MONAH IDA PHILLIPS, Appellant, v. **MARTHA NELSON** and **SARAH T. FREEMAN**, Appellees.

APPEAL FROM THE MONTHLY AND PROBATE COURT, MONTSERRADO COUNTY.

Argued March 24, 1949. Decided April 12, 1949.

1. Illness of counsel is good ground for which a court should grant a continuance.

2. Where a judge acts without jurisdiction his judgments are a nullity and cannot be enforced.

On appeal from a judgment dismissing appellant's objections to the probate by appellees of a warranty deed, *judgment reversed and remanded.*

William A. Johns for appellant. *Momolu S. Cooper* for appellee.

MR. JUSTICE DAVIS delivered the opinion of the Court.

The records certified to this Court from the court of origin in this case succinctly disclose the following: in the year 1943 the Government of Liberia sold to Martha Nelson and to Sarah T. Freeman, the above named appellees, one-quarter of an acre of land situated on Benson Street in the Commonwealth District of Monrovia, which land the Government as well as appellees considered a portion of the public domain of the State at the time of the sale. A public land sale deed, having been duly executed in favor of appellees and signed by the President of Liberia, then Edwin Barclay, was during the December term of the Monthly and Probate Court offered by appellees for probate. Appellant entered and filed formal objections to said deed being admitted to probate, claiming:

1. That the land in question was her *bona fide* property by virtue of having purchased same from the late Maria Williams,

2. That the deed executed by the Government in favor of appellees was fraudulent and deceptive in that, the amount named therein, namely one dollar and fifty cents as the purchase price paid by appellees into the treasury for a quarter of an acre of land was too meagre and therefore was not sufficient in keeping with the provision of law which declares thirty dollars as the purchase price for a town or City lot,

3. That the deed was not signed by T. Gyibli Collins, the then land commissioner, and was therefore fraudulent, because in the body of said deed is written the name of T. G. Collins, land commissioner, but in the signatory clause appears the name of Reuben Logan as registrar for Montserrado County; and

4. That the deed was not registered and probated within four months after its execution, for although executed in 1943 it was not offered for probate until December 1946, which, according to appellant's contention, rendered said deed voidable.

Countering these points raised in appellant's objections, appellees submitted the following in their answer :

1. That the land in question was, up to the time of the sale of same by the Government, a portion of the public domain of the State.

2. That appellant who claimed ownership in, and title to, said land as a result of a purchase from Maria Williams, as she alleged, should have made profert of her title deed, and her failure to do so rendered her objections liable to dismissal.

3. That the question of insufficiency of monetary consideration was not one within the purview of appellant as a private citizen to question or raise, as it could never operate in her favor; but that same concerned the revenue of the country and was therefore properly the duty of the proper law officers of the State.

4. That it is not the duty of the land commissioner to sign a public sale deed, but that said duty is that of the registrar; and

5. That the failure to have had said deed offered and admitted to probate within four months after its execution merely rendered said deed voidable and void only as against one holding a superior title to the same property.

These were the issues presented in the pleadings of the parties. A further perusal of the records also discloses that the Commissioner of Probate, His Honor James Auzzell Gittens, had, prior to his elevation to the bench as Judge of the Monthly and Probate Court, served as counsel for appellant. Consequently he found himself legally incapacitated to try and dispose of the said cause. Having disqualified himself, he, as the records reveal, instructed the clerk of the Probate Court, J. Everett Bull,

Esquire, to cite Nathaniel V. Massaquoi, Stipendiary Magistrate for the Firestone Plantations Magisterial Area —Bondiway, to preside over and determine the said case, asserting and relying upon for his authority section 127o of the second volume of our Revised Statutes.

Accordingly Stipendiary Magistrate Massaquoi came and, upon notice of the assignment of the cause for hearing being duly issued and served upon the parties, appellant's counsel D. Carmo Caranda, Esquire, gave notice of his illness and consequent inability to attend the trial. At the call of the case for trial on December 28, 1948, which meeting of the court the minutes of said date denominates as "a special sitting of the, Monthly and Probate Court to decide the issues in the [case] Monah alias Ida Phillips, Objector vs. Martha Nelson and Sarah T. Freeman, Respondendents," neithe'r appellant nor her counsel being present, the assigned magistrate sent someone to call appellant, who, according to the records, upon appearing in court, acknowledged service upon her of the notice of assignment, and informed the court that she had accordingly duly communicated said notice to her counsel in person. However, said counsel said he was ill and could not be present, and therefore she was not ready for her case to be heard.

