FIRESTONE PLANTATIONS COMPANY, by ROSS E. WILSON, General Manager, Appellant, *v.* WILLIAM E. GREAVES, Appellee.

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

Argued November 13, 14, 1947. Decided April 30, 1948.

1. Failure to serve a copy of a motion for new trial is not ground for dismissal of an appeal.
2. It is error for the trial judge to refuse to pass upon issues raised in a motion for a new trial. Where copy of said motion had not been served, said judge should have ordered appellant to make such service, adjourned the case for one day, and, after hearing, ruled on the issues.

After a verdict in favor of appellee appellant moved for a new trial but did not serve notice of the motion on the opposing party. The lower court sustained appellee's motion to deny the motion for a new trial on the ground that said notice was not served and rendered final judgment. On appeal to this Court wherein appellee moved to dismiss on the ground of failure to serve notice of motion, *lower court's denial* of motion for new trial *reversed, motion* to dismiss appeal *denied,* and *case remanded* on said issue.

B. G. Freeman and *H. Lafayette Harmon* for appellant. *Nete Sie Brownell* for appellee.

MR. JUSTICE REEVES delivered the opinion of the Court.

This is the third time we have had this case, involving an action of damages for injury to personal property, before us for adjudication on appeal. [*Firestone Plantations Co.* v. *Greaves,* 9 L.L.R. 147 (1946); 9 L.L.R. 250 (1947).]

On the day assigned for the hearing, the case was called and, since counsel for both parties were present, the motion

to dismiss filed by counsel for appellee containing the following three counts was considered, *viz.:*

"1. That upon verdict being rendered in favour of the appellee, appellants gave notice that they would file a motion for a new trial. That appellants were given their statutory numbers of days within which to file said motion for a new trial if they wanted the facts reviewed by the trial court.

"2. That upon the call of the case on the 25th April, —16 days after verdict,—appellants informed the court that they had filed a motion for new trial. Appellee observed to the court that no copy of said motion had been served upon him or his counsel in keeping with the rule of the court.

"3. That appellants were given opportunity to show that copy of said motion had been served upon appellee or his counsel. After due inquiry, appellants failed to show as they then claimed that this had been done. Whereupon the court below was compelled to deny the hearing of said purported motion and proceeded to render final judgment."

To this motion appellant's counsel filed a resistance setting forth the following allegations in traversal, to wit:

"1. Because appellants submit, that after a verdict of the petit jury in the aforesaid case in the trial court below, they excepted to said verdict and gave due notice to the court that they would file a motion for a new trial. That within the time provided by statute said motion was duly filed in the office of the Clerk of the aforesaid trial court, as will more fully appear by copy of said motion appearing in the records sent up to this Honourable Court by the court below. Appellee's allegation therefore, that no legal motion for a new trial was duly filed in the court below is misleading and untrue and not supported by the records of the case.

"2. Appellants further submit, that when said motion was called for hearing, appellee announced that they had not received a copy of the motion filed in court; whereupon appellants requested the court to suspend the hearing of said motion in order to give the appellee his four hours notice provided by rule of court, and the appellants an opportunity to furnish appellee another copy of said motion since he alleged that he had not received the copy previously dispatched to him in keeping with the practice of the court; this the court below refused to do and proceeded to deny appellants' motion for a new trial, and rendered final judgment, to which appellants excepted and appealed to this dernier tribunal for review.

"Appellants further submit that the ruling of the trial judge on said motion for a new trial being one to which exception was taken and appealed from, is the subject for review by this appellate court in the trial of the appeal, and is not grounds for the dismissal of said appeal, since it is now a mandatory statute authorizing this appellate court to dismiss appeals for one of the following three reasons only:– (a) Failure to file approved bill of exceptions, (b) Failure to file approved appeal bond, or where said bond is fatally defective, and (c) Non-appearance of appellant."

