MONROVIA TOBACCO CORPORATION, Appellant, v. **SEI FLOMO** and Labor Commissioner **HENRY B. BARNH, SR.**, Appellees.

Heard: June 12-13, 1989. Decided: July 14, 1 989.

1. If a defendant in a labor case has failed to appear, plead or proceed to trial, or if the hearing officer or the Board of General Appeals orders a default for any other failure to proceed, the complainant may seek a default judgment against the defendant. On the application for default judgment, the applicant shall tile proof of service of summons on complainant and give proof of the facts constituting the claim.

2. Service by mail shall be complete upon deposit of the paper in a post office or official depository of the post office within Liberia. The date of such deposit shall be evidenced by the post office receipt showing the mailing of the paper by registered mail to the addressee at his last known address.

3. Judgment rendered against a party whose counsel absents himself from the hearing, of which he was duly notified, is justified on the basis of abandonment of the case.

Sei Flomo, co-appellee herein, filed with the labor commissioner of Nimba County an action for wrongful dismissal against the Monrovia Tobacco Corporation, appellant herein. At the conclusion of the first hearing, the hearing officer ruled in favor of co-appellee, declaring that he was wrongfully dismissed. The appellant appealed from said ruling to the Debt Court for Nimba County which, after a review of the records, remanded the case for a new trial.

At the conclusion of the second hearing, the hearing officer again found appellant liable for wrongful dismissal and ruled that the co-appellee be re-instated or compensated in the aggregate amount of $12,850.00. Following this ruling, an application was made to the debt court for enforcement of the ruling against the appellant. The debt court rendered its ruling in the absence of the appellant. An attempt to enforce the said ruling, after the application was granted by the debt court, caused the appellant to move the Chambers Justice for a writ of prohibition, claiming that it was never served a copy of the ruling of the hearing officer, the enforcement of which was now being sought. Following a review of the records and realizing that said records were void of proof of service of the ruling, the contention was conceded by the appellees and the case was remanded with instructions to conduct a new trial.

At the third trial, after the co-appellee had rested evidence, the appellant took the stand and commenced the production of evidence. The hearing was suspended to be resumed upon due notice to the parties. The appellant subsequently requested the hearing officer to schedule the next hearing for November 18, 1988 at 2:00 p.m. This request, having been granted, the same was acknowledged, confirmed and re-confirmed by the hearing officer, the appellant as well as the appellee. However, on the scheduled date, neither the appellant nor

its counsel attended the hearing. Whereupon, the appellee, by and through his counsel moved the hearing officer for default judgment. The said motion having been granted, and the co-appellee having already rested evidence, the hearing officer entered final judgment and awarded the appellees the sum of $12,850.00.

Following an appeal to the Debt Court for Nimba County, the ruling was affirmed. Consequently, the appellant appealed to the Supreme Court for review and final determination. Relying on its earlier ruling on default judgment in labor cases, as well as the statutory provision on default judgment, the Supreme Court *affirmed* the ruling rendered against the appellant.

James D. K. Kumeh appeared for appellant. *Johnnie N. Lewis* appeared for the appellee.

MR. JUSTICE JUNIUS delivered the opinion of the court.

On October 26, 1987, Sei Flomo, appellee herein, filed with Honourable Henry B. Barnh, Sr., labor commissioner for Nimba County, a letter of complaint against the Monrovia Tobacco Company, appellant herein, which was his employer, alleging essentially that:

(1) He was employed by the appellant as a leaf inspector on January 1, 1980;

(2) During his services with appellant, he was on no occasion warned or suspended for any misconduct or any breach of duty;

(3) Having served as a leaf inspector for three years, he was elevated to the position of supervisor of administration, a position he held up to his summary dismissal;

(4) He has not been convicted of the commission of any job-related crime;

(5) Because of the circumstance leading to his summary dismissal, he considered it wrongful.

Upon receipt of appellee's complaint, a citation was issued upon the appellant with a copy of the complaint attached.

The complaint was first investigated, a ruling rendered in January, 1988, and in that ruling, the dismissal of the appellee was found to be wrongful. Appellant was ordered to re-instate him. Exceptions were noted and an appeal announced to the Debt Court for Nimba County. On disposition of the petition for judicial review, the debt court remanded the case to the hearing officer with instructions that a new trial is held.