Appellee's counsel strenuously contested appellant's right to enjoy the benefit of a postponement of .the matter, setting forth as reasons that the representation made by appellant's counsel respecting his engagement in the Circuit Court of the Sixth Judicial Circuit was untrue, and that he contested the veracity of the counsel's statement regarding his illness and contended that said statement should have been buttressed by a medical certificate.

Passing upon the submission of appellant Monah alias Ida Phillips as she stood before the bar of justice pleading for an opportunity to enjoy the benefits of a constitutional trial, Stipendiary Magistrate Massaquoi made the following ruling, which we deem necessary to quote *verbatim.*

"The court says that there being no motion for continuance filed by Counsellor Caranda with a Medical Certificate attached to prove his illness, it is bound to proceed with the hearing of the law issues of the case, since indeed the matter is one of long standing, since December 1946—quite over two calendar years. The court will now proceed to pass upon the written pleadings in view of the aforesaid, and it is hereby so ordered."

Having thus disregarded appellant's stated inability to go to trial and consequent

request for postponement of the hearing of the cause, the magistrate after hearing the argument made by appellees' counsel entered a final ruling dismissing the objections of appellant and admitting the deed to probate, with costs of the proceedings ruled against appellant. It is from said final ruling of the aforesaid magistrate that appellant has fled hither for review and relief.

Coming now to the bill of exceptions filed by appellant in this case, we find submitted therein the following points, to wit:

"1. That Stipendiary Magistrate Massaquoi was without legal authority to try and determine the cause; because, (a) although the statute provides that the Magistrate holding the oldest commission shall preside over and hear any matter in the Probate Court in which the judge of said court shall be intrusted and disqualified because of such interest, yet Massaquoi being a stipendiary magistrate for the Firestone Plantations magisterial area only,—which area embraces only the Firestone Plantations, and not Monrovia, he had no jurisdiction over said matter; and (b) nor did he hold the oldest commission as such type of magistrate contemplated by the statute in question.

"2. That the appellant was indeed denied her constitutional right, in that, her lawyer having notified the court of his illness, and she having confirmed said notice in person when sent for by the court, and stated upon record her unreadiness for trial, it was error, and a violation of the constitution for the trial magistrate to have proceeded with the hearing and disposition of the case in the absence of her lawyer, especially so since she was illiterate and unlettered."

We shall consider the points raised in the bill of exceptions in reverse order, taking first the one which attacks the judgment on the ground that appellant did not have her day in court.

In an effort to convince this Court that appellant was afforded a fair and impartial trial in the court below, counsel for appellees argued with great vigor and immense energy that the notice or information of the illness of counsel for appellant should have been supported by a medical certificate, as he, appellees' counsel, believed that the reported illness of appellant's counsel was untrue and was only designed to delay the trial of the cause, for there was, as he contended at this Bar, no legal merit in appellant's cause in the court below. This contention, in our opinion, would have appeared plausible if the trial magistrate had made the slightest effort to ascertain the whereabouts of appellant's counsel or the truthfulness or falsity of the information

regarding his reported illness, especially since appellees' counsel had endeavored to impress upon the said magistrate that the information respecting appellant's counsel was untrue. The record, however, is wanting in this respect. As soon as appellant expressed her unpreparedness for trial because of the illness of her counsel the trial magistrate, without suspending the matter for any inquiry into the veracity of appellant's statement with which appellees' counsel had joined issue, proceeded to make a ruling.

We are of the opinion that whether or not the issues embodied in appellant's pleadings appeared to the trial magistrate to have been meritorious he should have afforded the appellant the opportunity to be represented by her counsel on account of whose illness she had placed upon record her inability to go on trial. .

His Honor Mr. Justice Russell speaking for this Court in a case presenting circumstances similar if not identical with those surrounding the present case, said :

"The counsel for the defense having given notice to the court that he was sick and therefore prayed for the continuance of the trial until the following day; under these uncontrollable circumstances, being the act of God, it is our opinion that the trial judge, in view of the law and of the fraternal feelings which should always exist between the bench and bar, should have granted the application and continued said case." *Burney* V. *Jantzen,* 4 L.L.R. 322, 326, 2 New Ann. Ser. 162 (1935).

