CAROLINE LARTEY, Appellant, v. **SOLOMON D. LARTEY**, Appellee.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued December 13, 1943. Decided February 4, 1944.

1. Where a notice of appeal is not issued, served, and returned the appeal will be dismissed.

2. In computing time for the filing of pleadings and other legal papers or for the tendering of a bill of exceptions for approval, where Sunday happens to be the last day of the count said Sunday is to be excluded, and the filing or tendering would be timely on the following day, which day would constitute the tenth day.

On motion to dismiss in action for divorce, *motion granted.*

D. C. Caranda for appellant. W. 0. *Davies-Bright* for appellee.

MR. JUSTICE BARCLAY delivered the opinion of the Court.

Believing that there were certain irregularities and defects in the procedure of appellant in completing her appeal from the trial of her case in the Circuit Court for the First Judicial Circuit, Montserrado County, counsel for appellee prepared and filed the following motion to dismiss the appeal, the text of which reads as follows :

"1. Because the appellant has not brought up her appeal in the manner and form required by law and the rule and practice of this Honourable Court so as to give the Court proper jurisdiction in the case, in that, no Notice of Appeal was issued, served and returned, as is required by statute to be done in taking appeal.

"2. And also because appellant's bill of exceptions was not filed within ten days from the rendition of final judgment as is prescribed by law.

"Vide : Court's Records—Minutes of June 10, 1943, showing rendition of final judgment of said date.

"Vide : Bill of Exceptions showing date of preparation thereof, namely June 21, 1943,—a period of eleven (11) days. Official endorsement on Bill of Exceptions by

the Clerk of the Court below, viz : 'Received and filed this 21st day of June A.D. 1943, at the hour of 6:15 o'clock p.m. without approval of the trial judge.' "

The subject matter of the first count in said motion is one that has been repeatedly ruled upon by this Court and we can only reiterate the position taken by the Court in previous cases, which is that it is the service and return of the notice of appeal on appellee which gives the court jurisdiction, and unless this requisite has been complied with the appeal has invariably been dismissed.

In the case at bar although the motion to dismiss the appeal has been filed since October, 1943 there seems to have been a lack of interest by appellant and her attorneys in the appeal prayed for and granted by the trial court for, although ther6 is a copy of a notice of appeal in the records certified to this Court, yet there is nowhere any evidence in the record that said notice of appeal had been served on appellee. Furthermore, appellant did not file any resistance to said motion showing : (1) That a notice of appeal had been issued ; (2) That said notice of appeal had been served and returned by the sheriff; and (3) That because of its omission in the records sent forward by the clerk of the trial court, she prayed for the granting by this Court of a motion for dimunition of records so as to have the missing evidence of service and return sent up by the clerk of the court below, if same had been inadvertently omitted. Parties should not expect the Court to do for them what they should do for themselves.

On inspection of the notice of appeal issued by the clerk of the trial court as found in the records the evidence of its service on appellee by the sheriff is conspicuous by its absence, and hence we have reluctantly to conclude that the motion in that respect states a fact uncontrovertable by appellant, consequently her silence.

In the case *Brownell v. Brownell,* 5 L.L.R. 76, decided by this Court in January, 1936, a motion which was quite similar was filed by the appellee, the fourth count of which motion reads as follows :

" 'And also because appellee says that there is no sufficient return made to the notice of appeal showing with that certainty as the law requires that said notice was ever served on appellee and which returns to that effect alone could confer jurisdiction of the appellate court on the appellee ; the returns having simply stated that the notice was forwarded to Maryland County to be there served on appellee, and neither the Sheriff of Montserrado County [nor of Maryland County] having made returns that said notice was served on the appellee together with the date of said service.

Wherefore appellee respectfully prays that this case be dismissed for want of jurisdiction, and appellant ruled to all costs. And this the appellee is ready to prove.' " *Id.* at 77.

Referring to that count in said motion, Mr. Justice Dossen, speaking for the Court, said :

"In the said count of said motion we observe that the question of jurisdiction as raised by appellee has frequently been before this Court for years ; hence we will not enter into an exhaustive comment on same. The jurisdiction of courts over suitors is obtained by means of a writ, which is a mandatory precept, issued usually in the name of the sovereign or state, directed to the ministerial officer, who must not only serve it but make return to the fact that it has been served ; therefore courts of justice are bound *ex officio* to notice the writ as the foundation of its jurisdiction over parties, and for want of jurisdiction may entertain and sustain a motion to dismiss. . . ." *Id.* at 77-78.

But in this case it is contended by appellee that no service at all was made, and consequently there was no return by the sheriff. Further, in the case of *Morris v. Republic,* 4 L.L.R. 125, 1 New Ann. Ser. 127 (1934) the appellee in his motion made the following point which was approved by this Court :

" 'It is the service of the summons or notice of the completion of the appeal upon the appellee that gives the appellate court jurisdiction over the appellee and the cause of action; in the absence of said service, or when it is discovered that the said service was made beyond the appeal limit, the appellate court should refuse jurisdiction. . . " *Id.* at 126.

