one, this does not mean that merely because an accident has happened and somebody has been killed and in that sense danger has arisen, therefore it must follow that the accused was driving in a manner dangerous to the public.

Asking myself the before-mentioned question—"Had I seen this, should I have said without any doubt 'that was a dangerous piece of driving'?"—I find my answer is: "I cannot be sure about it." I am certain this accident would not have happened but for the dangerous and illegal action of the driver of the lorry in stopping on the offside of the road in a bend with his headlights shining.

I accordingly find the accused not guilty on both counts and he is accordingly acquitted and discharged.

[SUPREME COURT]

Freetown
February 15,
1963
Betts Ag.J.

PARAMOUNT CHIEF TAMBA S. M'BRIWA . . *Respondent/applicant*

v.

PARAMOUNT CHIEF DUDU S. BONA . . . *Petitioner/respondent*

[E.P. 13/62]

Election Petition—Application to strike out petition for failure to comply with rule 18 *of House of Representatives Election Petition Rules (Vol. VI, Laws of Sierra Leone,* 1960, *p.* 411)*—Failure to file copy of order with master "forthwith"—Effect of failure to raise objection at earlier appeal—Whether provisions of rule* 18 *mandatory or directory—Whether non-compliance with rule* 18 *could be waived.*

Petitioner filed an election petition on June 12, 1962. On the application of respondent, the Supreme Court ordered that the petition be struck out on the ground that rules 15 and 19 of the House of Representatives Election Petition Rules had not been complied with. Petitioner appealed to the Court of Appeal (Civil Appeal 21/62), which, on November 14, 1962, allowed the appeal and reinstated the petition.

Respondent then brought an application to strike out the petition on the ground that the order made by the Court of Appeal on November 14 and another order obtained by petitioner on June 20 had not been filed with the master "forthwith" as required by rule 18 of the Election Petition Rules. The order obtained on June 20 was filed on June 28, and the order made on November 14 was filed on November 27. Rule 18 provides: "A copy of every order . . . or, if the master shall so direct, the order itself or a duplicate thereof . . . shall be forthwith filed with the master, who shall stamp it with the official seal. . . ."

Petitioner argued (1) that respondent's objection was a mere technicality; (2) that the Court of Appeal should be deemed to have considered the objection in making its decision; and (3) that "forthwith" should be interpreted to mean such time as a reasonable man would say was practicable in the circumstances.

Held, for the respondent, (1) the fact that respondent could have raised the objection that rule 18 had not been complied with at the time of the appeal to the Court of Appeal did not preclude him from raising the objection after the decision by that court.

(2) The requirements of rule 18 are mandatory and not merely directory, and, therefore, they could not be waived by the respondent.

(3) The orders of June 20 and November 14 were not filed "forthwith" within the meaning of rule 18.

Cases referred to: *The Middlesex Justices* v. *The Queen* (1884) 9 App.Cas. 757; *Mather* v. *Brown* (1876) 1 C.P. 596; *Ex parte Lamb, In re Southam* (1881) 19 Ch.D. 169; *Kanagbo and others* v. *Bongay*, Sierra Leone Court of Appeal, July 27, 1962, Civil Appeal 14/62.

Zinenool L. Khan for the respondent/applicant.
John E. R. Candappa for the petitioner/respondent.

S. BETTS AG.J. Counsel for the applicant has brought this application to strike out the petition on the ground that rule 18 of the House of Representatives Election Petition Rules has not been complied with. Rule 18 reads:

> "A copy of every order (other than an order giving further time for delivering particulars) or, if the master shall so direct, the order itself or a duplicate thereof, also a copy of every particular delivered, shall be forthwith filed with the master, who shall stamp it with the official seal. Such order shall be filed by the party obtaining the same, and such particular by the party delivering the same."

The applicant relies, as a basis for this application, on the following: (1) that the respondent/petitioner had obtained an ex parte order on June 20, 1962, which was never filed until June 28, 1962.

(2) That another order in favour of the respondent/petitioner, made by the Court of Appeal on November 14, 1962, was not filed until November 27, 1962. Counsel for the applicant argues that these periods intervening between the obtaining of these orders and their respective filings amount to non-compliance with provisions contemplated by rule 18 which were urged, by counsel, to be mandatory and compelling.

For the respondent it was argued that the objections relied on were technicalities and that, an action in which this matter could conceivably have been raised having come before the Court of Appeal under circumstances in which a final judgment was given, it should be deemed that these instant objections, described as technicalities, would also have been taken into consideration when the appeal court was dealing with the appeal. It was further argued that the other side "took steps to further the action" and that being so, the applicant waived any right he might have had which was antecedent to the Court of Appeal's decision. It was also argued that "forthwith" should be interpreted to mean such a time as a reasonable man would say was practicable in the circumstance.