The trial magistrate therefore erred in disregarding appellant's expressed inability to go to trial because of the absence of her counsel, and in proceeding to hear and determine said cause under such circumstances. . Coming now to the issue submitted in count one of appellant's bill of exceptions which attacks the jurisdiction of the stipendiary magistrate over said cause, we deem it proper to first refer to and cite the statute upon which the Commissioner of Probate based his authority 'in citing the Stipendiary Magistrate of the Firestone Plantations Magisterial Area—Bondiway, to preside over and try said clause, which statute appellees' counsel repeatedly cited at this bar during his argument. We hereunder quote the statute :

"When any judge shall be interested in any matter docketed in his court, the clerk thereof shall summon the nearest magistrate having the oldest commission to preside over and try said matter. He shall be sworn in open court, and all his acts shall be valid and binding. He shall receive for his services the sum of two dollars per day and ten cents as mileage to and from his home." 2 Rev. Stat. § 1270.

The questions then, in our opinion, which evolved from a study of the foregoing statute are : (1) Is the Stipendiary Magistrate of the Firestone Plantations-Bondiway Area such magistrate as is contemplated by the said statute, taking into consideration his creation and his jurisdictional orbit specifically outlined in the Act of 1938, ch. XI, and other subsequent acts of the Legislature? (2) If he is regarded as such magistrate contemplated by the said act, was he the nearest magistrate and the holder of the oldest commission? (3) Was he duly sworn in open court to hear and determine the said case?

In the year 1938 the Legislature of Liberia by legislative enactment [Ch. XI] authorized the President to divide each of the counties of the Republic into magisterial areas, and to appoint over each magisterial area an official styled stipendiary magistrate who would replace a justice of the peace, and who, acting under the laws governing justices of the peace, would discharge all duties and functions which up to that time were discharged and performed by justices of the peace. Upon the authority of this enactment, the Firestone Plantations Magisterial Area was created and a magistrate duly appointed and commissioned as "Stipendiary Magistrate of the Firestone Plantations Magisterial Area" with jurisdiction over said area only and over such causes only as were cognizable before a Justice of the Peace. Later on amendatory statutes were enacted extending the jurisdiction of said magistrate. We quote the text of the amendatory statute of 1940:

"That from and immediately after the passage of this Act, Stipendiary Magistrates shall, in addition to exercising the powers heretofore conferred on Justices of the peace, have special jurisdiction within the limits of the Magisterial areas, in the following causes :

"All actions of debt and damages where the sum involved does not exceed three hundred ($300.00) dollars;

"Infraction of the peace where the fine does not exceed twenty-five ($25.00) dollars.

"That Stipendiary Magistrates shall have power to try Matrimonial Causes, arising under the Native Customary Law, in the Firestone Plantations Magisterial areas." L. 1940, ch. VI, §§ 1, 2.

It can be clearly seen that from neither the original statute of 1938, *supra,* nor the amendatory statute of 1940 quoted above, can be found the slightest authority for a stipendiary magistrate to function or to exercise jurisdiction over any matter beyond

or outside the limits of the area over which he is appointed. In both instances the statutes conferring jurisdiction upon said officer definitely state that said jurisdiction shall be exercised within the limits of the magisterial area over which the magistrate is appointed.

This being true and Stipendiary Magistrate Massaquoi having been appointed and commissioned to function within the Firestone Plantations Magisterial Area, and not the Commonwealth District of Monrovia or Montserrado County, we fail to see the legal propriety and fitness of having him cited to try the said case, especially when there were other magistrates within the Commonwealth District of Monrovia whose qualifications answered the requirements of section 1270 of the Revised Statutes (upon which the Commissioner of Probate based his order for Magistrate Massaquoi to be cited) in a more favorable measure than Magistrate Massaquoi. For example, H. Wilmot Dennis and J. Abayomi Thomas were both older in point of commission than Magistrate Massaquoi. Moreover they were both under the Commissioner of Probate and nearer the seat of the Probate Court than the Bondiway Magistrate. As such, one of them should have been cited by the Clerk of the Probate Court, and this of course without designation by the Commissioner of Probate who because of interest was disqualified, since the law gives him power to designate the magistrate. Moreover, after being cited, and upon his appearance, the magistrate should have been sworn in open court in keeping with the statute cited. According to the records certified to this Court this was not done.

