breaches of the covenant of the lease, that he did some of the repairs complained of but left others which seriously support the claim of the plaintiff. From the nature of the breach and the continued want of repair I do not consider this is a proper case where the defendant should be relieved from forfeiture.

As I stated, this should be sufficient ground for the plaintiff to succeed, but I find further an additional ground that the defendant has impugned the title of the plaintiff. I therefore order that the plaintiff should recover possession of the premises. On the claim for mesne profits, the plaintiff is entitled to the rent due from the date the action was instituted on this claim, that is, February 22nd, 1950, at £4 a month to the date possession was recovered. The defendant is to pay the costs.

Judgment for the plaintiff.

RADAR *v.* JABER

SUPREME COURT (Beoku-Betts, J.): March 9th, 1951
(Civil Case No. 348/50)

[1] **Land Law—adverse possession—owner in possession unaffected by adverse possession—entry on land by owner vests actual possession in him notwithstanding adverse claimant:** If the owner of property is in possession of it, no person with any adverse possession can eject him, and no tenant can claim any right which will have the effect of putting him out of possession; and entry on the land by the person who is entitled to the freehold vests in him for legal purposes the actual possession, and consequently the seisin, notwithstanding that an adverse claimant is on the land (page 113, lines 18–24).

[2] **Land Law—title—merger—lesser estate merges into greater estate acquired by same person in same land:** Where a lesser and a greater estate in the same land come together and vest, without any intermediate estate, in the same person and in the same right, the lesser is immediately extinguished by operation of law and merged in the greater estate; and this is so whether the estates involved are leasehold and freehold or both leasehold (page 111, lines 19–34; page 112, lines 9–24).

[3] **Landlord and Tenant—determination of tenancies—remedies of tenant—equitable relief or damages but no right to eject landlord:** While the person having the freehold of certain property has the right to terminate any leasehold interest in the property under the lease, the

tenant may not be without remedy against the owner: he may be granted equitable relief, such as an injunction, in a proper case, or, if he is in possession and by the lease entitled to remain in possession, he may sue for damages for breach of covenant; but he cannot claim the right to eject the freeholder from the property since that would be inconsistent with the relationship of landlord and tenant and would be a disclaimer of the landlord's title (page 113, line 24—page 114, line 18).

[4] **Landlord and Tenant—possession—re-entry—landlord may retake possession by force:** A landlord has the right to retake possession of his property by force when his right of re-entry arises (page 113, lines 25–26).

[5] **Landlord and Tenant — possession — re-entry — re-entry by person entitled to freehold vests actual possession in him—tenant cannot set up adverse possession against him:** See [1] above.

The plaintiff brought an action against the defendant to recover possession of certain premises.

The plaintiff was the tenant, and the defendant his sub-tenant, of premises which the owners sold to the defendant. The plaintiff then paid his rent to the defendant. The defendant alleged breaches of covenants in the lease by the plaintiff and instituted proceedings against him for possession of the premises. The Supreme Court (Beoku-Betts, J.) gave judgment for the present defendant and stayed execution for several days; but no specific order for recovery of possession was made. The proceedings are reported in 1950–56 ALR S.L. 97. The plaintiff, in accordance with the sub-lease, gave the defendant notice to quit, and instituted the present proceedings to recover possession of the premises from the defendant.

The Supreme Court considered which party was entitled to possession of the premises in the circumstances of the case.

Cases referred to:

(1) *Dynevor* v. *Tennant* (1888), 13 App. Cas. 279; 59 L.T. 5, applied.

(2) *Lows* v. *Telford* (1876), 1 App. Cas. 414; [1874–80] All E.R. Rep. 1302, considered.

R.B. Marke for the plaintiff;
Betts for the defendant.

BEOKU-BETTS, J.:

This is another action expedited for hearing at the request of the parties. It first came before me on an application to set aside

judgment and later on an application to show cause for contempt of court. I suggested the case should be put up for early hearing before another judge, but both parties suggested that I should try the case as early as possible and as a consequence I gave priority over all other cases then pending.

The statement of claim is attached to the writ of summons and would be better appreciated if it is set out. It is as follows:

1. The plaintiff was the landlord and the defendant the tenant of the premises.

2. By an indenture of lease of September 6th, 1946, between the plaintiff (Abdul Radar) and the defendant (Abdul Jaber) a portion of the building situate at the South-Western angle of Little East Street and Garrison Street in Freetown numbered 44 Little East Street containing part of the basement shop and comprising four doors in Little East Street and one door in Garrison Street were let out by the plaintiff to the defendant together with one bedroom on the first floor for four years from September 9th, 1946.