After the second trial the hearing officer again found that the dismissal of appellee was wrongful, and appellant was ordered to re-instate the Appellee or compensate him with two years salary and one month's salary in lieu of notice, making an aggregate amount of Twelve Thousand Eight Hundred Fifty Dollars ($12,850.00). Following the granting of a motion for enforcement of the judgment of the hearing officer by the Debt Court for Nimba County, appellant filed with the Justice presiding in Chambers a petition for a writ of prohibition,

with the Debt Court Judge for Nimba County and the appellee as respondents. In the petition for the writ, it was alleged that a copy of the ruling of the hearing officer had not been served upon appellant. As the records were void of proof of service of said ruling, the contention was conceded by the respondents and the matter was remanded with instructions that yet another new trial be had.

The present appeal is the result of the third trial, in which the ruling again found that the dismissal of appellee was wrongful, and again, the Debt Court for Nimba County confirmed the ruling of the hearing officer.

According to the records certified to us, hearing of evidence began on July 1, 1988, with Co-appellee Sei Flomo, Jr. taking the stand. Two other witnesses, Sei Flomo, Sr. and William Sonwahbey, also testified on behal f of the co-appellee. On the resting of oral evidence, counsel for co-appellee prayed for admission into evidence ten documents which had been earlier testified to, confirmed and marked by the investigation. The application was granted, and the documents were admitted. Appellee thereupon rested evidence.

On September 8, 1988, appellant started the presentation of its side of the case by introducing Joseph Cornomia, its personnel manager, who took the witness stand and testified on the direct examination. At the end of that day's session, the hearing was suspended to resume at 12 noon the following day; however, continuation of the hearing on that day was not resumed due to the absence of both the counsel and personnel manager of the appellant.

On November 2, 1988, Mr. Joseph Cornomia, personnel manager of appellant, sent a telegram to the investigation requesting an assignment for continuation of a hearing on November 18, 1988, at 2 p.m. when, according to him, he and his counsel would be present. The request was confirmed by a telegram of November 4, 1988, sent by Daniel K. Whern, labour inspector of Nimba County, due to the absence of Labor Commissioner Barnh from office. Labor Inspector Whern's telegram was received and acknowledged by Mr. Cornomia, but in another telegram of November 7, 1988, sent to the investigation, he demanded that the confirmation of the assignment be done by Labor Commissioner Barnh and not Labor Inspector Whern.

On November 9, 1988, Labor Commissioner Barnh, by telegram deposited that day with the Liberian Telecommunications Corporation at Sanniquellie, Nimba County, -acknowledged Mr. Cornomia's telegram of November 7, 1988, and advised, as follows:

"TELEX SENT REQUESTING HEARING 18 NOVEMBER 1988 CONFIRMED STOP WILL APPRECIATE APPEARANCE SCHEDULED DATE AS PER YOUR REQUEST STOP REGARDS BEST WISHES."

At the call of the matter for hearing on November 18, 1988, only appellee and his counsel were present; but neither Joseph Cornomia, appellant's personnel manager nor its counsel appeared. Hence, appellee, through his counsel, invoked the provision of Article I, Section 8 of INA Decree No. 21, prayed for a judgment by default against appellant for failure to proceed with trial. After due consideration, the application was granted and judgment rendered in favor of Appellee Sei Flomo, Jr., finding that his dismissal was wrongful on the grounds that appellant did not exhaust the procedure and remedy available in such cases prior to the dismissal action against appellee.

By operation of the Labor Practices Law, Lib. Code 18-A:9, the hearing officer ordered that appellee be reinstated to his position of supervisor of administration for the leaf department, with all benefits of which he had been deprived since October 5, 1987, or in lieu of reinstatement, that he be paid the equivalent of twenty-four months salary and a month in lieu of notice, in the aggregate of Twelve Thousand Eight Hundred Fifty dollars ($12,850.00).

The appellant excepted to the ruling of the hearing officer, and through the filing of a petition for judicial review, appealed to the Debt Court for Nimba County. Following a hearing by the judge of the Debt Court for Nimba County, the ruling of the hearing officer was confirmed and affirmed, with costs against the appellant. To the final judgment of the judge of the Debt Court, Nimba County, the appellant noted exception and prayed for an appeal to this Honourable Court, which was granted.

The only issue presented by this appeal is whether the trial judge was justified in confirming the default judgment rendered by the hearing officer in favor of appellee?