Appellee's counsel denied count two of appellant's resistance and requested the Court to inspect the records of the lower court sent forward under the clerk's certificate. To clarify the issue, recourse to said records was had. No such request was recorded. Said records support the fact that appellee requested the court to deny the motion for new trial under rule of court because a copy of said motion had not been served on appellee or on his counsel. Appellant's counsel stated that as far as he knew a copy of the motion was served on appellee by his messenger.

The court inquired of him whether that fact could be substantiated by his despatch book or by a receipt. He answered, "I don't know see [*sic*] entry in the despatch book." The judge then ruled: "That in the absence of proof positive, the copy of the motion was not really served on plaintiff, now appellee, the application of plaintiff is granted and the motion denied." Consequently we must concede the point that a copy of said motion for new trial was not served on appellee or on his counsel by appellant's counsel as the rule requires, and thereby appellant violated Rule VIII of the Rules of the Circuit Court. But we must ask whether or not such violation can be considered a ground for dismissal of an appeal before this appellate court, particularly since an exception was taken to said ruling, which forms a part of count three of appellant's resistance, to wit:

> "[T]hat the ruling of the trial judge on said motion for a new trial being one to which exception was taken and appealed from, is the subject for review by this appellate court in the trial of the appeal, and is not grounds for the dismissal of said appeal. . . ."

Is it not the failure by the losing party to file a motion for a new trial after the rendition of the verdict that constitutes a ground for the dismissal of an appeal when a motion to dismiss is properly filed before this Court? This Court has in several opinions laid down this principle. *Gardiner* v. *Republic,* 8 L.L.R. 406 (1944), involving forgery. The reason for this is apparent, for our statutes declare that:

> "These [*sic*] shall be no appeal from any verdict of a jury, in any question of mere fact, except to the court in which the case was tried, for the purpose of setting aside the verdict in the manner herein before provided for." Stat. of Liberia (Old Blue Book) ch. XX, § 2, 2 Hub. 1578.

and

> "On the rendition of a verdict, if any party excepts

thereto on the ground that it is contrary to the law or the evidence, or is against the weight of evidence, he must before the jury is discharged enter his exceptions on the minutes of the Clerk of the Court. Before doing so he may cause the Clerk to ask each juror as to whether or not such verdict is his own, *and he shall give notice of motion for a new trial.*" 1 Rev. Stat. 481. (Emphasis added.)

In *Gardiner* v. *Republic, supra,* we find this legal proposition advanced:

"[T]he ground for our law being that every effort should be made to obtain relief in the trial court and only after the party shall have exhausted the means placed at his disposal by the law should an appeal to this Court of *dernier ressort* be permitted." *Id.* at 413.

It is true that Rule VIII of the Rules of the Circuit Court requires that "notice of all Motions shall be given to the other party at least four hours before they are called for hearing or the motion shall not be entertain[ed] by the Court upon objections properly taken by [the] opposing party"; however, said rule cannot be considered mandatory in the case of a motion for new trial.

Our statute laws require the losing party to file a motion for a new trial before he can be entitled to the right of an appeal. But if a violation of said Rule VIII justifies a judge of the lower court in denying said motion, as in this case, we must ask what would become of appellant's appeal. It is elementary that the judge of the lower court must rule upon the issues raised in a motion for new trial after its filing before said motion becomes a fit subject for the appellate court to review. Obviously, if he be legally clothed by rule to deny said motion without passing upon the issues raised therein, the appellate court would be barred from a review of the same occasioned by a conflict created thereby. Rule VIII of the Rules of the Circuit Court was never intended by the Legislature to

cause such a conflict. To make this clear, we shall examine section 8 of the Judiciary Act of 1911–12:

> "The Chief Justice shall edit and supervise the publication annually of the opinions of the Supreme Court; and such Judicial opinions as the majority of the Court may deem important; shall draft the rules of the Supreme and Circuit Courts in order to secure uniformity in the administration of justice throughout the State provided that such rules shall not conflict with any existing Statutes."