Appellees' counsel in arguing the case before this Court and in an effort to justify the action of the Commissioner of Probate in citing Magistrate Massaquoi instead of either Magistrate Dennis or Magistrate Thomas, each of whom he admitted held an older commission and was nearer the seat of the Probate Court than the Bondiway Magistrate, contended that these two officials, Dennis and Thomas, were merely associate stipendiary magistrates proper, and that since the Revised Statutes in pointing out who shall preside over the Probate Court in case the judge is disqualified mention a magistrate and not an associate magistrate, Messrs. Dennis and Thomas could not have been cited since they were merely associate magistrates. This argument would seem plausible if it could be shown that at the time of the passage of section 1270 Revised Statute the office of stipendiary magistrate had been created in our jurisdiction; but since the facts point to the converse such an argument collapses. It is obvious that the terms employed in said statute, "nearest magistrate holding the oldest commission," refer to, and are intended to mean, the nearest justice of the peace who is oldest in terms of his commission. Both Dennis and Thomas were justices of the peace, were nearer the seat of the Probate Court than Massaquoi, and

held commissions of an older date than that of Massaquoi. One of them, therefore, should have been cited by the clerk of the Probate Court, and before entering upon the trial of said cause, in harmony with the provision of the Revised Statutes, he should have been sworn in open court to try the said case, for in our opinion this is one of the steps which gives him authority over a case of this nature, since ordinarily he would not be able to try same.

In the light of the foregoing, we are of the opinion that Stipendiary Magistrate Massaquoi was without jurisdiction to try the said cause. While it is true that the records do not show that this question of jurisdiction was raised by appellant and made an issue in the court below, nevertheless it is a settled principle of law that where there is want of jurisdiction any judgment rendered under such circumstances is a nullity.

"Individual citizens require protection against judicial action as well as against legislative; and perhaps the question, what constitutes due process of law, arises as often when judicial action is in question as in any other cases. But it is not so difficult here to arrive at satisfactory conclusions, since the bounds of judicial authority are much better defined than those of the legislative, and each case can generally be brought to the test of definite and well-settled rules of law.

"The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act. Jurisdiction is, *first,* of the subject-matter; and, *second,* of the persons whose rights are to be passed upon.

"A court has jurisdiction of any subject-matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be divested by means of them.

"It is a maxim in the law that consent can never confer jurisdiction : by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and upon considerations of general public policy defines and limits their jurisdiction ; and this can neither be enlarged nor restricted by the act of the parties.

"Accordingly, where a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it is at liberty to

repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceedings as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all. Consent is sometimes implied from failure to object; but there can be no waiver of rights by laches in a case where consent would be altogether nugatory.

"In regard to private controversies, the law always encourages voluntary arrangements; and the settlements which the parties may make for themselves, it allows to be made for them by arbitrators mutually chosen. But the courts of a country cannot have those controversies referred to them by the parties which the lawmaking power has seen fit to exclude from their cognizance. If the judges should sit to hear such controversies, they would not sit as a court; at the most they would be arbitrators only, and their action could not be sustained on that theory, unless it appeared that the parties had designed to make the judges their arbitrators, instead of expecting from them valid judicial action as an organized court. Even then the decision could not be binding as a judgment, but only as an award ; and a mere neglect by either party to object to the want of jurisdiction could not make the decision binding upon him either as a judgment or as an award. Still less could consent in a criminal case bind the defendant; since criminal charges are not the subject of arbitration, and any infliction of criminal punishment upon an individual, except in pursuance of the law of the land, is a wrong done to the State, whether the individual assented or not. . . ." 2 Cooley, *Constitutional Limitations* 845 (8th ed. 1927) .

In view of the foregoing facts, citations of law, and conclusions, we are left with no alternative but to reverse the judgment of the court below, and to remand the case to said court with the following instructions : That inasmuch as it has been clearly shown that the Commissioner of Probate J. Auzzell Gittens is disqualified to hear and determine said case since he served as counsel for one of the parties before his elevation to the bench, B. T. Collins, Esquire, who has been commissioned by the President as Acting Commissioner of Probate, will immediately take jurisdiction and proceed to hear, pass upon, and decide the objections and other pleadings of the parties filed in this case, giving due notice to the parties and their counsel of such hearing and trial. And that the said case shall have preference to and priority over any other case pending in the said Probate Court as far as the hearing or trial of same is concerned, the reason for this being that this Court desires said case to be disposed

of before the Commissioner of Probate J. Auzzell Gittens, who is disqualified to try said case, resumes duty.

Costs of these proceedings to abide final determination of the matter. And it is hereby so ordered.

Reversed.