ABAYOMI KARNGA, Appellant, *v.* HENRIETTA M. WILLIAMS, WILLIAM O. DESHIELD, and JAMES H. DESHIELD, Appellees.

MOTION TO DISMISS APPEAL.

Argued March 17, 1948. Decided April 30, 1948.

1. Every action of ejectment imports the principle of adverse possession, an issue of mixed law and fact, irrespective of whether or not an answer has been filed.
2. In an ejectment action it is not necessary to move for a new trial in the lower court.

On motion to dismiss appeal in action of ejectment on ground that appellant has failed to move for a new trial in the court below, *motion denied.*

D. C. Caranda for appellant. *O. Natty B. Davis* and *Richard A. Henries* for appellees.

MR. JUSTICE SHANNON delivered the opinion of the Court.

Upon call of the case we were confronted with two motions, one to dismiss the appeal and the other to continue the hearing of the appeal to the October term ensuing. The former was filed by the appellees and the latter by the appellant; since it appears that the former was filed first we proceeded to hear same. The ground set out for the dismissal of said appeal is as follows:

> "Because the said appeal thus taken by appellant has not been prosecuted in the manner provided by existing statutes and the decisions of this Honourable Court, in that said appellant has thus failed to file in the court below a motion for new trial, which act of appellant is [in] utter violation of the provisions of our statutes, and is especially repugnant to the prin-

ciple enunciated by this Honourable Court in the cases: Gardiner versus Republic—Forgery, and Marker Brown et al., vs. Republic—Riot, and several other decisions of this Honourable Court. Appellees submit that an appeal to this Honourable Court is only properly and legally taken when the party seeking same has exhausted every possible remedy due to him under the law in the court of origin; and therefore where he fails to file a motion for new trial after verdict is rendered against him, he has not exhausted every remedy or right in the court of origin, and therefore his appeal should be dismissed. Wherefore appellees pray that the appeal of appellant, because of such wanton and flagrant violation of the law, be dismissed, and the judgment of the court of origin affirmed with costs against appellant."

The resistance filed by the appellant to this motion appears to us to be a mass of verbiage with barely any attempt on his part to join issue with the appellees on the point submitted in their motion to dismiss the appeal. Because of this we have deemed it unnecessary to pass upon what appears therein to be, or is intended to be, a traversal of the appellees' motion.

We will therefore decide the merits of the motion as submitted. It is correct that this Court has recently decided that where, in an appeal to this Court based upon a verdict and judgment of a lower court, it appears that the losing party has failed in the trial court to file a motion for new trial where said verdict was based upon mere facts, the appeal will be dismissed upon motion properly made therefor. *Gardiner* v. *Republic,* 8 L.L.R. 406 (1944), involving forgery. *Brown* v. *Republic,* involving riot, decided in the term, March 1945 [unreported]. However, in the case *Johns* v. *Witherspoon,* 9 L.L.R. 376 (1947), involving ejectment, we decided that ejectment proceedings involve mixed questions of law and fact and hence under our statutes are always to

be tried by a jury under the direction of the court. Because of this difference in *Johns* v. *Witherspoon* we ruled that the statute which controlled our decisions in the *Gardiner* and *Brown* cases, *supra,* did not apply to actions of ejectment.

We have not been persuaded that we should depart from the ruling given in *Johns* v. *Witherspoon, supra,* and hence are unwilling to do so.

In instituting their motion before us, counsel for appellees strongly argued that whilst they concede our ruling in *Johns* v. *Witherspoon, supra,* that particular ejectment case involved an issue of mixed law and fact because that case was ruled to trial upon both the complaint of the plaintiff and the answer of the defendant; but that in this case there was no issue of mixed law and fact since the trial judge had ruled the answer of the defendant out, thereby leaving him to rest his defense on the bare denial of the facts stated in the complaint. As plausible as this argument may appear, nevertheless it is elementary to state that every action of ejectment imports the principle of adverse possession, an issue of mixed law and fact, irrespective of whether an answer has been filed. Therefore this argument must crumble.

Because of this, the motion is denied and the cause ordered heard upon its merits; costs to abide final determination of the case; and it is hereby so ordered.

Motion denied.