the making of Rules of Court, but none have yet been made. So one has to fall back on subsection (2) thereof, which provides that until other rules are made the rules existing before the Act came into force shall " with any necessary modifications and adaptations " be deemed to have been made under section 62 (1). The existing rules are the House of Representatives Election Petition Rules, which I am calling the rules.

The Act revoked, by implication, some of the rules, the subject-matters of which are now provided for in the Act. It has also made rule 15 (and perhaps others) partly inapplicable in its existing wording, because it has altered the law as to security for costs, and so the rule, which was designed to meet the former situation, does not meet the present and altered situation. I will set it out. It is:

> " Notice of the presentation of a petition and of the nature of the proposed security as hereafter provided for in rule 20, accompanied by a copy of the petition, shall be served by the petitioner on the respondent within ten days after such presentation, exclusive of the day of presentation."

A petitioner seeking to comply with this rule is up against the difficulty that under the new Act it is no longer possible to give notice " of the nature of the proposed security as hereinafter provided for in rule 20." When the rule was made the amount of security was fixed, and it could be a cash deposit or by recognisance, or partly deposit and the rest by recognisance at the option of the petitioner; and rule 15 was met in this respect by saying what had been chosen. When there was a recognisance there were other rules enabling the respondent to object. All this has now ceased to mean anything, because the amount of the security is no longer fixed. An application has to be made to the court for an order of court as to the amount and nature (" given in such manner ") of the security. This is the effect of section 60 of the Act. The security has to be given " at the time of presenting an election petition or within such time as the court shall order." It cannot be done " at the time,"

as I pointed out in my judgment in the recent appeal of *H. M. Kanagbo and ors.* v. *M. J. Kamanda Bongay* (Civil Appeal No. 14/62).

Mr. Macaulay, for the respondent, argued that the wording of the rule is only appropriate to notice by written document, and I think that it does intend written and so concrete notice as distinguished from any other sort of notice by inference from something else. There is no prescribed form: but Mr. Macaulay pointed out that the Encyclopedia of Forms (Vol. 8, Form 581) includes a form. And so it may, but as long as it is not prescribed, notice in that particular form is not obligatory: and anyhow the form does not exactly fit rule 15 now that it is necessary to apply to the court for an order as to security.

The learned judge said:

> "It is the duty of the courts to try to get at the real intention of the legislature by attending to the whole scope of the rules and in considering this rule 15 in relation to the entire rules governing election petitions I come to the conclusion that the requirements far transcend form. They go to substance which cannot be waived."

Yet it seems that he struck out the petition on the question of the form of the compliance with rule 15. He had said earlier in the judgment:

> "It seems to me that three things are required to be done under [rule] 15:
>
> 1. Notice of the presentation of a petition;
> 2. The nature of the proposed security and
> 3. A copy of the petition already presented to the master under rule 2.
>
> "Nature of the proposed security, in my view, does not presuppose a copy of a notice of motion."

No one knows since the Act of 1962 what "the nature of the proposed security" presupposes. This passage of the judgment was followed by:

> "Owing to the time factor attending preliminary steps to the hearing of an election petition it seems to me that such application for security for costs could be made ex parte and if this view is correct service of the motion for security on the respondent is not a sine qua non to the fixing by the court of a security for costs. A fortiori the motion for the fixing of security for costs and its attendant affidavit and petition exhibited cannot be regarded as notice of the presentation of a petition in terms of the requirements of rule 15."

No one knows whether it is to be ex parte or on notice. The intention of the rules on this matter was, until the Act of 1962, that the respondent should have an opportunity of objecting to a recognisance, when there is one. The rules as to that have been repealed by implication, as I have already pointed out. There is no reason to suppose that the legislature intended to take away that right. How then can it be given him unless by making the application for the order on notice to him. All this is somewhat conjectural as the rules are now silent on the point. The long and the short of it appears to me to be that the Act of 1962 has made the rule an unsatisfactory one and the position will continue to be unsatisfactory until it is amended.

What, then, should be done? One cannot say; one can only see what the petitioner did and consider whether or not it can be held reasonably that he

complied substantially in the circumstances of today with what was, and still is today, the intention of the rule, namely, to tell the respondent that an election petition has been presented, and to give him a copy of it, and to let him know what has been done about security.

I have said that the requirement of section 60 as to security being given at the time of presentation of the petition cannot be followed: but the respondent did the next best thing. He applied for the order on the day of presenting the petition: and he did so on notice and attached to it a copy of the petition, verified by affidavit.

The learned judge held that this was not a compliance with the rule. It is clear from what he had said before, which I have quoted, that had the petitioner served on the respondent a document of notice of presentation and the copy of the petition but without a document of notice of application for the order for security that he would have held it to be sufficient. The petitioner did it the other way round.

With all respect to the learned judge I think that, in the unsatisfactory state of the rule today, one must say that the rule has been complied with substantially (whether by good fortune or good management). This is the conclusion reached by the learned acting Chief Justice in the other appeal.

There remains the question of rule 19. Did the petitioner comply with that? This court has held in the appeal *H. M. Kanagbo and others* v. *Kamanda Bongay* (mentioned above) that the rule is imperative and must be complied with. It requires an affidavit of service to be filed " immediately after " service. Those two words are not precise, as, say, within a specified number of days would be. I opined in the appeal just mentioned that the affidavit has to be entered immediately after, because the rules do not require an entry of appearance and this rule makes up for that. One has to see what the circumstances are, where the respondent was when served, and so on, and then see whether or not the affidavit can be said to have been filed within the meaning of the rule. Each case must depend on its own circumstances, as my brother Dove-Edwin J.A. pointed out clearly in his judgment in that appeal.

In the instant case the learned judge held that it was not. He had before him an affidavit which appeared on the face of it to be untrue. We were asked to, and did, receive in evidence an affidavit correcting, or clarifying the one before the learned judge. It makes the period of time taken to file the affidavit one day longer; but even so, I think it reasonable to hold that in the circumstances of this case it was done within the meaning of the rule (as also did the learned acting Chief Justice in the other appeal).

The result is that in this appeal by the petitioner, No. 23/62, *J. O. Sourie* v. *S. W. G. Capio*, I would allow the appeal and set aside the order striking out the election petition.

In the other appeal by the respondent, in which the application to strike out the election petition was dismissed, No. 24/62, *P. L. Dunbar* v. *G. W. Mani*, I would dismiss the appeal.