

T. Y. LARMOUTH, Appellant, v. **REPUBLIC OF LIBERIA**, Appellee.

APPEAL FROM THE PROVISIONAL MONTHLY AND PROBATE COURT,
TERRITORY OF MARSHALL.

Argued May 21, 22, 1957. Decided June 14, 1957.

When the record of judgment below has been omitted from the papers submitted on appeal, and such record has been lost through negligence of the clerk of the court below, the clerk will be disciplined by the Supreme Court, and the case will be remanded for new trial.

On appeal from judgment in a case of assault and battery, *remanded*.

J. C. N. Howard for appellant. *Assistant Attorney General J. Dossen Richards* for appellee.

MR. JUSTICE MITCHELL delivered the opinion of the Court.

The above-entitled case of assault and battery originated in the Magisterial Court for the Territory of Marshall, Montserrat County. Judgment was entered against T. Y. Larmouth, the within-named appellant, who being dissatisfied therewith, excepted and appealed his cause before the Provisional Monthly and Probate Court, Territory of Marshall, to be tried, *de novo*, according to law.

The records certified to this Court show that the said case was duly tried by His Honor, John H. Marshall, Judge of the Provisional Monthly and Probate Court, Territory of Marshall, after which trial a judgment was rendered; but, on inspection of the records before this Court, no trace could be found of what final disposition was made of the case in the court below, since the records are void of the lower court's final judgment.

It was defendant below, now appellant, who brought this appeal before this Court for final adjudication. Therefore this Court infers that judgment in the lower court was rendered in favor of the plaintiff below, now appellee; but this Court still remains in a quandary as to what was the judgment so given.

Upon closer inspection of the records, it was further observed that, appellant's bill of exceptions, filed with the clerk of the lower court, was also missing, and that, when assignment of the hearing was made, appellant filed a motion in this Court for

diminution of record predicated upon absence of the final judgment and the bill of exceptions from the records before us.

The motion was granted and the appropriate writ issued calling upon His Honor, John H. Marshall, Judge of the Provisional Monthly and Probate Court of the Territory of Marshall, for the transmission of the aforesaid records from the office of the clerk.

In obedience to the writ, a certified copy of appellant's bill of exceptions was filed in the office of the clerk of this Court on May 15, 1957, accompanied by the following "Certificate of Admission," as the document is styled, subscribed to in the autograph of one Teage A. Warner, former clerk of the Monthly and Probate Court, Territory of Marshall, as quoted word for word hereunder:

"This is to certify that on July 4, 1956, the final judgment in the case Republic of Liberia, Appellee, versus Timothy Y. Larmouth, Appellant, charged with assault and battery, was rendered and formed a part of the records of the Provisional Monthly and Probate Court of the Territory of Marshall, but due to carelessness on my part the said records got misplaced, and after diligent search same cannot be located.

"Respectfully submitted,

"[Sgd.] T. A. WARNER

"[Sgd.] TEAGE A. WARNER,

"Former Clerk of the Monthly and Probate Court, Marshall Territory."

This Court then became moved with great concern and disgust over such action evincing gross negligence, incapability and worthlessness, and feels that such an act of recalcitrance and indifference in the performance of the duties of office by the careless handling of important documents of court in matters engaged in litigation should not escape disciplinary measures.

Viewing the peculiarity of this unfavorable situation, the Court afforded an opportunity to counsel concerned to make a joint submission if they elected to do so, which could be regarded as a legal premise on which to take some action *pro et con*; and at the call of the case, appellant's counsel made the following submission without resistance from the appellee:

"1. The judgment in the court below is missing, and the former clerk of the lower court has certified to this Court that the said judgment was negligently lost by him

and cannot be found.

"2. Appellant further submits that the kernel of any case—civil or criminal—upon which this Court of last resort might render judgment, is a judgment coming before it from the court below.

"3. According to law the judgment of the court below might either be affirmed or reversed, or this Court might give such judgment as should have been given in the court below.

"4. It is the opinion of the appellant that a judgment such as should have been given in the court below must be based on errors appearing patent on the face of the judgment, but not on the mere records of a case absent judgment.

"5. Appellant's counsel submits that, not having appeared in the court below, he does not know what the judgment below was, nor has he had an opportunity to read and scrutinize the judgment which was excepted to in the court below, and upon which principally the appeal was made to this Court. Hence appellant's counsel does not feel it would be fair to his client, in view of the circumstances above recited, to correct a judgment which this Court has not seen."

Referring to common law principles, this Court feels that the above submission is well founded ; and we quote hereunder :

"The prevailing rule is that if the court, on the hearing of a motion to establish a lost paper, *e.g.*, so as to complete the record for the purpose of an appeal, finds it impossible to supply such a paper, the loss not being due to the moving party's fault or negligence, a new trial should be granted, inasmuch as a party should not be deprived of any right by loss of the record due to an accident not chargeable to him."
17 R.C.L. 1174. *Lost Papers and Records* § 10.

This Court, therefore, has no alternative but to entertain the submission, to remand the case, and to order the Provisional Monthly and Probate Court of the Territory of Marshall to resume immediate jurisdiction and conduct a new trial.

As for the indifferent and recalcitrant action of Teage A. Warner, former clerk of the said lower court, we order him to pay a fine of twenty-five dollars imposed by this Court, forthwith, or commit his body to the Common Jail of Montserrado County until said fine is liquidated. The aforesaid lower court is further ordered to submit

returns to this Court as to the manner in which this judgment is executed. And it is hereby so ordered.

Remanded.