The late Chief Justice Toliver, under such authority, edited the Rules of the Circuit Court, of which Rule VIII is one; but, in order that said edited rules be properly understood and correctly used, he circularized a letter, as a preamble, which we find published with said rules, which is as follows:

> "MONROVIA, LIBERIA, *July —, 1912.*
>
> "TO THE JUDGES OF THE SEVERAL CIRCUIT COURTS, OF THE REPUBLIC OF LIBERIA:
>
> "There has been a long standing need of a [uniformity of] practice in the several Courts of the Republic, and the object of the present rules is to supply this need. Of course rules and orders of the court should be controlled by the Court, but a definite and comprehensive code of criminal and civil proceeding should be regulated by Legislative sanction. This I shall endeavour to have accomplished.
>
> "JAMES A. TOLIVER,
> *Chief Justice Republic of Liberia.*"

This circular letter considered together with section 8 of the above act removes any doubts and simplifies the situation. That the rules of the courts are under the control of the courts is accepted universally. We find this principle recorded in *Corpus Juris Secundum:*

> "While some authorities hold that a court has no power to suspend or modify its rules in a particular case, others held that a court may exercise such power

when justice so requires. When the rule is not mandatory, but is merely directory and for the convenience of the court, it may be disregarded by the court. Ordinarily, a court cannot abrogate or suspend rules prescribed for it by a higher court, nor can rules made by a lower court be suspended by a higher court. Rules adopted by the court as such cannot be disregarded by a single judge.

"There are numerous cases which declare that rules of court should be adhered to both by parties litigant and the court, in all cases which fall within them, as long as they remain in force, and that the court has no power in a particular case, where no discretion is reserved, to suspend or to modify any rule which it has made. On the other hand, there is abundant authority in support of the view that rules of court are but a means to accomplish the ends of justice, and that the court has the power to modify, suspend, or rescind its own rules whenever justice requires it, at least where no party is prejudiced thereby. . . .

. . . . . .

"Rules of Practice are for purpose of aiding in speedy determination of causes, while the courts are established for the higher purpose of the administration of practice [*sic*], and, where the strict enforcement of the letter of a rule would tend to prevent or jeopardize the administration of justice, the rule must yield to the higher purpose, and be relaxed by the court." 21 *Id. Courts* § 178, § 178 n. 11 (1940).

In further support of what has been outlined, *Ruling Case Law* states that:

"In so far as a rule of court is an expression of the legislative power of the court, it is an expression of a legislative power which, whenever the court is in session, it is competent again to exercise, by the repeal

> or modification of any of its rules, and thereby to a certain extent to withdraw any given case from their operation. The rules and practice of the court being established by the court may be made to yield to circumstances to promote the ends of justice. There is, however, a conflict of judicial authority respecting the power of a court, while it leaves its rules unrepealed and unmodified, to except a single case from them, or to refuse to apply them, as it shall from time to time seem best. Thus, the statement has been made by the very highest authority that rules of court are but the means to accomplish the ends of justice, and that it is always in the power of the court to suspend its own rule, and except a particular case from its operation, whenever the purposes of justice require it. . . ." 7 *Id. Courts* § 55 (1915).

In view of what we have stated above and of the legal references cited and quoted, this Court is of the opinion that it was within the power of the judge of the court below to have, and he should have, ordered appellant's counsel to supply appellee's counsel with a copy of said motion for a new trial, suspended the issues until the day following, and after hearing arguments ruled on the issues raised in said motion. It was error for said judge, who was fully aware that the issues of the motion had to be passed upon by him before a review could be had by the appellate court, to have denied the said motion. The ruling of said judge is consequently reversed, appellee's motion to dismiss the appeal is denied, and the case is remanded with instructions to the trial judge to resume jurisdiction, to order the appellants, who were defendants in the lower court, to serve a copy of the motion for new trial on appellee or his counsel, and, after ample time has been allowed, to hear the arguments on the issues raised in said motion and to pass thereon so that the appellate court may be in a position to review them on appeal; costs

to abide final determination of said case, and it is hereby so ordered.