The points taken on appeal before the Court of Appeal were that rules 15 and 19 of the House of Representatives Election Petition Rules were not complied with. The concluding words of the judgment in connection with the appeal reads: "I will allow the appeal and set aside the order striking it out." There should be no doubt in anybody's mind as to what is meant by the words set out. It means one thing only—a complete revival of the original action. That being so, everything and particularly every objection which was pertinent then would be pertinent now. I accept that the offending rule 18 could have been

raised on appeal and I even grant that the appeal court itself, if it deemed it sufficiently connected with the points raised on appeal, could have adverted to it, but neither course was taken, and, not having been taken, rule 18 can now substantially form a ground on which an objection can be based.

This point having been cleared, the next consideration is to determine whether the provisions of rule 18 as applied to this action are mandatory or whether they are merely discretionary. I would like to look at this matter from the angle of what interpretation should be given to the rules (election) and to consider whether the same interpretation would be applicable to cases arising from these rules. It is agreed that when a statute or a rule made applicable to a statute requires something to be done, or done in a particular manner, without stating a penalty for non-compliance, then one has to consider what the intention of the legislature is by weighing what the consequences will be when such statute or rule is treated as imperative, or directory only. This principle is expressed in *The Middlesex Justices* v. *The Queen* (1884) 9 App.Cas. 757, 778. It makes it possible for one to choose one way or the other depending on what the test of the consequences indicates. With regard to cases arising under these rules, Lord Coleridge C.J. in *Mather* v. *Brown* (1876) 1 C.P. 596, 601 had this to say:

> "It must be remembered that, in dealing with cases under these Acts, we are sitting as a final tribunal of appeal . . . and, therefore, are more especially bound to keep ourselves strictly within the letter of the Acts, and to abstain from any attempt to strain the law."

As a result of these instances it is seen that, though the rules are liable to be interpreted in the alternative, cases arising under them are to be interpreted strictly and within the letter of the Acts. Following this principle I would quote again a portion of the rule, that is, rule 18: "A copy of every order . . . shall be forthwith filed with the master." Applying this test to determine whether the section is mandatory or discretionary, the simple question to be asked is, what will be the consequence if the order is not filed forthwith? As the procedural steps are progressive it is easily conceivable that the master would normally allow the next step to be taken whether or not that step is proper or justifiable. The consequence would be, therefore, the possibility of the entire machinery being thrown out of gear. Obviously the legislature would not enact proposals to frustrate the normal course of justice in the courts and one would come to the conclusion that the intention is, therefore, mandatory and not directory. When once the consequences have been examined and the results have indicated the intention of the legislature, the application to cases arising under these rules should be in strict conformity to the intention arrived at. Summed up, the position is that an objective test should be applied to the statute or rule and a case arising thereunder is to follow the result of such test. This, I opine, is a general rule one should follow.

With regard to the aspect of the case itself, the facts are that an ex parte order was obtained on June 20, 1962, and was not filed till June 28, 1962; another was obtained on November 14, 1962, and that also was not filed till November 27, 1962. Could these lapses, then, be said to conform to the mandatory character of the rule? I am inclined to hold that they do not. When this matter was under appeal, explanation was given why the seeming disregard of the provisions of rules 15 and 19 of the House of Representatives Election Petition Rules took place, and in the light of the explanation given the

Court of Appeal held that the conditions had substantially been complied with and, therefore, reversed the decision of the Supreme Court. Now the objections put forward to this application are: (a) that it is a mere technicality; (b) that the Court of Appeal should be deemed to have taken such technicality into consideration as it was antecedent to the appeal court's decision, and (c) that "forthwith" should be interpreted to mean such time as a reasonable man would say was practicable in the circumstances.

