CASES ADJUDGED

IN THE

SUPREME COURT OF THE REPUBLIC OF LIBERIA

AT

APRIL TERM, 1931.

BANK OF BRITISH WEST AFRICA, LTD., Monrovia, by and through their Manager, WM. LAMPREY JAMES, Appellant, *v.* C. W. DAVIES-JOHNSON, Appellee.

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

Decided May 15, 1931.

1. Where an appellee motions the court upon objections not touching the merits of the case the court will discourage and deny same.
2. All motions in bar of an action should not be construed technically.
3. An appeal is perfected under the statute when the appellant's bill of exceptions is duly signed within ten days and the appeal bond approved within sixty days from date of final judgment.

In an action for damages for breach of contract, judgment was given for plaintiff, now appellee, in the Circuit Court. On appeal to this Court, motion to dismiss appeal *denied* and judgment *affirmed.*

Barclay & Barclay for appellants. *R. Emmons Dixon* for appellee.

MR. JUSTICE BEYSOLOW delivered the opinion of the Court.

C. W. Davies-Johnson, appellee in the above entitled cause, respectfully motions this Honorable Court to dismiss this appeal and rule appellant to all cost for the following legal reasons to wit:

Because appellee says that the appeal has not been completed in that no notice of appeal has been issued and served on him as required by law so as to give this Court jurisdiction over the matter.

After reviewing the grounds set forth in the appellee's motion to dismiss this cause, the Court is of the opinion that where an appellee motions this Court upon objection not touching the merits of this case, this Court will discourage and deny such motion.

All motions in bar of an action are to receive, if not liberal, certainly not narrow and merely technical, construction. They are always to be construed according to their entire subject matter and should not be determined by a disjoining of their members, or by laying stress upon what is merely technical.

In view of the circumstances of the case the Court will not entertain the motion to dismiss the case, as no injustice will operate against the appellee by the judgment of this Court.

The initial constitutional limitations imposed on the colonial assemblies by the colonial charters were enforced continually by the judicial committee of the English Privy Council. After such charters were transformed into state constitutions, the judicial committee was superseded by the Supreme Court of the several States. Finally, when the new system of limitation was lifted into a higher sphere through its application to the legislative power vested in the unique Federal Republic created by the Constitution of 1787, the inevitable outcome was the Supreme Court of the United States, the only court in history then endowed with the right to pass on the validity of a national law. The momentous result thus attained was reached through a process of legal

growth, in the earlier stages of which the nature of the mature product was not clearly perceived. Not until thirteen years after the organization of the Supreme Court was the first attempt made, in the case of *Marbury* v. *Madison,* 1 Cranch 137 (U.S. 1803), to put the stamp of nullity upon a national law; and not until twenty years after its organization was the first attempt made, in the case of *Fletcher* v. *Peck,* 6 Cranch 87 (U.S. 1810), to put the stamp of nullity upon a state law.

A careful review of the creative judicial work of those men who were forced during the critical period to break new paths in the effort to establish the national character of the new government and court, leaving it above the state control, justifies a cordial approval of the estimate of an eminent critic who declared that the judges who occupied the bench before the time of Marshall are entitled to have said of them that what they did was of incalculable value to representative institutions, not in America alone, but throughout the world.

In the case of *Coleman* v. *Republic,* 2 L.L.R. 137 (1913), the Supreme Court said through Mr. Justice McCants-Stewart that the essential requisites of an appeal are the indemnity bond and the bill of exceptions and it was so held by this Court.

An appeal is perfected under the statute when the appellant's bill of exceptions is duly signed within ten days. and the appeal bond approved within sixty days from date of final judgment.

We shall not look favorably upon technical motions, but shall endeavor to hear and dispose of all causes on their merits. *Coleman* v. *Republic,* 2 L.L.R. 137, 139, 3 Lib. Semi-Ann. Ser. 4 (1913).

Therefore the Court denies this motion and will go into the merits of the case. From the genesis of the Supreme Court of the United States to the time of the incumbency of Chief Justice Marshall, over twenty judgments have been recalled. And during the time of Marshall to the

incumbency of Chief Justice Chase, over one hundred decisions were recalled or nullities placed upon federal and state laws.