Motion denied.

MR. JUSTICE SHANNON, dissenting.

According to the majority opinion, my colleagues have decided to remand this case to the court of original jurisdiction for the sole purpose, as per instructions therein contained, of having said court dispose of the motion for new trial filed after a verdict at the hearing therein. The reason assigned for this is, they claim, that the trial judge erred in refusing upon objections properly made to entertain, hear, and determine said motion.

Because of my unwillingness to agree with this conclusion of the majority, I have withheld my signature from the judgment and am reading and filing this dissent to record my grounds leading thereto. It appears that after entry of the verdict in favor of appellee appellant excepted and gave notice of an intention to file a motion for new trial, and that four days after said verdict the said motion was filed and after twelve days, upon call for disposition of the motion, the appellee moved the court to refuse to entertain it upon the grounds that he had not been given the four hours' notice required by rule of court or been furnished with a copy of said motion which is required by statute. Countering this position, appellant submitted that said notice was served; but, upon being required to prove this, he abjectly failed in the effort since he could not produce the despatch book or a receipt from the opposing party or from his counsel evidencing this service, and could not even get his office messenger to testify upon oath that a copy of the motion was delivered to appellee or to his counsel. As a result, the trial judge refused to entertain the motion. Appellant, in its resistance to the motion to dismiss the appeal, also

submitted that a request was made to the trial judge to suspend the case in order to allow an opportunity for the service of the notice with a copy of the motion on the opposite party, which request was denied; but this submission finds no support in the records, as the majority opinion already has indicated.

To me the one point which the decision of this case should resolve is whether or not the trial judge was wrong in refusing to entertain the motion for new trial under the circumstances and upon objections properly taken. Each court has the inherent right and power to make rules and regulations for its government so long as those rules and regulations are not repugnant to, or in disagreement with, the constitution and statute laws of the state; but where a particular statute delegates the power of formulating such rules and regulations to a superior or appellate court, such rules and regulations must supersede those of the inferior court.

> "It is well established that courts have the inherent power to prescribe such rules of practice and rules to regulate their proceedings and facilitate the administration of justice as they may deem necessary. This power, though expressly recognized by the statutes of some states, is inherent, and exists independently of statute. . . . In other states, however, it has been expressly provided that the rules of certain courts may be prescribed by, or shall be subject to the approval of, the supreme court." 7 R.C.L. *Courts* § 50, at 1023 (1915).
>
> "While courts are very generally authorized by statute to make their own rules for the regulation of their practice and the conduct of their business, a court has, even in the absence of any statutory provision or regulation in reference thereto, inherent power to make such rules. This power is, however, not absolute but subject to limitations based on rea-

sonableness and conformity to constitutional and statutory provisions. . . .

. . . . . .

"In the absence of some authority under either the constitution or a statute, an appellate court has no power to make rules which are binding on an inferior court as to practice and proceedings in the latter. In a number of states, however, the higher courts are given power to prescribe rules for procedure in the lower courts, and rules thus prescribed have all the binding force of a statute. Such a provision abrogates the inherent common-law power of such courts to make rules regulating their own practice, at least to the extent to which such matters are regulated by rules established by the higher courts, although it is considered that, notwithstanding such provisions, the lower courts retain the power to adopt rules of their own in respect to matters for which the higher court has failed to provide. Sometimes such rules are subject to the approval of the higher court." 15 C.J. *Courts* §§ 276, 277 (1918).

This principle is also recognized in volume 14 of *American Jurisprudence* in sections 150–52 at page 355 (1938) and in volume 11 of *Cyclopedia of Law and Procedure* in section VI A. at page 739 (1904). It is also stated that where such rules are made and promulgated they have the force of statutes.