3. It was a term of the indenture that at the expiration of the term of four years the defendant should continue to occupy the said premises on a yearly tenancy unless at least three months before the expiration of the said term the plaintiff gave to the defendant notice in writing of his intention to take possession of the premises.

4. That, by notice in writing on February 30th, 1950, the plaintiff served on the defendant notice of his intention to take possession at the end of the said term.

5. The defendant is still in possession of the premises and refuses to give up possession.

The amended defence, so far as is relevant, is as follows:

1. The defendant admits the lease between the plaintiff and defendant but states that, by a deed of conveyance dated July 22nd, 1948 between Marian Taylor and the defendant, the defendant became the owner of the premises.

2. That the defendant obtained the tenancy from him by paying rent to him of £4 a month as from March 1949 to August 1949.

3. That the plaintiff is estopped from denying the title of the defendant.

4. In para. 6 the defendant denies the notice of the plaintiff to take possession of the premises.

The simple question that I have to decide is whether the plaintiff is entitled to eject the defendant from the premises as claimed. The plaintiff gave evidence that by Exhibit A dated September 6th,

1946 he granted a lease to the defendant of a portion of the premises. He said he rented to the defendant four shop doors in Little East Street, one door in Garrison Street and one bedroom on the first floor. He then said he gave the defendant notice to quit and his solicitor ejected the defendant.

In cross-examination the plaintiff stated that he knew that the defendant bought the premises in 1948 and he stated that he paid rent to the defendant as owner for five months. The plaintiff said that he went into possession of the whole premises in December last after the defendant had been ejected from the portion in which he was living.

Evidence was given by certain post office officers, and I have no doubt that the plaintiff attempted to give notice to the defendant but that the defendant would not accept the document. The first defence witness gave evidence that he bought the property from Marian Taylor in 1948. Exhibit A showed that the property was sold by Marian Taylor and two other persons who were the joint owners, namely James William Lawrence Taylor and Goldstone Patrick Taylor. The Master of Court then produced Exhibits J and K. From the evidence and records it appears that the plaintiff made a lease with Marian Taylor by Exhibit B dated September 15th, 1936, by which Marian Taylor purported to lease to the plaintiff premises at No. 6 Garrison Street and No. 44 Little East Street. By Exhibit A dated September 6th, 1946, the plaintiff leased a portion of these premises (referred to in the statement of claim) to the defendant for a term of years. I may state the numbers of the exhibits are in the order given in evidence. Marian Taylor (the same person who had the leased portion of the premises under Exhibit B) then sold the property with the two other persons referred to, James William Lawrence Taylor and Goldstone Patrick Taylor, as owners in fee simple to the defendant. The defendant after that remained in physical possession of the portion that had been leased to him by the plaintiff under Exhibit A and the plaintiff recognised the right of the defendant as owner by paying rent, as he admitted in evidence.

Much of the difficulty in this case has arisen through the fact that the real legal position between the parties did not seem to have been realised as early as it should have been. Counsel for the plaintiff claimed the right to enforce the rights under a tenancy which had been merged in a higher interest, and counsel for the defendant, by raising the point in a letter that the plaintiff had

not given notice of his intention to take possession of the premises, gave the impression that he thought there could be such a right after the sale of the freehold. It was when the defence was delivered that the defendant raised the point that he is owner of the premises and that the plaintiff was estopped from raising the question of ownership by paying rent to the defendant. The legal questions are now: (a) whether the plaintiff was at one time, or is now, the landlord of the defendant; (b) whether the defendant by buying the property ceased to be a tenant or whether he continued as such notwithstanding the sale of the freehold; and (c) whether the plaintiff can maintain this action against the defendant.