The power of the Supreme Court of this Republic is transcendent within the limits of the Constitution. Modern practice of law is progressive, it is scientific, it is advancing every day.

This case was brought to the Supreme Court for review at its November term, 1930, from the First Judicial Circuit Court, Montserrado County, by the appellant, the defendant in the court below, on a bill of exceptions.

The substance of the case is a contract entered into by the Bank of British West Africa, Ltd., hereinafter known as the Bank, appellant, and C. W. Davies-Johnson, hereinafter known as Johnson, the appellee, who was employed by the Bank.

An eminent legal writer says: "It is a pleasing commentary on human honesty that the great majority of contracts are performed in accordance with their terms without question or dispute. The law is complied with, wherever its provisions are known, as a matter of routine. Business today is conducted upon a very high plane. Yet no businessman wishes to be without the protection which the law affords. To avail themselves of this protection, businessmen observe strictly all the forms of law; and when important transactions are involved, they enter into elaborate contracts with all the safeguards they and their legal advisers can devise. Special precautions are taken to guard against mistakes and to see that every term is clearly stated and thoroughly understood. Many lawsuits and much unpleasantness are prevented by these means. Nevertheless, the courts are constantly being called upon to construe and enforce contracts and to determine the rights and liabilities of parties."

Professor Harriman of Chicago says: "We have defined contractual obligation as that obligation which is imposed by the law in consequence of a voluntary act, and

which is determined as to its nature and extent by that act. . . ." Harriman, The Law of Contracts, § 21. From this definition, it will be seen that there are three distinct elements essential to the existence of a contractual obligation. These are, first, that the party bound should do an act; second, that the act should define the extent of the obligation and the conditions of its action; third, that the law should impose that obligation as a consequence of such act.

The exceptions taken by the defendant, now appellant, as set out in the bill of exceptions, in the court below, from exceptions 1–5 inclusive, are well founded, and the original court should have allowed questions answered which were propounded to the bank manager.

But inasmuch as those questions were answered by the evidence of other witnesses on the hearing and trial of the case in the court below, the appellate court is well informed on those points.

1. In the grounds of dismissal of the bank clerk, Mr. Johnson, it does not appear upon the record that Paterson and Zochonis nor the East African Company nor A. Woermann nor any other party made any complaints against Mr. Johnson for dishonest dealing; nor does it appear anywhere in the records that Mr. Johnson was without funds to take up the parcels shipped to him by Brown and Co. and Spaulding.
2. But it does appear that the shippers who sent these goods to Mr. Johnson were rather high in their rates and prices, for a man of Mr. Johnson's financial standing; for example, a necktie for five and seven shillings apiece. Goods of that kind may suit the bank manager, but are impossible for the clerk.

When Mr. Johnson returned the parcels, the Court fails to see any dishonesty of purpose; because his wife secured a small credit from Woermann and the East African Company, the Court cannot see dishonesty on her side

to show that Mr. Johnson really violated the contract now in litigation.

After careful inspection of the records and the weighing of the evidence in the case, the judgment of the court below is hereby affirmed. And it is so ordered.

Affirmed.

MR. JUSTICE KARNGA, dissenting.

From the records in this case, it appears that in the month of August, 1920, one F. B. C. Goodliffe, Manager for the Bank of British West Africa, Ltd., Monrovia, engaged by a written contract the services of Mr. C. W. Davies-Johnson as a clerk in the said Bank, at a yearly salary of one hundred pounds sterling payable monthly on the last day of each month while the latter remained in service. The contract also stipulated that three months' notice shall be given by the party desiring to terminate the contract to the other. It appears that on February 26, 1929, the Bank disregarded this stipulation and dismissed the said clerk without the said notice. An action of damages for the violation of contract was therefore instituted against William Lamprey James, then manager of the said Bank, at the August term of the Circuit Court of the First Judicial Circuit, Montserrado County, by the plaintiff. Judgment was properly entered in favor of the plaintiff in the court below; upon appeal the case was brought before this Court for review.