Article 1, Section 8 of INA Decree No. 21 provides:

"If a defendant in a labor case has failed to appear, plead or proceed to trial, or if the hearing officer or the Board of General Appeals orders a default for any other failure to proceed, the complainant may seek a default judgment against the defendant. On application for a default judgment, the applicant shall file proof of service of the summons on defendant and give proof of the facts constituting the claim of the default judgment. . ."

The records reveal that in response to Appellant's telegram of November 2, 1988, requesting that the continuation of hearing of the case be scheduled for November 18, 1988, at 2 p.m., Labour Inspector Daniel K. Whern, of the labour office in Sanniquellie, Nimba County, promptly acknowledged same and confirmed the assignment for the date and time which had been requested by the appellant. Inspector Whern's telegram was received and acknowledged by appellant's personnel manager on November 4, 1988; therefore, as of that date appellant had notice that the hearing would resume on November 18, 1988, at 2 p.m.

Notwithstanding the foregoing, appellant, by and thru its personnel manager, Joseph Cornomia, on November 7, 1988 sent another telegram to Labour Commissioner Barnh, demanding that he, Commissioner Barnh, confirm the hearing date and time, which was done by telegram dispatched on November 9, 1988. Although there is no proof in the records that this second telegram was untimely received, as contended by the appellant, the issue most emphasized during arguments before this Bench was when, as a matter of law did the service of the second telegram became effective?

The Civil Procedure Law, Rev. Code 8.3(5), provides that: "Service by mail shall be complete upon deposit of the paper in a post office or official depository of the post office within Liberia. The date of such deposit shall be evidenced by the post-office receipt showing the mailing of the paper by registered mail to the addressee at his last known address."

The foregoing statutory provision, referred to in legal parlance as the "mailbox rule," also applies to acceptances dispatched by means other than letters, i.e. telegrams. And as the Second Restatement puts it: "Acceptance is effective upon proper dispatch." Restatement of Contract 2d., § 63 (a).

Even assuming that the only confirmation of the request of appellant was the telegram of November 9, 1988 sent by Labour Commissioner Barnh, we hold, under the rule of law quoted *supra,* that service was effective as of November 9, 1988, the day on which the telegram was deposited with the Liberia Tele-communications Corporation in Sanniquellie, Nimba County, even though appellant has argued that the confirmation of the telegram was received few hours before the hearing was to commence and, Monrovia being far from Sanniquellie, it was not possible to make the appearance. We cannot accept this argument of appellant. We therefore must conclude that the trial judge was justified in confirming the default judgment rendered by the hearing officer in favor of the appellee.

This Court has held, and we hereby confirm that "judgment rendered against a party whose counsel absented himself from the hearing of which he was duly notified is justified on the basis of abandonment of the cause." *Mathelier v. Mathelier,* 17 LLR 472 (1966).

In view of the foregoing, it is our considered opinion that the final judgment appealed from be and the same is hereby confirmed and affirmed, with costs against appellant. And it is hereby so ordered.

Judgment affirmed.

MR. JUSTICE KPOMAKPOR *dissents.*

This Court has consistently upheld the principle that where a trial is regular and the evidence clear the resultant judgment should not be disturbed. *Phillips v. Republic,* 4 LLR 11 (1934), text at 15. The converse of which principle must naturally be that where a trial is not regular or the evidence clear the judgment resulting therefrom ought not to stand. To me it does not

appear that the trial in this case was regular or the evidence unbiased, and the following facts taken from the records certified to us are the basis for my conclusion. Saye Flomo, plaintiff, now appellee, instituted an action for illegal dismissal in the office of the labour commissioner in Sanniquellie, Nimba County, against appellant, the Monrovia Tobacco Corporation, on the 26thday of October, 1987. The complaint was first investigated and ruled upon on January 4, 1988, by Daniel Whern, who acted as a hearing officer. Following that hearing, he adjudged appellant liable for having wrongfully dismissed appellee. To this ruling, appellant excepted and announced an appeal to the Debt Court for Nimba County.

Following a hearing by the debt court judge on a petition for judicial review filed by appellant, the said debt court judge rendered final judgment against appellant in the complete absence of any service of notice of assignment. Therefore, when said judge attempted to enforce his judgment, appellant filed for and obtained a writ of prohibition against the said debt court judge to prohibit the enforcement of said judgment.