Although it may be contended, and has been contended, that a party should not be made to suffer for the neglect or omission of the clerk of court or of the sheriff to perform a plain duty in accordance with statutory provision, yet this Court has held and still holds to the view expressed by Mr. Justice McCants-Stewart at our January term, 1911, who, in speaking for this Court in the case *Moore v. Gross,* 2 L.L.R. 45, said *inter alia:*

"While a party cannot be held responsible for an immaterial error or omission made by a clerk of court in transcribing the records on appeal, yet material errors and omissions in the preparation of the record on appeal resulting from the neglect of the party to the action, or his counsel, are ground for the dismissal of the appeal." *Id.*

at 46.

Also in the case of *Greaves v. Johnstone,* 2 L.L.R. 121, decided by this Court on June 13, 1913, a case similar to this where there was a notice of appeal found in the record certified to this Court but no returns, Mr. Justice Johnson, later Chief Justice Johnson, speaking for the Court, said *inter alia:*

"On inspecting the records we find that the notice of appeal was issued by the clerk, but there were no returns thereto or other matter of record to show that the said notice was served upon appellees. It was held by counsel for appellant that as the Act made it the duty of the clerk to issue and serve the notice of appeal the neglect of that officer to perform said duty, should not prejudice the rights of appellant. We must however, repeat the views expressed by the court in the case *McCauley v. Laland* (1 Lib. L. R. 254) that 'while we must admit the dictum of the legal maxim that the act of the court should prejudice no man, we are of the opinion that the acts of the court should be carefully distinguished from the unauthorized, unlawful or neglectful actions of its officers or of the parties to the suits.' In that case it was held that it is the writ of summons or the notice served upon appellee and the returns thereto made, which gave the court jurisdiction over the case." *Id.* at 122.

The Court then held that the omission from the records of a return to the notice of appeal is a fatal defect.

We are not in a position to say that the regrettable condition of this case which necessitated the filing of the motion to dismiss the appeal is to be attributed to the neglect or omission of the clerk or ministerial officer of the trial court to perform a duty, for there was no issue joined by the filing of a resistance to said motion by appellant contradicting the facts stated in the motion, and appellant's counsel did not even trouble himself to file a brief. What appears to us, therefore, is that the sub-stance of the motion as to count one should be sustained, leaving the question of liability for neglect or omission of duty where it belongs.

As to count two of appellee's motion, it is the opinion of the majority of my colleagues, and consequently the opinion of the Court, that in computing time for the filing of pleadings and other legal papers or for the tendering of a bill of exceptions for approval, where Sunday happens to be the last day of the count said Sunday is to be excluded. Thus the filing or tendering on the following day, which day would constitute the tenth day, would be considered timely.

At common law when Sunday is the last day for the performance of an act Sunday is usually excluded and performance on Monday is allowed. The contrary, however, has been held. This view that Sunday is to be excluded in such computation of time seems also to be supported by the following from *Cyclopedia of Law and Procedure:*

"As Sunday is *dies non* in regard to judicial proceedings, and as the performance of common labor as well as the transaction of ordinary business on that day is generally prohibited by statute, it is a general rule, made so by statute in many jurisdictions, that when the last day of a period of time within which an action is to be done falls on Sunday, that day is excluded from the computation, and the act may be rightfully done on the following day, an exception to the rule existing where the act in question may be lawfully done on Sunday. Although, in a few jurisdictions, the rule is confined in its application to matters of court practice and is held not to apply to the computation of statutory time, except where so provided by the statue itself, it is generally given a much wider operation and is applied, among other things, to the time for performing or tendering performance of a contract, and the time within which a bill should be returned to the legislature by the governor. And although the decisions are not entirely uniform the rule has also been held to apply to pleading, serving process, putting in special bail, the service, publication, and operation of notice, returning an execution, suing out a writ of scire facias to revive a judgment, preparing and serving a statement on motion for a new trial, the filing of a bill of exceptions, transcript, brief, appeal bond, or undertaking, and the taking of other steps necessary to perfect an appeal, redeeming lands from a tax or other judicial sale, as well as to the time within which a justice of the peace must render judgment after submission of the case. The rule has, however, been held not to apply in computing the time . . . for refiling a chattel mortgage, or filing and enforcing a mechanic's lien, or filing a motion to set aside a default; and where the day fixed for the payment of commercial paper falls on Sunday, the weight of authority is in favor of the view that the preceding day is the day of maturity, at least where the paper is entitled to grace." 38 *Id. Time* 329-31 (1911)

Consequently this Court overrules count two of the motion.