On the first question, when the parties entered into Exhibit A, the lease of September 6th, 1936, the ordinary relationship of landlord and tenant was created between them. But, by Exhibit F on October 27th, 1948, the defendant bought the freehold of the whole of the property from Marian Taylor and the two other co-owners, and the lease between the plaintiff and defendant, or so much as was existing between them, became merged, and the defendant had a greater interest then than the plaintiff had. In *Cheshire on Real Property*, 5th ed., at 115–116 (1944), and 24 *Halsbury's Laws of England*, 1st ed., at 214, the law is clear that there can be no remainder after an estate in fee simple and no interest higher than a fee simple. By the purchase of the property the defendant became the absolute owner of the property. By the principles of the common law there is a merger where a term of years becomes vested in the owner. A man cannot at law be a reversioner to himself: see Hill & Redman, *Law of Landlord & Tenant*, 10th ed., at 400 (1946). When the defendant became owner, he succeeded to the reversionary interest of Marian Taylor and her co-owners in the property, and the term of years ceased to exist. Even in the case of leasehold, without the freehold there can be a merger, and where the terms in a lease merge the covenants attached to it are extinguished: see *Dynevor* v. *Tennant* (1), where it was held that when the rights under a lease merge, the lease is extinguished.

It must follow therefore that where a person who has been a leaseholder becomes the freeholder, all rights under the lease become extinguished in so far as they are inconsistent with the freehold rights in the property. In this action the plaintiff granted a sub-lease of a portion of the premises to the defendant. That sub-lease was as regards one-third of the rights in the property. Subsequently the defendant bought the freehold of not only the plaintiff's half of

the leasehold but the whole of the freehold. On such a purchase the sub-lease of the one-third portion which the plaintiff had ceased to exist. But the plaintiff, even after the sale, took steps to enforce conditions in the lease of the one-third interest as against the owner who had the freehold of the whole property. A consideration of the law as stated in *Cheshire*, at 833, shows how contrary to all known principles is this action on the part of the plaintiff. *Cheshire* states the following:

> "The term *merger* means that, where a lesser and a greater estate in the same land come together and vest, without any intermediate estate, in the same person and in the same right, the lesser is immediately annihilated by operation of law. It is said to be 'merged,' *i.e.* sunk or drowned, in the greater estate.
>
> For example:
>
> If land is limited to A. for life, remainder to B. in fee simple, merger will result from any event which produces the union in one person of the life interest and the remainder of the reversion in fee. Thus if A. conveys his life interest to B., or if B. conveys his reversion to A., or if the reversion in fee beneficially descends to A. on the intestacy of B., there is in each case a merger. Again, a term of years may merge in a life interest, and an estate *pur autre vie* may merge in the interest held by a tenant for his own life."

One has only to consider the facts on which the plaintiff bases his claim to realise the departure from all the principles governing the law of real property. The defendant took a lease from the plaintiff for four years and it was provided that he should continue to occupy the premises on a yearly tenancy after the expiration of the tenancy, unless at least three months before the expiration of the term the plaintiff gave notice in writing of his intention to take possession of the premises. By the time this notice should have been given, the defendant had bought the freehold of the property and the plaintiff therefore could not enforce the claim against the defendant. In spite of this, and although the plaintiff had paid rent to the defendant, the plaintiff gave the defendant notice that he wished to take possession of the premises, and as appears from the records the plaintiff actually turned the defendant out of the premises and continued to hold possession of the premises in spite of an order setting aside the judgment in default of appearance. In my opinion, where the freehold became vested in the defendant, the

plaintiff had no right to enforce possession against the defendant for the property became in law or in equity the property of the defendant. The plaintiff failed to realise this, or if he did he acted in contravention of all known principles, when he gave notice of his intention to take possession of the property. The legal relationship between the parties had changed by the sale. I cannot understand how the plaintiff could imagine that he had the right to eject the defendant, the owner of the property. When the leasehold continued, the defendant was liable to pay rent for the portion he occupied, and the plaintiff paid rent to Marian Taylor for the whole property. When the relationship changed, the plaintiff was liable to pay rent for the whole of the property and this rent he paid to the defendant. There is no evidence the defendant paid any rent to the plaintiff. In fact he could pay no rent. What probably happened is that as the defendant was in possession of part of the premises the plaintiff must have paid less rent for that portion.

In 24 *Halsbury's Laws of England*, 1st ed., at 215, note (h), is to be found the following: "Entry on the land by the person entitled to the freehold vests in him, for legal purposes, the actual possession, and consequently the seisin in deed, notwithstanding that an adverse claimant is on the land." If the owner of property is in possession, no person with any adverse possession can eject him. In fact no person who is in fact his tenant can claim any right which would have the effect of putting the owner out of possession. The landlord has the right to retake possession of his property by force: see *Lows* v. *Telford* (2). The defendant had the seisin by deed of the whole of the property, and the plaintiff cannot claim to eject him from it. Where there is a lease, if subsequent to that lease the property is sold, the purchaser has the highest right over the property. As I have said before, the lessee is not without remedy against the owner, but may be granted equitable relief, or, if he is in possession and by the lease entitled to remain in possession, may sue for damages for breach of covenant. In a proper case the court may grant an injunction against the owner of property or may award damages according to the nature of the case, but I have yet to find any authority that the lessee of premises can in circumstances such as those in this case give notice to the owner that he (the lessee) intends to occupy the premises and enforce this by ejectment of the owner.