When the case was heard by the Chambers Justice, appellee's counsel called the court's attention to his returns in which he had conceded the fact that the record below was void of any proof that a copy of the ruling of the hearing officer was ever served upon appellant and prayed the Justice in Chambers to send a mandate to the judge of the debt court to resume jurisdiction for the purpose of having a copy of the decision served on appellant. Accordingly the Justice in Chambers ordered the Clerk of this Court to send a mandate to the debt court judge, His Honour Mamadee S. Sheriff of Nimba County, ordering him to cause the hearing officer to resume jurisdiction and hear the case pro *el con* as if it had not been heard before. This was on June 8, 1988.

On the 6th day of July, 1988, trial commenced and due to the repeated absences of the hearing officer the case was continued up to September 7, 1988, when appellee's counsel made a submission to the labour commissioner that the hearing officer, Honourable Daniel K. Whern, to whom this case had been assigned for hearing and who had in fact presided over the case up to the resting of evidence by appellee on July 9, 1988, had failed to show up after making the following successive assignments: July 9, 1988, July 20, 1988, August 4, 1988, and August 11, 1988. (emphasis supplied). Whereupon, he requested that in keeping with the Constitution of Liberia and the new Labor Law regarding the speedy disposition of cases to promote substantial justice, the hearing should be transferred from "Hearing Officer Daniel K. Whern to the labour commissioner". To this submission appellant's counsel expressed full agreement. The labour commissioner granted the request and assigned the case for hearing by him on September 8, 1988.

Trial was resumed by the labour commissioner and after some further interruptions, appellant on November 2, 1988, requested an assignment from the labour commissioner for November 18, 1988. Instead of receiving an acknowledgment from the labour

commissioner, appellant instead received a reply from the first hearing officer, Labour Inspector Daniel K. Whern, who had been removed from the case. Whereupon, appellant, on November 7, 1988, again telexed the labour commissioner and requested an assignment in accordance with its earlier telex of November 2, since the reply of the labour inspector could not be legal as he had already been removed from the case as per minutes of the court. To this second telex of appellant to the labour commissioner, appellant received no response until the afternoon of November 18, 1988, at 12:.45 p.m., which response finally acknowledged receipt of appellant's original request for assignment dated November 7, 1988, and advised that hearing of the case would commence at 2 o'clock p.m. on the same afternoon the telex was received.

Here is what the record in the case reveals with respect to the improper handling of the trial by the Hearing Officer Daniel K. Whern, which led to the request by both parties for his removal from further hearing of the case:

"That Honourable Daniel K. Whern has presided over the case up until the resting of evidence by the Complainant on the 9' day of July A. D. 1988, and thereafter, the case was assigned for trial for July 20, 1988 at 2;00 p.m. and the parties along with counsels were present but the hearing officer was absent, hence the case could not have been heard. Subsequently the case was again assigned by communication from Honourable Daniel K. Whern, to the counsels for the parties for trial on August 4, 1988, at 2: 00 p.m. Again the parties, along with the counsels, were present but the hearing officer, Honourable Daniel K. Whern, was again absent. Further, and on a subsequent date communication was then addressed to counsel for the parties by Hon. Daniel K. Whern, assigning said case for trial on August 11, 1988, at 2;00 p.m. and again, the counsels and both parties were present, anxious for hearing but the Honourable hearing officer, Daniel K. Whern, was again absent." The record also reveal at the investigation of September 7, 1988, both counsels petitioned the commissioner as follows:

"These event claimed the attention of counsels for both parties and upon conducting independent investigation found out that the present hearing officer, Daniel K. Whern, has been incapacitated by serious domestic issues and problems which would certainly not enable him to appear in the City of Sanniquellie from the City of Bahn, Nimba County, to preside over this case for the rest of the year 1988."

Counsel for plaintiff further says that he along with counsel for defendant, realizing the frustration and inconveniences their clients are going through due to the situation of continuous absence of the hearing officer due to incapacity, and further realizing that in keeping with the Constitution and the intent of new labor decree requiring speedy and cheap disposition of cases to promote substantial justice, elected to continue this case, that is to say

to proceed with the hearing with the Honourable labour commissioner, Henry B. Barnh, Sr., substituting for Daniel K. Whern, in the interest of justice.

Wherefore and in view of the foregoing, counsel for plaintiff prays that the case be proceeded with Honourable Henry B. Barnh, Sr., presiding over same from where the case ended with plaintiff resting evidence. And submit.

Counsel for defendant says that he is in complete accord with the plaintiffs counsel to the effect that Honourable Henry B. Barnh Sr. assumes jurisdiction over this case from the point at which evidence was rested by the plaintiff. By this then, it means that the defendant will take the stand and give testimony before Honourable Barhn for the very sound reasons already stated in the submission to plaintiffs counsel. And submit."

