

IRENE JACKSON on behalf of WILLIAM H. JONES, Surviving Heir of the Late
ELEANOR LOUISE JONES, Objector-Appellant, v. **HENRY B. DUNCAN**,
Purported Sole Executor and Legatee under the Will of Said ELEANOR LOUISE
JONES, Respondent-Appellee.

MOTION TO DISMISS APPEAL.

Argued November 9, 1950. Decided February 2, 1951.

1. It is the duty of the clerk of the lower court and not the party to transmit the records of the lower court to the appellate court.
2. Failure by the clerk of the lower court to transmit a copy of the approved appeal bond is no ground for dismissal of the appeal.

On motion to dismiss an appeal on jurisdictional grounds, *motion denied*.

T. G. Collins for appellant. *R. A. Henries* for appellee.

MR. JUSTICE BARCLAY delivered the opinion of the Court.

When this case was reached on our trial docket, it appeared that a motion had been filed by appellee to dismiss the appeal. Said motion was heard, and this opinion is limited only to its disposition.

The reasons set out by appellee for dismissal of the appeal are as follows:

1. That according to the records sent up to this Court there is no indication that the appeal bond was approved, which is an essential requirement in the prosecution of an appeal.
2. That the Commissioner of Probate gave a final ruling on October 25, 1949 which was excepted to by appellant, and an appeal was announced to the Supreme Court, but said appeal was not filed in the office of this Court until February 23, 1950, which is one hundred twenty-one days from the date of final judgment.
3. That the failure of appellant to file the records in the Supreme Court within ninety days is not the fault of the clerk of the Probate Court, but was due to the indifference, neglect, and carelessness of appellant and her legal representative,

according to a certificate filed therewith issued by the clerk of the Probate Court.

Appellant resisted the granting of said motion, stating:

1. That the appeal bond was stamped and approved by the trial judge and filed in the office of the clerk of the Probate Court. In support of this allegation a certificate issued by the clerk of said court was filed. The omission in the records sent up was the fault of the clerk who inadvertently omitted to record the approval of the Commissioner of Probate on the copy of the appeal bond transmitted.

2. That it is not the duty of the appellant to file the records in the office of the clerk of the Supreme Court within ninety days, but that it is the duty of the clerk of the court from which the appeal is taken to transmit to the clerk of the Appellate Court the records so made. Furthermore, where the clerk neglects to transmit the records, such failure is not a legal ground for the dismissal of an appeal under the provisions of the act of 1938.

Since count 1 of the resistance was not controverted, it was considered waived by appellee.

As to counts 2 and 3 of the motion, the statute controlling appeals does not place the duty of transmitting the records to the appellate Court upon the party, but rather upon the clerk of the lower court:

"The clerk of the court from which, or from whose judge, an appeal is taken shall make a full and complete copy of the record containing all the writs, notices, certificates, returns, complaints, answers, replies, and other pleadings, verdicts, motions, judgments, bills of exceptions, minutes, and all other proceedings in the said cause; and he shall within ninety days after the appeal has been taken transmit to the clerk of the appellate court the record so made. Upon the receipt of said record by the clerk of the appellate court, he shall forthwith docket the same and forward a receipt to the clerk who transmitted said record to him. If any clerk should violate or neglect any duty required of him in connection with such record, he shall on complaint to the President be immediately dismissed from office and proceedings be taken against his bond for any damages which the complaining party may have sustained." 1 Rev. Stat. § 428.

Nowhere in the act of 1938 controlling the dismissal of appeals does it appear that the neglect of the clerk of court or of a party to transmit the records from the trial

court to the appellate court is a ground for dismissal of an appeal. L. 1938, ch. III, § 1. The said act has been so often quoted in our opinions that there is no need to recite the grounds set out therein in this opinion.

Consequently, the motion is denied and the case will be heard on its merits at our March term, 1951; and it is hereby so ordered.

Motion denied.