WILLIAM A. JOHNS, Heir of the Late Honorable J. J. W. JOHNS, Appellant, *v.* WILLIAM N. WITHERSPOON, Appellee.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT, SINOE COUNTY.

Argued April 16, 1947. Decided May 9, 1947.

Since ejectment embraces mixed questions of law and fact to be tried by a jury, a motion for new trial is unnecessary as a prerequisite to an appeal.

On motion to dismiss appeal in action of ejectment on ground that appellant had not moved in the circuit court for a new trial, *motion denied.*

William A. Johns for himself. *William N. Witherspoon* for himself, assisted by *A. B. Ricks.*

MR. JUSTICE RUSSELL delivered the opinion of the Court.

This is not the first time that this case has come before this Court. 8 L.L.R. 462 (1944); 9 L.L.R. 152 (1946). It originated in the Circuit Court for the Third Judicial Circuit. Before we could proceed to the hearing of the case, however, the appellee filed a motion to dismiss appellant's appeal for the following reason:

> "Because appellee says that upon the return of the verdict of the petit jury in open court in the presence of the parties to this action in the court below, which verdict was in favour of appellee, the said appellant failed either to give notice that he would file a motion for a new trial or to ever file such motion, as he should have done in order that had said motion been heard and denied, upon exceptions duly taken thereto by the appellant, [there] would have laid good and ample

basis for his appeal to this Honourable Supreme Court of highest judicature in Liberia. This not having been done, there is no legal premise upon which the appellant is basing this appeal.

"Whereas appellee prays that this appeal be dismissed and that the appellant be ruled to pay all costs of court.

"All [of] which the appellee in duty bound will ever pray."

To this motion the appellant filed the following resistance:

"The appellant in the above entitled case most respectfully prays this Court not to sustain the motion brought by the appellee to dismiss the appeal, and for legal reasons begs to show the following:–

"1) Because . . . [in] the year of our Lord 1938 the Legislature of this Republic enacted a statute enumerating the causes upon which an appeal to this Honourable Court may be dismissed, and these causes are as follow:

"1) Failure to file an approved Bill of Exceptions

"2) Failure to file an approved appeal bond or where said bond is fatally defective

"3) Failure to pay bill of cost of the lower court

"4) Non-appearance of the appellant.

(See Act of Legislature approved November 21, 1938.)

"Appellant respectfully submits that this Honourable Court will, in keeping with both law and precedent refuse to interfere into the plain provisions of statute unless same is shown to be unconstitutional. The failure of the appellant to have filed a motion for new trial in the lower court not being one of the causes enumerated in the above cited Act on which an appeal may be dismissed; and such failure not being an act

which in any way is unconstitutional, the contention of the appellee in his motion to dismiss is obviously untenable and without any authority of law, and the Motion to Dismiss ought therefore [to] be not sustained. And this the appellant stands ready to prove.

"2) And also because the citations stated in appellee's Motion to Dismiss all relate to Criminal cases decided by this Honourable Court, but they should not be made applicable to Civil Cases in which the rigidness of the law is relaxed; moreover, this Honourable Supreme Court as far back as the year 1878 in the case: Brown for Woermann vs. Grant in [1] L.L.R. page 87/9, enunciated the principle that 'a waiver of one legal right does not debar one from resorting to another,' and this principle was fully upheld by Mr. Justice McCants-Stewart in the case: Minor vs. Pearson, found in the 3rd. Annual Series (Old) [2 L.L.R. 82 (1912)] in which Opinion the Supreme Court definitely decided that the failure of the appellant to file a motion for new trial in the lower court is no bar to an appeal and should not vitiate an appeal taken from the final judgment.

"3) And also because the provisions of section 2 of Chapter twenty, in the Old Blue Book provide that there shall be no appeal from the verdict of a jury on any question of mere fact except to the court in which the case was tried, does not and cannot be made applicable to the present case, in that, this case is an Action of Ejectment and an inspection of Appellant's Bill of Exceptions will show that many of the issues which were submitted to the jury, involved mixed questions of both law and fact; moreover, besides these mixed questions of law and fact which were tried by the jury under the direction of the judge, there

were other issues of law on which the judge alone ruled and which are embodied in the Bill of Exceptions as grounds of appeal. Hence, appellant submits that this appeal is not taken from the verdict of the jury on a question of mere fact so as to make the provision of the second section of Chapter twenty in the Old Blue Book Statute applicable.

"4) And also because an Action of Ejectment involves mixed questions of both law and fact which shall be tried by the jury under the direction of the court:

See: Reeves vs. Hyder page 271 [, 1] L.L.R.
Harris vs. Locket page 79 [, 1] L.L.R.

Appellant therefore submits that it would have been futile and an empty gesture to have filed a Motion for a New Trial on a verdict involving mixed questions of law and fact rendered under the direction of . . . court, as well as to attempt to get the judge to go back on himself in rulings made on purely law issues decided against the appellant by the judge. This condition was clearly foreseen by our law makers when they provided in the Old Blue Book as quoted above that motions for new trial on only exceptions to the verdict of the jury on mere questions of fact should be made to the court in which the cause was tried, but when the grounds of exception relate to a verdict on mixed questions of law and fact or to rulings of the judge on purely issues of law, appellant has no other remedy but to appeal direct to this Honourable Court without having first [made] a motion for a new trial in the lower court.

"WHEREAS appellant prays this court not to sustain the appellee's Motion but to dismiss same."

In the arguments heard on the motion, appellee stressed

and cited certain cases wherein this Supreme Court had dismissed the appeal because appellant had not given notice that a motion for new trial would be filed and also failed to file said motion. Appellee's counsel further contended that inasmuch as appellant had in this case failed to file a motion for new trial said appeal was not properly before this Tribunal and therefore should be dismissed. Among the cases cited was *Gardiner* v. *Republic,* 8 L.L.R. 406 (1944), involving forgery. A careful inspection of the opinions, however, will disclose that they were dismissed only where the questions submitted to the jury were of mere fact, for in such cases an appeal should be only to the court wherein the case was tried. Stat. of Liberia (Old Blue Book) ch. XX, § 2, 2 Hub. 1578. But matters of ejectment are concerned with mixed questions of law and fact and must consequently be tried by the jury under the direction of the court. The questions involved in this case are mixed questions. Reason being the soul of the law, it would not be reasonable to expect that were a motion for a new trial made in such cases, the court would reverse itself where an appeal would still lie from such reversal. Consequently it is not required, and the law does not provide, that a new trial be prayed for in cases where the questions to be determined are other than those of mere fact.

This Court therefore hereby denies the motion, and the case is ordered heard on its merits; costs to abide final determination of the action; and it is hereby so ordered.

Motion denied.