Reacting to the above minutes, the labor commissioner ruled as follows:

"INVESTIGATION: Since records speak for themselves.

As already stated by both counsels, which is self explanatory, as of the date for our taking over this hearing, submission of both counsels are hereby granted, and the case is assigned for hearing on September 8, 1988, at the hour of 9:00 a.m. And it is hereby so ordered. MATTER SUSPENDED.

Given under my hand this r day of September, A. D. 1988.
Henry B. Barnh
LABOUR COMMISSIONER.'"

As of September 8, 1988, Labour Commissioner Barnh assumed jurisdiction over this matter and the case was assigned for continuation of the hearing on September 8, 1988, at 9:00 o'clock. Trial was scheduled for September 8, 1988, but was not had due to the absence of counsel for appellant. Another assignment was issued but again trial was not held, even though both counsels were present. On November 2, 1988, appellant telexed the judge and requested another assignment for continuation of the hearing on November 18, 1988, at 2:00 p.m., and for the purpose of this dissenting opinion I shall quote in full the telex of November 2, 1988 as follows:

"TO SANNIQUELLIE
FROM: MTC MONROVI

FOR HENRY BARHN, LABOUR COMMISSIONER RYT CONCERNING THE CASE *SEI FLOMO V. MTC* RECEIVED WITH THANKS. REGRETTABLY OUR LAWYERS ARE PREOCCUPIED WITH SUPREME COURT CASES. HOWEVER PLEASE RE-SCHEDULE SAME FOR NOVEMBER 18 AT 2:P.M. WITH THE ASSIGNMENT

THAT MESSRS BASHIR HAMMOND AND MINOR ARE ARRESTED AND DETAINED PENDING OUR ARRIVAL IN SANNIQUELLIE IN KEEPING WITH OUR WRIT OF SUBPOENA IF OK, PLEASE CONFIRM TWO OR THREE DAYS AHEAD OF TIME THRU TELEX OR OTHERWISE.

REGARDS J. N. CORNOMIA."

Instead of Honourable Henry Barnh replying to the telex quoted above, Labour Inspector Whern, in utter disregard of the decision reached between the parties, on one hand, and the Labour Commissioner, on the other, involved himself in the case and sent the following telex in reply:

"MR. J. N. CORNOMIA PERSONNEL ASSISTANT MONROVIA TOBACCO COMPANY MONROVIA ACKNOWLEDGMENT RECEIPT TELEX 2 NOVEMBER 1988, CMA REQUESTING ASSIGN CASE CMA SAYE FLOMO VS. MONROVIA TOBACCO COMPANY IS NOVEMBER 18, 1988 AT 2 P.M. STOP DATE AND HOUR REQUESTED CONFIRMED STOP. REMIND YOU SUPREME COURT MANDATE TO SPEED UP THE CASE SO AS TO AVOID DELAY STOP PLEASE LET THIS CLAIM YOUR SERIOUS ATTENTION STOP REGARDS LABOUR INSPECTOR WHERN."',

Upon receipt of this latter telex signed by Mr. Whern the original hearing officer from whom the case had been removed, appellant immediately communicated with the labour commissioner and requested confirmation of its request for an assignment, since the reply came from the one from whom the hearing of the matter had been taken and, hence, was without jurisdiction to continue the hearing.

According to the opinion just read by our distinguished colleague, Mr. Justice Junius, the Court has again abandoned one of the old cherished general principles of law which is: "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordeans,* 234 U.S. 385, 394 (1963). This right to be heard has little reality or worth unless one is duly informed that the matter is duly scheduled to be heard or determined on a specified time and can choose for himself whether to appear or default, acquiesce or contest. The facts of this case and that of *Vah et a! v. The Liberia Operations Inc.,* 36 LLR 555 (1989), decided by the Court in this March Term, A. D. 1989, are very similar and could have been decided together. Both cases involved default judgments rendered against the appellant.