With regard to (a) I have given sufficiently strong indication that the application is not merely technical and on (b) I have also disclosed I have adopted the view that the decision of the Court of Appeal made it open for any point which could have been taken prior to the hearing by the Court of Appeal to be taken after. In connection with (c) it has been held in this court in several cases that the word "immediately" is to be construed according to circumstances. In Stroud's Judicial Dictionary, Vol. 2, 3rd ed., that principle is followed. But it goes on to say, at page 1148: "But where an act required to be done 'forthwith,' is one which is capable of being done without any delay, no delay can be permitted. . . . *Ex parte Lamb, In re Southam* (1881) 19 Ch.D. 169." In that case the London agents of the county solicitors of an appellant from an order made by a county court in bankruptcy entered the appeal with the Registrar of Appeals in London on Friday, August 5, the last possible day, but did not post a copy of the appeal notice to the county solicitors until the following day, and it was not received by them until Monday, August 8, and on that day they sent a copy of the notice to the registrar of the county court. It was held that the copy of the notice had not been sent to the registrar for the county court "forthwith" on entering the appeal as required by rule 144, and that consequently the appeal was out of time. In the present case no circumstances have been set out which might have induced the court or satisfied me that the lapse of eight and 14 days respectively were such time that a reasonable man would say was practicable in the circumstances. There does not appear to me to be any reason why the delay—eight and 14 days—should be permitted. In the case of *Kanagbo* v. *Bongay*, Sierra Leone Court of Appeal, July 27, 1962, Civ.App. 14/62, the Chief Justice, Sir Salako Benka-Coker, said in relation to the submission that the respondent had waived his right:

> "The question of waiver does not arise, in my opinion. There is no evidence that there was knowledge on the part of the respondent when he entered appearance, even if we were to hold that entering appearance was necessary and a fresh step. This, however, is a statutory, mandatory, obligatory provision as to procedure and cannot be waived by the respondent."

The application in this matter is under a statutory, mandatory and compelling provision, and like rules 15 and 19 the application is pursuant to a procedural provision. It cannot be waived by the respondent.

The finding of the Court of Appeal is in fact a matter still pending before that court until after it is settled and filed. At this stage there should be a distinction between the order itself and its operational aspect. The functional portion of it can be referred to another court while the order itself cannot be. Any matter, therefore, which is directly connected with the order itself has to be pursued in the Court of Appeal: the act that has to authorise the functional capacity of the finding has to be regulated by the appeal court rules. I hold

that the second order cannot be considered outside the scope of the Court of Appeal rules. I am of the opinion, therefore, that the respondent herein has failed to comply with rule 18 of the House of Representatives Election Petition Rules and that this application to strike out the petition should be allowed. I so order. Petition struck out with costs.

[SUPREME COURT]

GBASSY KEISTER . . . . . *Plaintiff*

v.

ELIJAH J. SPECK, M. S. MUSTAPHA AND A. T. BATTISON-NICOL . . . . . *Defendants*

[C.C. 414/60]

Practice—Supreme Court—Motion for order for specific performance—Order intended to be enforced by attachment—Necessity for personal service—Service on wrong solicitor.

Supreme Court Rules (*Vol. VI, Laws of Sierra Leone,* 1960, *p.* 126), *Ord. XXX, r.* 28; *Ord. XLVII, r.* 2—*Rules of the Supreme Court* (*England*), *Ord.* 42, *r.* 30; *Ord.* 67, *r.* 2; *Ord.* 7, *r.* 2—*The Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41).

On June 23, 1961, the Supreme Court ordered Elijah Speck to convey certain property to plaintiff. On July 17, Speck died without having conveyed the property. He left a will in which he appointed M. S. Mustapha and A. T. Battison-Nicol as his executors. On November 7th, the Court of Appeal ordered that the executors be substituted for Speck for the purpose of taking an appeal against the Supreme Court judgment. On March 9, 1962, the appeal was struck out by the Court of Appeal (Civil Appeal 13/61). On February 18, 1963, the plaintiff moved the Supreme Court for an order that the executors execute a deed of conveyance within one month. The motion was served on Cyrus Rogers-Wright, Esq., who had been executors' solicitor for purposes of the appeal, although James E. Mackay, Esq., was executors' solicitor of record. At the hearing of the motion, when neither the executors nor their solicitor appeared, the court ordered the executors to execute a conveyance of the property to plaintiff. The executors moved to set aside this order on the ground that the motion had been improperly served.

Held, for the executors, (1) since plaintiff asked for the order with the intention that if it was not obeyed it should be enforced by attachment, it was necessary for the motion to be served personally on the executors.

(2) Even if it was not necessary to serve the executors personally, the service on Mr. Rogers-Wright was improper, because Mr. Mackay was the solicitor of record.

Case referred to: *Reg.* v. *The Justices of Oxfordshire* [1893] 2 Q.B. 149.
Cyrus Rogers-Wright for the executors.
Edward J. McCormack for the plaintiff.

BENKA-COKER C.J. This is a motion to set aside an order made herein for the above-named defendants/applicants to execute a conveyance of 23, Sibthorpe Street, Freetown, to the plaintiff/respondent. Judgment was obtained