Order 54A, r. 1, of the English Rules, reads as follows:

"In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

Rule 4 states:

"The court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

These Rules are substantially the same as our Order XLII (10) and proviso.

Applying the above principle, I do feel that all the matters raised in the summons are well within the provisions of this Order and matters quite properly raised on an originating summons. It is my considered view that before the learned trial judge formed the opinion that such construction ought not to be determined on originating summons both sides should have first been heard on the point or at least should have been given an opportunity of being heard. The record of proceedings shows clearly that neither was done. Both Mr. Barlatt and Mr. Pratt agreed before us that neither was done. In this regard I find that the learned trial judge acted on wrong principles in the exercise of the discretion given him by the proviso to Order XLII (10).

The learned trial judge in arriving at his opinion also relied heavily on the affidavit of the respondent which, as I have already pointed out, had very little or nothing to do with the matters raised on the originating summons. In doing so, he misconceived the real purpose of the summons. This was a material fact which affected the exercise of his discretion. This court has always held that it will intervene where the court finds that the judge in the court below, acting under a misconception as to a material fact, did not exercise his discretion judicially.

For the reasons given, I would allow the appeal and set aside the decision of the court below, and would order that the matter be remitted to the court below for determination by another judge of the issues raised on the originating summons.

[COURT OF APPEAL]

Freetown
Dec. 10,
1963.

IN THE MATTER OF THE GOLD COAST PROPERTIES COMPANY LIMITED

[Civil Appeal 5/63]

Ames Ag.P.,
Dove-Edwin
J.A.,
Cole Ag.C.J.

Companies—Landlord and tenant—Lease to company which went into voluntary liquidation—Application by lessor for order rescinding lease—Whether lease "contract" within meaning of section 252 (5) *of Companies Act* (*Cap.* 249, *Laws of Sierra Leone,* 1960).

In 1955 and 1956 Mr. B. L. Macfoy leased two adjacent areas of land to the Gold Coast Properties Company Limited, which changed its name in 1957 to the Central Property Company (Ghana) Ltd. (Ghana). In August 1957, Ghana

went into voluntary liquidation. In November, 1961, Macfoy applied to the Supreme Court by motion on notice under section 252 (5) of the Companies Act for an order that the two leases be rescinded.

Section 252 (5) of the Companies Act provides: The court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract. . . ."

In May 1962, the Supreme Court made an order for the rescission of the leases, and against this decision Ghana appealed on the ground, inter alia, "That notice of motion is not the correct procedure for claiming rescission of the leases and damages for breaches of covenants in leases, and that the learned trial judge was wrong in failing to order that a writ of summons be issued by the respondent."

Held, allowing the appeal, that the word "contract" in subsection (5) of section 252 of the Companies Act does not include a demise of land by deed for a term of years.

Rowland E. A. Harding for the appellants.
Cyrus Rogers-Wright for the respondent.

AMES AG.P. In 1955 and 1956 the applicant/respondent, Mr. B. L. Macfoy, whom I will call the respondent, leased two adjacent areas of land at the Kissy By-pass to the respondents/appellants, the Gold Coast Properties Co. Ltd., whom I will call the appellants, for terms of 15 and 25 years respectivelly.

In March, 1957, the appellants' name was changed to the Central Property Company (Ghana) Ltd. On August, 1957, the appellants went into voluntary liquidation, and appointed a liquidator. The liquidation was still continuing on November 14, 1961, and, apparently, until today also.

On that November 14, 1961, the respondent applied to the Supreme Court by motion on notice under subsection (5) of section 252 of the Companies Act (Cap. 249) for an order that the two leases be rescinded, and for an order for payment of arrears of rent. The affidavit filed in support of the application averred breaches of covenants in respect of each lease, including non-payment of rent, and parting with possession of the premises. A counter-affidavit averred tender and refusal of rent and denied parting with possession, and ended by saying:

> "The lessees and their attorney say that by a memorial of judgment dated the 19th day of November, 1958, the United Africa Company Ltd. are the owners of the said premises and they deny that Benjamin Leonard Macfoy is the owner as alleged; the lands are to be sold by the sheriff to satisfy the said judgment."

No witnesses were called, or asked for, by either side at the hearing, and on May 28, 1962, an order was made for the rescission of the leases "for the remainder of their respective terms" and for payment of all arrears of rents and rates due, and that the master and registrar should ascertain and report their amounts. That order was drawn up and signed on May 31, 1962.

The master and registrar held an inquiry and reported the amounts of rents and rates in arrear. On January 25, 1963, the learned judge made an order accordingly and this order was drawn up and signed on January 28, 1963. This appeal is against that judgment.

Both these drawn-up orders were erroneous. Each ordered the rescission of the leases, and overlooked the learned judge's qualification "for the

remainder of their respective terms." The learned judge did use the word "rescission" without qualification on January 25, 1963, but he was clearly referring to the qualified rescission ordered on May 28, 1962. His order for rescission was in fact an order for the forfeiture of the leases.