In the *Vah* case, the appellant contended, supported by a certificate of the clerk of the trial court, that in violation of our law, the court failed to cite him to attend the trial when the default judgment was prayed for and granted. In the instant case, appellant contends that the notice served upon it for the hearing during which appellee prayed for a default judgment and same was granted was not duly served. I also dissented in the *Vah* case for the same

reason, the denial of the right to due process of law to the appellant. Obviously, it was both impracticable and impossible for the witnesses and counsel for appellant in this case to have traveled from Monrovia and be present in Sanniquellie, Nimba County, for a hearing scheduled to commence at 2 o'clock, November 18, 1988, when appellant only received the notice of the assignment from the labour commissioner at 12:45 p.m. on the afternoon of the same day of the trial. This fact has not been denied by either the appellee or the majority of my colleagues.

My colleagues have taken the position that once the assignment was made by telex and there is proof that the message was sent, this is tantamount to constructive service of the assignment, and where appellant failed or was unable to appear, then the resultant default judgment was proper and the trial was regular. In other words, the appellee has contended and my colleagues have agreed, that when the mail is used it matters not when the message was received but rather when it was dispatched or mailed. I agree that this is the general rule, but I strongly maintained that this rule is not applicable to the facts and circumstances of this case.

In this case, there is no record of any notice of assignment ever having been served upon appellant's counsel except, however, we can consider the reply to appellant's telex sent to the labour commissioner requesting an assignment for November 18, 1988, and which telex the court did not respond to until the afternoon of November 18, 1988, as an assignment. My questions, therefore, are: (1) Could such a response to a request for assignment be considered adequate notice so as to have afforded appellant the opportunity to be present in court? (2) Could the court have expected appellant to travel from Monrovia and be in Saniquellie, Nimba County at 2:00 o'clock, when the telex was received only at 12:45 p.m.?

Law writers are agreed that under certain circumstances the presumption of constructive notice, as my colleagues seem to have based their conclusion in this case, may be repelled. In 58 AM JUR 2d, *Notice,* ∫ 10, page 494, we have the following: "If it appears that the person sought to be served with notice was not heedless of the warning signal, but made inquiry and used due diligence to discover the facts which were suggested by the facts by which he had knowledge thereof the inference of notice is rebutted and he is not affected thereby."

The appellant in this case, if I may recap the pertinent facts, on the 2" day of November, 1988, requested, by telex, an assignment of his case for November 18, 1988. That telex which had already been quoted earlier herein, was addressed to the labour commissioner and not to the labour inspector, who had been ordered by the labour commissioner to desist from further hearing of the case.

On the 2"d day of November, 1988, a reply came from Nimba County under the signature of the labour inspector, advising that appellant's request for assignment had been granted but realizing that said labour inspector had no jurisdiction over the case, appellant sent a

second telex to the labour commissioner calling his attention to the request for an assignment since no reply has been received from him, and, because as the records of the court clearly revealed that the labour inspector was no longer involved in the trial, appellant considered the purported reply from said inspector as presumptuous.

From the facts of the case, appellee asked us to consider the following single issue:

Whether the trial judge was justified in confirming the default judgment rendered by the hearing officer in favor of the appellees?

As for the appellant he asked that we consider the following as the sole issue presented by the facts and circumstances of the case:

Whether or not a default judgment is binding upon a party who has neither been duly cited to appear before the court nor afforded an opportunity to be heard?

Obviously, the majority agreed with the appellees that the issue as presented by them was the question before us for determination. Of course, I disagree with them on this point. In essence, I think the issue is as stated by the appellant, whether or not a default judgment should be affirmed when the party to be affected thereby was served the notice of assignment on November 18, 1988 at 12:45 p.m., requiring him to travel from Monrovia to Sanniquellie and attend a hearing on November 18, 1988 at 2:00 p.m.?

I have observed, reading through the opinion of the majority of my colleagues, that they have relied primarily upon three sources of authority, that is INA Decree No. 21, Article I, Section 8; Civil Procedure Law, Rev. Code 1: 8.3(5); and the case, *Mathelier v. Mathelier, 17* LLR 472 (1966). It is puzzling to me as to why the majority has cited and relied upon the three authorities just mentioned, because a careful reading of these authorities will readily reveal that not one of them is applicable to the facts and circumstances of the case at bar.

For instance, INA Decree No. 21, cited by the Court, provides: "If a defendant in a labor case has failed to appear, plead or proceed to trial, or if the hearing officer or the Board of General Appeals orders a default for any other failure to proceed, the complainant may seek a default judgment against the defendant. On the application for a default judgment, the applicant shall file proof of service of the summons and complaint and give proof of the facts constituting the claim, the default judgment . . ."