"Rules adopted by a court without exceeding the limits of its authority are often spoken of as having the effect of rules enacted by the legislature or of positive law and, therefore, as being obligatory both on the court and on the parties, as well as on an appellate court. This is certainly true in so far as the parties and their counsel have acted upon them and have sought to preserve and protect their rights in compliance therewith. The court cannot adopt a dif-

ferent rule and apply it retroactively to their prejudice or treat them as in default if they have conducted themselves as required by the rules of the court, doing the acts required by them to be done, within the time and in the manner therein specified.

"The proper office of a rule of court is to establish fixed and settled practice to which the court is required to conform, and any error of opinion in respect of its legal effect or its application to a particular case will entitle the party injured to redress by appeal." 14 Am. Jur. *Courts* § 156 (1938); 7 R.C.L. *Courts* § 54 (1915).

This principle is also substantially held and so stated in II *Cyclopedia of Law and Procedure* 742 (1904).

Where a rule is mandatory, there is no room for the exercise of discretion in its application nor a reserved right or power for its suspension.

"There are numerous cases which declare that rules of court should be adhered to both by parties litigant and the court, in all cases which fall within them, as long as they remain in force, and that the court has no power in a particular case, where no discretion is reserved, to suspend or to modify any rule which it has made; but, on the other hand, there is abundant authority in support of the view that rules of court are but a means to accomplish the ends of justice, and that the court always has the power to modify, suspend, or rescind its own rules whenever justice requires it. This conflict of authority is, however, more apparent than real, for while the cases do not always bring out the distinction clearly, the general tendency appears to be toward an opinion that the power of a court to modify or suspend its rules in particular cases depends largely on the character of the rule, the principle being that rules which are merely directory, or which are prescribed solely for the governance of attorneys and the convenience of the court, may be dis-

pensed with when the ends of justice so require, but rules which are mandatory must never be dispensed with in an arbitrary manner in cases where it will operate to the prejudice of the parties, or tend to unsettle the established practice of the court. In any event, an application to have a rule of court set aside in a particular case will be refused, unless strong reasons are presented in its favor. The action of a court in refusing to suspend one of its rules will not be reviewed on appeal, unless the rule in question and the circumstances alleged to justify its suspension are set out in the bill of exceptions. . . .

"When the rules of a court are prescribed by a higher court under a statute, the court for which such rules are prescribed has no authority to modify or suspend the same." 15 C.J. *Courts* § 292 (1918).

As the majority opinion has just shown, these Rules of the Circuit Court were promulgated by the late Chief Justice Toliver of this Court upon the authority of a legislative enactment, so that if a provision of any of the rules is mandatory, upon the strength of the authorities just quoted none of the circuit courts within this jurisdiction for which said rules were prescribed has the right or power to suspend same.

Now let us examine the particular rule in question and see whether it is directory or mandatory.

"Notice of all Motions filed shall be given to the other party at least four hours before they are called for hearing or the motion shall not be entertain[ed] by the Court upon objections properly taken by opposing party." Rules of the Circuit Ct., 6, Rule VIII.

If the provisions of this rule are mandatory, as they appear to be, and if the motion in question was filed without giving notice of the filing to the other party who can, upon call of same for disposition sixteen days after the

noted date of filing, properly enter objections to the court's entertaining it, one must ask if the trial judge was wrong in sustaining the objections thus taken. In other words, one must ask if the trial judge had any scope for the exercise of discretion in the application of this mandatory rule of court which was formulated by a superior and appellate court upon the authority of a legislature enactment. I am sorry that I find myself unable and unwilling to join my colleagues in entering an affirmative answer to the above queries. Unlike the rules of this Supreme Court which require twenty-four hours' notice to the opposing party of the filing of motions before they are called for hearing and which do not penalize cases of default, thus leaving room for the exercise of judicial discretion, Rule VIII of the Rules of the Circuit Court in this particular is mandatory in terms and provides a penalty against the defaulter, which is an inhibition against the entertainment of the motion upon objections properly taken.