It is of interest to quote the following from *Cheshire*, at 35:

"It is necessary to discuss only one example of interests

classified by Common Law as being less than freehold, and that is leasehold interest. This interest, generally referred to as a term of years, arises where land has been demised, *i.e.* leased to a man for a definite number of years. It thus lacks the requirement of an uncertain duration, and though the period for which it is to last may be very great, as for instance 999 years, yet it is not a freehold estate, and in the eye of the law, is a smaller interest than a life estate."

While the person having the freehold has the right to terminate a leasehold, the contrary is not the case. A tenant or leaseholder who claims the right to eject the freeholder from the property loses all rights in the lease. He errs against the very foundation of the rules of real property. Even if there were an agreement by which the owner agreed to forego the enforcement of certain rights, when the tenant claims rights against the title he commits an act which is a disclaimer of the title of the landlord and forfeits all rights to the tenancy. The acts of the defendant are inconsistent with the relationship of landlord and tenant.

I have indicated enough to show that in my opinion the plaintiff's attitude is a novel principle of real property, and I have no hesitation in saying that the plaintiff fails and the action is dismissed with costs.

In this matter I must take notice of certain events in the records, Exhibits K and J, and statements of counsel for the plaintiff. When this action started, the plaintiff continued in possession of the premises even after the court had ordered that the judgment under which he took possession should be set aside. An application was made for an order to commit him for contempt for disobeying the order of the court. Counsel for the plaintiff opposed the order and it was agreed the action should be tried as early as possible. The plaintiff remained in possession on the ground that in my former order I did not make a specific order for recovery of possession. I did not think that necessary. In view of the result of this action, I make a special order, in dismissing the claim of the plaintiff, that the defendant should recover possession from the plaintiff of the portion of the premises involved. The former action had given the plaintiff recovery of possession of the portion claimed with a stay of execution for seven days. This judgment confirms that the judgment under which the plaintiff entered into possession ceased from the date the judgment was set aside. The defendant should recover possession of this part of the property. Since it is the house

of the plaintiff and it will cause him inconvenience to be turned out, there will be a stay of execution for 10 days as from the present date.

Order accordingly.

RADAR *v.* JABER

SUPREME COURT (Beoku-Betts, J.): March 20th, 1951
(Civil Case No. 75/50)

[1] **Civil Procedure—execution—stay—stay granted only on proof of exceptional circumstances—court's discretion to be exercised only after consideration of all facts:** The granting of a stay of execution is based on proof by the applicant of exceptional or special circumstances, and the court should consider all the facts of the case before deciding to exercise its discretion in the matter (page 116, lines 27–32).

[2] **Civil Procedure—execution—stay—stay not to be granted merely because delay between judgment and appeal substantial—applicant can be compensated by damages if appeal successful:** The fact that there will be a substantial delay between the giving of a judgment and the hearing of the appeal from that judgment is not of itself a circumstance which will cause the court to grant a stay of execution; if the appeal is successful, the applicant may be compensated by damages (page 116, line 35—page 117, line 33).

[3] **Evidence—burden of proof—stay of execution—burden on applicant to show exceptional circumstances justifying stay:** See [1] above.

The plaintiff (now the respondent) brought an action against the defendant (now the applicant) to recover possession of certain premises.

The defendant was the tenant of a portion of premises which the owners sold to the plaintiff, who had previously been the defendant's sub-tenant. The plaintiff alleged breaches of covenants in the lease by the defendant, and instituted the present proceedings for possession of the premises. The Supreme Court (Beoku-Betts, J.) held that the defendant had broken certain covenants in the lease, refused to grant him relief from forfeiture of the lease and gave judgment for the plaintiff. Execution was stayed for several days. These proceedings are reported in 1950–56 ALR S.L. 97. The defendant then applied for the stay of execution to be extended until the hearing of the appeal.

The Supreme Court considered the nature of the circumstances