The majority in quoting the above provision stressed the words, "the complainant may seek a default judgment against the defendant." From my point of view, based upon the facts, the pertinent words in the Decree are not those emphasized by the Court but rather the following:

"on the application for a default judgment, the applicant shall file proof of service of the summons . . . ." (Emphasis added)

The primary contention of the appellant is that the telex of November 1988, citing him to appear on November 18, 1988 at 2:00 p.m. was delivered and received on November 18, 1988 at 12:45 p.m. These facts regarding the delivery and receipt of this telegram on November 18, 1988 at 12:45 p.m. were conceded by the appellee and the majority of my colleagues. I am of the opinion, therefore, that given these facts and circumstances, appellee failed to carry the burden imposed upon him by the Decree that as a prerequisite for granting a petition for a default judgment in his favor, he must first of all establish that the appellant against whom the default judgment is to be enforced was duly served with the notice of assignment to appear for the hearing but that he neglected to appear personally or through counsel.

A telex or notice of assignment served on a party residing in the City of Monrovia at 12:45 p.m. and ordering him to appear in the City of Sanniquellie on the same day and date cannot be described as a notice duly served on the party which should subject the appellant to a default judgment as the trial judge did in this case. A notice or summons served on the party, which makes it impossible for him to attend under any reasonable circumstances, is no notice at all. It is no different from a judge hearing a case in the absence of one of the parties without making any attempt to cite him for the hearing.

The second authority cited by the majority and upon which it has affirmed the judgment of the lower court is Section 8.3 (5) of the Civil Procedure Law, Rev. Code 1. That law provides:

"When service by mail is complete. Service by mail shall be complete upon deposit of the paper in a post office or official depository of the post office within Liberia. The date of such deposit shall be evidenced by the post office receipt showing the mailing of the paper by registered mail to the addressee at his last known address."

The citing of this provision of the Civil Procedure Law bewilders me, to say the least, in that the reliance upon it is misplaced. In other words, the provision is generally applicable to complaint and writ of summons served by publication through the mail. It is also applicable to instances such as the mailing of the bill of exceptions or an appeal bond to a judge who has left the circuit and cannot be physically reached by the appellant to secure the approval of his bill of exceptions or his appeal bond. This rule also applies in cases of contracts of sales when the question is whether or not an offer has been legally made and or whether an acceptance to an offer has been made. This general rule, often referred as the mail box rule, holds that the place and date of the dispatch of the message is the affective date and not necessarily the date upon which the message was received at the other end. For example, if appellant "A", against whom a final judgment has been rendered, mails his bill of exceptions within ten days, or his appeal bond to the trial judge within sixty days, respectively, the rule

holds that appellant "A" has complied with the statutory provision quoted above; this is so regardless of when the trial judge received the bill of exceptions or the appeal bond.

Appellee has contended, and the majority of the Court has agreed, that this rule of the mail box is also applicable to the service of notice of assignment. I disagree with their interpretation and insofar as the circumstances of this case are concerned, I have not come across any authority that has construed acts similar to the facts of this case and applied the mail box rule, as my distinguish colleagues have done.

The third and final authority cited and also relied upon by Appellee and the majority of the Court is the *case Mathelier v Mathelier, 17* LLR 472 (1966). The purpose for citing this case by the Court is also unclear to me, as the facts of that case are quite different or distinguishable from those of the case at bar. In the *Mathelier* case, the counsel was duly cited to attend the hearing on behalf of his client but he chose to abandon his client's interest, rather than appearing and putting in a defense. In affirming the decision of the trial court in that case, this Court held:

"Neither was petitioner's counsel rejected nor was notice of assignment lacking. It is our opinion that any lawyer, whose determination in the trial of a case is apparently to subordinate the court to his will and thereby employs legal delay tactics to divert the normal course of the administration of justice, directly or indirectly, may not be permitted to enjoy any legal benefits which, otherwise might have accrued therefrom. . ."

The Court went on to say that its judgment in confirming the default judgment against Mrs. Mathelier was based on the facts that the appellant abandoned her case and therefore she should have herself to be blamed and not the trial court. Can it be said, realistically, that the Appellant in the instant case abandoned its case, as the appellee and the majority have contended? Of course not.

For the foregoing reasons assigned and the law supporting same, I have thought it my duty to file this dissenting opinion, whereby I refrain from joining my colleagues of the Bench in affirming a default judgment of the trial court in favor of the appellee who has failed to establish that a notice of assignment was duly served on the appellant and that he failed to appear.