THOMAS E. BEY-SOLOW, Appellant, v. **J. T. GORDON**, Appellee.

ARGUED JANUARY 16, 1913. DECIDED JANUARY 29, 1913.

Toliver, O. J., McCants-Stewart and Johnson, JJ.

1. When a cause comes to an appellate court for review, and it is discovered upon the face of the records that such cause was not conducted according to law, the appellate court will grant a new trial.

2. Unless excused upon statutory, or other legal grounds, witnesses should appear at a trial to be examined and cross-examined.

3. Where the verdict of a jury is against the law and the weight of evidence, the judgment will be reversed.

Mr. Chief Justice Toliver delivered the opinion of the court:

Damages—Appeal from Judgment. This case was filed in the Circuit Court, first judicial circuit, Territory of Grand Cape Mount, at its May term, A. D. 1912. A jury was empanelled and issue joined, witnesses were called and deposed in the presence of the court and jury; the examination of witnesses last41 several days, when the case was submitted to the jury for their verdict; this was on the 20th day of May, A. D. 1912. The petit jury in said case came into court and announced that it was impossible for them to come to a verdict, whereupon the court ordered the jury dismissed and a new trial awarded for the August term, A. D. 1912.

At the August term of the court a new jury was empanelled to try the cause; it appears that both parties by stipulation agreed to dispense with the examination of witnesses and substituted the depositions taken in the former trial at the May term.

The result of the trial was a verdict and judgment in favor of the defendant, now appellee, to which verdict appellant excepted and effected an appeal to this court. In the first instance we would remark that a jury is a body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them. Our statute law describes testimony as detail

given on oath by living witnesses of their knowledge of facts ; witnesses should be examined in the presence of the court and jury, and as such subject to cross-examination by the court, jury and parties as they give in their statement for either plaintiff or defendant; there is a difference between cross-examination of witnesses and reading of depositions in the hearing of a jury; we find from the records that the trial judge made inquiry from the parties as to whether they would have the witnesses in the cause depose or would they have the depositions of the previous trial. Whereupon the parties agreed to have the depositions ; this court considers the action of the court in making the inquiry error, as the witnesses should have deposed before the court and jury in order to be cross-examined.

It appears that the appellee was clerk of the Court of Quarter Sessions and Common Pleas for the Territory of Grand Cape Mount when an action of injunction was filed by appellant against the City Corporation of Robertsport, Grand Cape Mount ; a judgment was awarded against plaintiff_ who appealed to this court from the said judgment of the court at its May term, A. D. 1908. The appellee in this case being clerk of the court, neglected to send up a complete record in said case, the bill of costs being omitted, whereupon the appellant applied for and obtained a mandate from this court, requiring the clerk now appellee to forward said bill of costs. The mandate of this court was not speedily obeyed up to the time of hearing of the case before this court, hence the case was on motion dismissed for nonpayment of costs ; and appellant ruled to costs. The records show that this inconvenience the appellant was put to and the delay and expense was specially traced to the conduct of the appellee by not transmitting a complete record to the appellate court in accordance with the prescribed statute. It further shows that in a former case, Bey -Solow, appellant, v. Moore, et al., appellees, when an appeal was pending at the November term, A. D. 1909, in the Territory of Grand Cape Mount, that during the session of the said court, the appellee closed his office, and absented himself thereby prohibiting the appellant from taking out his appeal ; in consequence of which appellant applied for and obtained the issuing of a mandamus to compel the appellee to transmit said record, upon receipt of which the said appellee transmitted all of the original records in the case to the Supreme Court, which was contrary to rule; and also contrary to ruling of the court (see ruling in the case A. A. Hulsman V. Johnson).

All of the foregoing actions of the appellee caused the appellant to suffer unnecessary inconvenience and were prejudicial to his interest. The statute declares that every act that is prejudicial to the interest of another is an injury, and consequently the subject of an action; such action not being warranted by law, the acts of the appellee, clerk as aforesaid, can be specifically traced to the conduct of the said appellee, by a minute examination of the records in this case.

We discover that the appellant is entitled to recover some damages for the injury he has sustained by means of the dereliction of duty on the part of the appellee.

The judgment of the lower court is therefore reversed, and a new trial awarded, costs to abide events.

T. E. Bey-Solow and L. A. Grimes, for appellant. Arthur Barclay, for appellee.