While I feel that this is true with reference to the computation of time in some instances, yet in this case and under the circumstances and the provisions of our statute on the subject, I regret I cannot share the view above expressed and am not in accord therewith for the following reasons :

(1) It is not apparent that under the existing circumstances in this case the last day of

the time within which the bill of exceptions should be tendered for the approval and signature of the judge of the trial court fell on Sunday. It is not apparent on any part whatever of the record of the case before us, either, nor has our attention been in any way called thereto by appellant. I do not think it proper to look *dehors* the record for any information as to whether or not the last day fell on a Sunday and act on facts so obtained. In the case *Hulsmann v. Johnson,* 2 L.L.R. 20, 1 Ann. Ser. 23 (1909), which involved an action of debt on a written instrument, this Court held on page 21 that it "takes cognizance of matters of . . . [record] only upon the face of certified copies of the proceedings in the lower court transmitted through the proper channel. . . ."

(2) My second reason is that it appears to me that bills of exceptions do not fall under the general rule governing the filing of pleadings, especially where the provision for the filing or tendering thereof is controlled by statute and the time *within* which said act is to be performed is more than seven days, as in our statute controlling appeals which declares *inter alia:*

"That . .. all defendants wishing to appeal from any County Courts of record, shall be allowed ten days from the rendition of final judgment to prepare and tender his *[sic]* bill of exceptions to the Judge of said court for his signature . . . provided the said bill of exceptions is submitted within the aforesaid ten days. The appellant shall in all cases sign the bill of exceptions before submitting the same to the said Judge for his signature. . . ." L. 1893-94, 10 (2d) [§ 1].

It is to be noted that our statute provides that a bill of exceptions to be in time must be *submitted* to the trial judge for his approval and signature *within ten days.* The general rule in such cases laid down in *Ruling Case Law* stated with reference to the word "within," in dealing with its construction, that "where an act is to be performed *within* a specified period from or after a day named the general rule is to exclude the day designated and to include the last day of the specified period." 26 *Id. Time* § 18, at 744 (1920). (Emphasis added.) *Sheets v. Selden's Lessee,* 69 U.S. (2 Wall.) 177, 190; 17 L. Ed. 822 (1864).

In Bouvier's *Law Dictionary* we find that "Sundays cannot be excluded in computing the time for signing bills of exception." 3 *Id. Time* 3279 (Rawle's 3d rev. 1914) ; 26 R.C.L. *Time* § 23, at 748-49 (1920).

The rule, when an act is to be performed under requirement of statute, as found in *American and English Encyclopedia of Law* is as follows :

"But some cases lay down the rule that when the act to be performed is in fulfilment of a statutory requirement, Sunday will not be excluded, and performance, if not lawful on Sunday, must be made on Saturday, the court rightfully holding that it cannot extend the time given by statute." 28 Am. & Eng. Encyc. of Law *Time (Computation of)* 225 (2d ed. 1904).

"Where the computation is to be made from or after an act done, or the time of an act, or the happening of an event, the rule supported by the weight of authority is that the date of the act or of the happening of the event is to be excluded, and the last day of the period included." *Id.* at 211.

"The rule has been stated by some authorities to be that an intervening Sunday will be included when the computation covers a period of more than seven days, but excluded when the period is less than a week." *Id.* at 223.

In the case *American Tobacco Co. v. Strickland,* the rule is laid down as follows :

" 'As a general rule where an act is required to be done in any certain number of days after or before a fixed time, Sunday is to be included in computing the number of days when it exceeds seven. If it is less than seven, Sunday must be excluded.' 26 *Ency. of Law* 10, and cases cited. Of course that rule will not apply when Sundays are expressly excluded by the statute or the intention of the Legislature to exclude them is manifest. The rule may be said to be somewhat arbitrary, yet it is not without a reason. When the Legislature fixes a limitation of time of more than seven days, it knows that the period must necessarily include one or more Sundays, and hence if it intends to exclude them it can and should say so, but when the period of time is less than seven days, it may or may not include a Sunday, depending upon the day of the week it is computed from. It is said in *Hanover Fire Ins. Co. v. Shrader,* 89 Texas 35 (30 L.R.A. 498), 'The principle would seem to be that when but a few days are allowed in which to do the act, it is not to be presumed that the Legislature intended further to abbreviate it in effect by including a day ordinarily observed as a day of cessation from all ordinary business. . . .

"There are but few exceptions to the general rule laid down above. There are cases which may seem to be, but a careful examination of the most of them will show that when Sundays are excluded from the computation of time of more than a week, it is because of the language of the statute or because the days referred to are such as the Courts find exclude Sundays. . ." *Id.* 88 Md. 500, 508-09, 41 A.1083, 69 L.R.A. 909, 913 (1898).

Because of the above I have differed from my distinguished colleagues in their opinion that count two of the said motion should be overruled. I take the view unhesitatingly that count two of the motion should be sustained also.

Notwithstanding, however, our difference of opinion as to the disposition of said count two of the motion, yet we are unanimous that count one is of sufficient cogency and importance to be sustained and to warrant dismissing the appeal with costs against appellant, and it is hereby so ordered.

Motion granted.