My colleagues are strongly of the opinion that, confronted with the circumstances presented by the records before us, the trial judge should have, *sua sponte,* suspended the case until another time in order to afford appellant an opportunity to give the opposing party his four hours' notice as required by the rules of court. To my mind, this would be appropriate in the absence of objections formally filed against the entertainment of the motion; and it would be rather dangerous and a subversion of the rule to advance the principle without making an effort to annul, modify, or suspend said rule.

In the final analysis of the matter, I am also confronted with the question whether the remand of the case at this stage to the trial court with instructions limited only to the entertainment, hearing, and determination of the motion for new trial, which is a virtual sustention of a count in appellant's bill of exceptions, would not be tantamount

to a decision of an appeal in a piecemeal manner, a practice which this Court has looked down upon and set itself against in several of its opinions.

In a dissent read and filed by me during the last October term, I tried to advance and advocate the principle that in the decision of issues courts should not, like practising lawyers, direct their line of thinking and argument from a principle to a specific case, but rather must, if possible, make sure that their application of a particular principle to a given case also fits in with the application of that principle at large to other cases. *Liberty* v. *Republic,* 9 L.L.R. 437 (1947).

We have recently been confronted with instances where the faithful and honest performance of duty on the part of some of the clerks of our lower courts has been questioned and put in issue. Here is an incident where the honesty of the clerk is susceptible of questioning. In the absence of notice of filing of the motion for new trial on the opposing party in time, the presumption can arise that no such motion was filed in time and that the clerk accepted the motion after the proper time but noted it filed in time, especially where the notation of filing according to the date thereof is shown to be the fourth and last legally possible day after the rendition of the verdict, under which circumstances it would have been risky to serve a copy on the opposing party after expiration of the time. This is, however, only suggested as an assumption that can arise in the matter and hence the appellate court should be careful—and this without regard to the parties —in relaxing a fixed rule of court which is mandatory in its construction and terms and which was also formulated and promulgated by a superior and appellate court under the authority of a legislative enactment.

It is my opinion that remanding the case for the sole purpose of hearing and disposing of the motion for new trial is a novelty in our court procedure, especially when the decision to do so simply grows out of a motion to dis-

miss the appeal. Further, this decision tends to show that the act of the trial judge in refusing to entertain the motion for new trial upon grounds stated in the objections of the opposing party was an error.

As I have tried to show before, the trial judge had no alternative, confronted by the objections taken, but to refuse to entertain said motion and his act in so refusing is supported by Rule VIII, *supra*. The situation would have been otherwise in the absence of the objections. I reiterate my strong disagreement with my colleagues when they say that the trial judge could have exercised discretion in suspending the rule and allowing the appellant ample and sufficient time within which to serve his notice of the motion for new trial on the opposing party.

This Court in a decision rendered 48 years ago declared:

> "[T]he court further says that it is unwilling, as the last legal and equitable resort for justice, to lay a precedent on account of technicalities that will prevent all men from enjoying their full rights under the law of the land, be they Liberians or foreigners. The court knows no north, no south; no rich, no poor; no Liberian, no foreigner; and it can guarantee no rights or privileges other than what the Constitution and the laws of the land guarantee to each. Its motto is, 'Let justice be done to all men.' And the court will not lend its aid to men who seek to take advantage of others by evading a righteous and equitable course of conduct, however adroitly they may endeavor to cover their intentions, for equity is righteousness." *Tubman* v. *Westphal, Stavenow & Co.*, 1 L.L.R. 367, 369 (1900).

Correlating this dictum with the principle enunciated in *Blacklidge* v. *Blacklidge*, 1 L.L.R. 371, 372 (1901) that "litigants must not expect courts to do for them that which it is their duty to do for themselves," and in the

absence of any record to show that the appellant made an effort to have the court suspend the rule, as improper as it may have been to do so in the face of objections properly taken, I am the more forcefully persuaded of the correctness of my position in dissenting from my colleagues.

Under these circumstances, as much as I would like the issues submitted in the appeal to be heard and disposed of and filed, I am of the opinion that the ruling of the trial judge in refusing to entertain the motion for a new trial upon the grounds in the objections should be upheld and sustained.