Neither party has applied to amend the title to the suit, although the Gold Coast Properties Company Ltd. no longer exists as a legal entity.

At the outset of the hearing before us a preliminary objection was argued, that the appeal was not properly before the court, having regard to section 182 (1) (*a*) of the Companies Act, because at the end of the notice of appeal, where the persons affected have to be stated, the appellant was said to be the liquidator, and also the notice was signed "H. McCartney" personally and not for and on behalf of the appellants.

Mr. Harding spent some time attempting to justify these defects (and no amount of argument could do that); he then veered round to the opposite point of the compass and asked leave to amend. We allowed him to, on terms. It was clear throughout the notice that the company were the appellants, until these lapses at the very end.

Mr. Wright in arguing the objection had cited *Keister* v. *Speck*, a decision of this court given in March 1962, where leave to amend a notice of appeal was refused. That case was not similar. In it a necessary document had been omitted from the appeal papers.

Mr. McCartney, who signed the notice of appeal, was (and may still be) the General Manager of the United Africa Company of Sierra Leone Ltd. It had been his predecessor in that appointment who had filed the counter-affidavit. That predecessor had been appointed attorney of the liquidator and his power of attorney was exhibited. No power of attorney of Mr. McCartney was exhibited, but no point was taken as to this.

I now come to the merits of the appeal.

I think that the appeal should be allowed on the first three lines of the first ground of appeal. I will set out the whole ground. It is:

> "(1) That notice of motion is not the correct procedure for claiming rescission of the leases and damages for breaches of the covenants in leases, and that the learned trial judge was wrong in failing to order that a writ of summons be issued by the respondent."

I do not interpret the word "rescission" in section 252 (5) as meaning the remedy of rescission which the courts of equity have always granted in cases of fraud, misrepresentation, duress, undue influence, and sometimes mistake. I interpret it as conferring a new power on the court in the exercise of its jurisdiction in equity to rescind a contract where the supervening winding up of a company would make it inequitable that the applicant should be held to his contract, and equitable to rescind it on such terms as the court thinks just. (The applicant can be ordered to pay damages where justice so requires. If damages have to be paid to him he can prove for them as a debt.)

I cannot interpret the word "contract" in subsection (5) as including a demise of land by deed for a term of years. Section 252 is not a collection of miscellaneous provisions about the winding up of a company. It is a logical sequence of provisions about disclaimer, and must be read as a whole.

A company's property may be of many different kinds, and the section makes provisions about several different kinds of property. Subsection (1)

regards "land of any tenure burdened with onerous covenants" and "unprofitable contracts" as different kinds of property. Mr. Wright, in his argument for the respondent, did not agree that a demise of land by deed for a term of years is within the term "land of any tenure." I think it is. In the early feudal age, what we now call a rent-paying tenant had no rights at all. But his estate in the land has long since been protected and it has long since been usual, and correct, to speak of leasehold tenure.

In subsection (4), the word "property" in the first line means the different kinds of property mentioned in subsection (1), and the subsection makes provisions about them, but also makes, towards the end, a further particular provision about contracts.

Skipping subsection (5) for the moment, one finds that subsection (6) starts off with provisions about all kinds of property, and ends with a proviso about property "of a leasehold nature," which can, if disclaimed, be vested in an underlessee and so on.

Now returning to subsection (5), it is concerned only with contracts made with the company. In my opinion, it cannot be interpreted as including a demise of land by deed for a term of years.

If I am correct, it follows, of course, that where a liquidator does not disclaim property of leasehold tenure, the lessor cannot apply by motion under this section for the rescission of the lease. He must allow the lease to continue, although the lessees are in liquidation. If asked why this should be so, I would say, perhaps because he is protected by his right of re-entry, and the law of landlord and tenant, but most of all because the legislature, whether for that or for some other reason, has not enabled him to. Of course, if circumstances exist or arise justifying forfeiture of the lease, the lessor can follow the normal procedure for its forfeiture, and, if it comes to an action in court, evidence can be called, and any application, if made, for relief against forfeiture can be considered.

In my opinion, the section did not enable the application of the respondent to be made, and consequently the court had no jurisdiction to entertain it or make any order under it. For these reasons I would allow the appeal, set aside the judgment appealed from, and enter judgment striking out the respondent's application.

[COURT OF APPEAL]

Freetown
Dec. 10,
1963.

SANTIGIE KAMARA . . . . . *Respondent*

v.

THOMAS DANIEL BULL . . . . . *Appellant*

Ames Ag.P.,
Dove-Edwin
J.A.,
Cole Ag.C.J.

[Civil Appeal 19/63]

Tort—Negligence—Negligent operation of automobile—Inevitable accident—Res ipsa loquitur—Burden of proof—Damages.

Plaintiff was standing on the pavement over a ditch beside the Freetown–Wellington road. Defendant drove his automobile past a stopped lorry on his right, struck and killed a third man, and then veered to the side of the road, striking the plaintiff and knocking him into the ditch. Plaintiff sustained severe injuries.