

RICHARD FAZZAH, Appellant, v. ROGERS SHOE  
COMPANY, by RICHARD HENRIES, Attorney in  
Fact, Appellees.

MOTION TO DISMISS AN APPEAL IN ACTION OF DEBT.

Argued June 16, 17, 1955. Decided August 5, 1955.

Where an appellant's failure to fulfill the requirements for perfecting an appeal is due to a mistake or omission by an officer of the court, the defect is not fatal to the appeal, but may be remedied by order of the appellate court so as to promote substantial justice.

Appellees applied to this Court for an order to the court below to resume jurisdiction and enforce its judgment in an action of debt, on the ground that appellants had failed to file a timely or complete record on appeal. On appellants' showing that the defects referred to by appellees were due to mistakes or omissions by the clerk of the court below, *motion denied*.

*S. Raymond Horace* for appellant. *J. Dossen Richards* for appellee.

MR. CHIEF JUSTICE RUSSELL delivered the opinion of the Court.

Appellees in the above entitled action filed for the consideration of this Court an application for an order to the court below to resume jurisdiction and to enforce its judgment upon grounds alleged as follows:

- "1. Four months, or one hundred twenty-three days, elapsed since appellant excepted to the judgment of the lower court and gave notice of appeal therefrom, within which period the records were not transmitted to this Court; which period of time far exceeds the statutory requirement in such case made and provided.

"2. The appellant failed to file a motion for new trial in the court below."

In opposition to this application of the appellees, the appellant submitted the following resistance:

"1. The appellant performed in season, meaning within statutory time, all acts necessary to have been faithfully done by him, in that he filed in the court below, after recording exceptions to the judgment of the said court and appealing therefrom, a bill of exceptions duly approved by the trial judge and an appeal bond also duly approved; and the appellant also duly served upon the appellees a notice of appeal.

"2. The delay in transcribing and transmitting the records to this Court is due to no fault of the appellant, since, with the rendition of the lower court's judgment during the latter part of December, 1954, the appellant paid to one Robert Anthony, the clerk of the court below, whose duty it was to have transcribed and transmitted the said records, the sum of forty-one dollars and fifty cents (\$41.50). Acknowledgment of the same is evidenced by the following receipt:

'Office of the Clerk of Court of the Civil Law Court, Sixth Judicial Circuit, Montserrado County, Monrovia. Received from Richard Fazzah defendant, action of debt, the sum of forty-one dollars and fifty cents (\$41.50) for preparation of the court's records for the Honorable Supreme Court of Liberia. Respectfully submitted [Sgd.] ROBERT ANTHONY, *Acting Clerk, Civil Law Court. 23/2/55.*' "

Appellant further submitted that a certificate from the clerk of this Court should have been attached to the said application in verification of the allegation contained therein, and that, because of the absence of notice, the said application should not be sustained by this Court.

In further resisting the application of appellees, appellant alleged that the objections raised by appellees as to appellant's failure to file a motion for new trial in the court below were prematurely raised because the instant case had not first been docketed. Appellant also submitted that the issues passed upon the court below were of law and not fact, an issue of law being that Richard Henries, although holding himself out as attorney in fact, did not have any power of attorney from Rogers Shoe Company duly registered and probated according to law to represent the said company as such.

The above contentions have been presented to this Court to be passed upon. Salient is the failure of the clerk of the lower court to transcribe and transmit the required records within statutory time.

This Court, having held that it will pass only upon issues certified to from the records, deems it unnecessary to pass upon the filing of the bill of exceptions, appeal bond, etc., since the appellees herein have not raised these points for consideration.

The controlling statute imposes the duty of transcribing and transmitting records to the appellate court upon the clerk of the court below. Failure or neglect so to do is ground for penalty. Rev. Stat., sec. 428. The question then arises: is this a duty of counsel, or of a party appealing; and should any delay therein be held to prejudice the rights of a party appealing?

The applicable statute provides, in part:

"That no act nor omission of a Judge nor any officer of Court shall affect the validity of an appeal, but such act, mistake or negligence shall be remedied by some appropriate order of the appellate court so as to promote substantial justice." L. 1938, Ch. III, sec. 1.

It is therefore our opinion that the appellees have failed to show sufficient grounds for depriving this Court of jurisdiction over the said cause or to justify the lower court in resuming jurisdiction. The statute quoted,

*supra*, enumerates certain jurisdictional steps to be taken by an appellant. Failure to take these steps would have been fatal to the instant appeal. Since the appellees did not raise any question as to these basic jurisdictional points we are of the considered opinion that the application herein should be denied and the case tried upon its merits. And it is hereby so ordered.

*Motion denied.*