When the case was called for hearing, however, the appellee offered a motion to vacate the proceedings and rule the appellants to all costs, on the grounds that no notice of appeal had been issued and served in order to give the Court jurisdiction over the said appellee. But the counsel for the appellants contended that the said case ought not to be dismissed and the appellants ruled to all costs;

1. Because the neglect of the clerk of court through ignorance or wrong conception of the law as to his duty with reference to the notice of appeal should not prejudice appellants in the prosecution of their appeal.
2. Also because the non-service of a notice of appeal is not one of the statutory causes for the dismissal of an appeal.
3. Also because the non-service of a notice of appeal does not prevent the court taking jurisdiction since indeed the notice is only for the benefit of the appellee and may be waived, the bond under our statutes being the essential thing.

We will now proceed to inquire into the contention of both parties and give such ruling in the matter as justice and equity would require. In considering the appellant's reply to the motion to dismiss the appeal, beginning from the bottom to the top, we find ourselves unable to accept the views of the counsel for the appellants in this case. It is a well settled principle of law that the procedure necessary to perfect an appeal is usually the subject of statutory regulation, and there must be at least a substantial compliance with the requirements, otherwise no jurisdiction is secured by the appellate court and the court cannot dispense with any of the prescribed requirements. When the necessary proceedings to perfect an appeal have not been taken, the appeal will of course be dismissed. 2 R.C.L., "Appeal and Error," §§ 73, 143. According to our statute "Every appeal must be taken and perfected within sixty days after final judgment, except in cases of admiralty, when the appeal must be taken in twenty days." 1 Rev. Stat. § 424. "Appeal bonds are to be approved by the Court from which the appeal is taken, within sixty days after final judgment, as well as the payment of all costs; this being done, the Clerk of the said court shall forthwith issue a notice to the Appellee, informing him that the appeal is taken, and to what term of

the Court; and that said appellee appear to defend the same, which shall complete the said appeal." Acts of Legislature, 1893–94, 10 (2nd), sec. 1. On this point the common law and our statutes seem to harmonize; the Court can therefore do nothing but adhere strictly to the law.

With reference to the second point in the appellants' reply, we are of the opinion that the statute on appeal did not limit the causes for which the Supreme Court shall dismiss cases before it on motion. In section 430 of the *Revised Statutes* it is provided: "The appellate court may dismiss cases upon motion for any of the following reasons: non-appearance of parties, non-approval or defect of bond, failure to pay costs, or to file bill of exceptions." The language of the above statute seems to be quite plain but if the meaning of the enactment, whether from the phraseology used or otherwise, is obscure, or if it is unfortunately expressed in such open language that it leaves the enactment quite as much open, with regard to its form of expression, to the one interpretation as to the other, the question arises what is to be done. We must try and get at the meaning of what was intended by a consideration of the consequences of either construction. And if it appears that one of these constructions will do injustice, and the other will avoid the injustice, "It is the bounden duty . . ." says Earl Cairns in *Hill* v. *East and West India Dock Co.*, 9 *App. Cas.* 448, 456 (1884), "to adopt the second and not to adopt the first of those constructions." The Court is then bound to construe a statute, as far as it can, to make it available for carrying out the object of the Legislature, and for doing justice between parties. Hardcastle Treatise on Construction and Effect of Statute Law (3rd ed.), ch. II, p. 107.

In seeking therefore to carry out this high object of doing justice between parties litigant, we here observe that the Supreme Court of Liberia is vested with authority under the laws of the Republic to dismiss causes before it on motion for the following reasons:

(a) The non-appearance of parties; (b) the non-approval or other defect of bond; (c) failure to pay costs; (d) failure to file bill of exceptions; (e) failure to summon appellee as prescribed by statute; (f) when indictment states no offense within the jurisdiction of the court —such a defect being fatal at any stage of the proceedings and is not waived by the failure to take advantage thereof in the trial court (2 R.L.R., § 54); (g) any financial interest of the presiding judge in the subject-matter of the litigation before him; (h) cases where judgment has been rendered by a judge related to either party in suit; (i) when no assignment of errors has been filed with clerk of court or an affidavit is not signed by the deponent or his agent or when otherwise defective.

Observed Justice Charles in *Reg.* v. *London County Council;* re *The Empire Theatre,* 71 L.T. Rep. 638, 639 (1894),

> "Now one of those principles which must guide a person in a judicial position is that he must not be both accuser and judge. If there is on a tribunal anyone who is an accuser, and who, although he is accuser, acts also as judge, his presence on that tribunal is fatal to its jurisdiction, and it is of no importance that had he been absent the decision would have been the same. The mere presence of a person who is accuser and judge vitiates the decision of the tribunal . . . [and] anybody is disqualified to act on any judicial matter in reference to which he has any pecuniary interest or any real bias. . . ."

"The object of the rule," remarked Lord Justice Atkin, "is not only that the scales be held even; it is also that they may not appear to be inclined." Robson, Justice and Administrative Law, 61 (1st ed.). And for similar reasons, where judgment has been rendered by a judge related to either party in the suit; and when no assignment of error has been filed with the clerk of court, or when not filed in time. It is a well settled principle of law that in every writ of error there must be a special assignment of errors

in which the precise matter of error or defect of the proceedings in the court below relied upon as grounds of reversal must be set forth, and no other will be heard or considered by the court. 7 Encyclopaedia of Forms, 755; Rules of the Supreme Court, IV 3, 4 (1st), 2 L.L.R. 663.

With reference to the first point in the appellant's brief, we will here only affirm the several decisions handed down by this Court on this subject. In *Greaves* v. *Johnstone,* 2 L.L.R. 121, an action of damages on a written contract decided June 13, 1913, Mr. Justice Johnson delivering the opinion of the Court held:

> " '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 the case *McCauley* v. *Laland,* 1 L.L.R. 254] 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.
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> "This principle has also been established in the case *Johnson v. Roberts* (1 L.L.R. 8) and recently in the case *Moore v. Gross* (Lib. Ann. Ser., No. 2, p. 18)."

The position of the Court was again affirmed in the case *Kyasi Adai* v. *Jackson,* 2 L.L.R. 171, 4 Lib. Semi-Ann. Ser. 23 (1914). Mr. Justice Johnson again delivering the opinion of the Court strongly held:

> "While we have repeatedly declared that this court will not regard technical objections which do not materially affect the case, we must here observe that the objection raised to the manner in which a notice of appeal is issued and served is not a technical objection but a material point, which claims the serious consideration of this court, affecting as it does, the very existence of the case in this court."

It has been suggested in the argument by the counsel for

the appellant that the clerk of the court is the court and therefore his actions should not prejudice appellant's appeal. On this point we should remark that the term court is derived from the Latin word *Curia,* and may be defined as follows:

> ". . . 2. The place where justice is judicially administered. 3. The judges who sit to administer justice; and, in jury trials, the judge or presiding magistrate, as opposed to the jury. . . ." Mozley and Whiteley, Law Dictionary, "Court."

It is the judge therefore who constitutes the court—it is his acts that should not prejudice parties litigant.

After maturely considering this case, we regret we cannot agree with the majority of the Bench to close our eyes and with a single blow over-turn those well settled principles of law which have been handed down by our learned brothers on this Bench from almost the very commencement of the Republic and have since become hoary with age, nor should we make this case an exception to the rule. There is no alternative but to adhere to those sacred principles. To abandon them and pursue a different course would not only cause the practice to be uncertain, but also subject this high Court of last resort to a just criticism of instability and fickleness in its opinions and judgments. We feel bound to support the opinions by this Court and which are also in accord with the common law. It is therefore my opinion that while it is the duty of the clerk to issue the notice of appeal to be served on the appellee, it is also the duty of the appellant to see that it is legally done. No notice of appeal having been issued and served on the appellee within sixty days as prescribed by statute in order to perfect the appeal, this Court can take no jurisdiction over the said appellee.

The Clerk of this Court shall file this dissenting opinion in the archives of this Court and it is so ordered.