LOTTIE L. LIBERTY and ROSE JOHNS, Appellants, *v.* REPUBLIC OF LIBERIA, Appellee.

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

Argued November 4, 11, 13, 1947. Decided December 12, 1947.

An omission in the records certified to the appellate court of a copy of the appeal bond is a jurisdictional defect which will result in dismissal of the appeal.

On appeal from conviction of assault and battery with intent to do grievous bodily harm, *motion to dismiss* on jurisdictional grounds *granted.*

B. G. Freeman and *O. Natty B. Davis* for appellants.
D. Bartholomew Cooper, Solicitor General, for appellee.

MR. JUSTICE BARCLAY delivered the opinion of the Court.

Appellants, Lottie L. Liberty and Rose Johns, were indicted for assault and battery with intent to do grievous bodily harm at the November term, 1946 of the Circuit Court for the First Judicial Circuit, Montserrado County, and after trial were duly convicted and accordingly sentenced. Appellants having prayed an appeal from the final judgment of the court below, the case is now before us for review.

Unfortunately, in the interim appellant Lottie L. Liberty died.

During the hearing of the appeal the Honorable Solicitor General of the Republic of Liberia interposed the following motion to dismiss appellants' appeal for want of jurisdiction:

"The above named appellee, by and thru her Counsel, D. Bartholomew Cooper, Solicitor General of

Liberia, respectfully moves this Honourable Court to dismiss appellants' appeal for want of jurisdiction in this, that is to say, this Court is without jurisdiction to review this case because there has not been filed by appellants the required appeal bond. Wherefore, said appeal is irregularly before this Honourable Court, and should be dismissed; and appellee so prays.

"(Vide: Records certified to this Court, Act of Legislature, approved November 21st, 1938.)"

Appellants' counsel yielded the point and offered absolutely no resistance to this motion.

Nevertheless, let us see whether said motion is well-founded and is of sufficient cogency to warrant the granting thereof. Upon a thorough inspection of the records certified to this Court we see that there is no appeal bond to be found therein. Supposing, however, that the records contained the notice of appeal notifying appellee of the completion of the appeal required to be issued by the clerk of the court from which the appeal emanates, which has repeatedly been held by this Court to give the Court jurisdiction over the case, the presumption would be great that an appeal bond had been filed by appellants since the clerk is only authorized to issue said notice upon completion of the necessary requisites to an appeal. We searched, but to our astonishment this very important document was also nonexistent.

His Honor Mr. Chief Justice Grimes, in the case *Wodawodey* v. *Kartichn,* 4 L.L.R. 102, 1 New Ann. Ser. 105 (1934), issued the following admonition which all litigants seeking the great benefits secured to them by the Constitution and the subsequent statutes of the Legislature should strictly follow: The right of appeal from a court of record to the Supreme Court of this Republic is given in general terms by the Constitution of the Republic. Several statutes subsequently passed, the most

recent of which is that of 1893–94, have set out the method of procedure to be followed. The requirements of said statute are jurisdictional and must be strictly complied with.

In the case *Delaney* v. *Republic*, 4 L.L.R. 251, 2 New Ann. Ser. 86, decided by this Court, January 18, 1935, involving forgery, His Honor Mr. Justice Dossen speaking for the Court said:

> "The Court will not entertain a case legally deficient in its records; and the omission of a copy of the appeal bond in the records is fatal to an appeal. Although this case presents many important issues which this Court would like to pass upon and decide, yet so long as this and other cases remain unreversed, this Court will be bound to uphold the principle set forth and contained therein and dismiss all and any other appeal of like nature, as the omission of a copy of the appeal bond in the records, as is in this case, is fatal to any appeal. . . ." *Id.* at 254.

And in his concurring opinion in the *Delaney* case, Mr. Chief Justice Grimes reiterated his support of the principle set forth in *Wodawodey* v. *Kartiehn, supra,* that:

> "[E]ach step prescribed by the Legislature in taking an appeal is jurisdictional, and the omission of any one step necessary to be taken by appellant deprives the appellate court of the power to hear and determine the appeal upon its merits." *Delaney* v. *Republic,* 4 L.L.R. 251, 257, 2 New Ann. Ser. 86 (1935).

The Legislature reinforced, as it were, the statute on appeals in that respect by providing *inter alia* that an appeal may be dismissed for "failure to file an approved Appeal Bond or where said bond is fatally defective." L. 1938, ch. III, § 1.

Our distinguished colleague who has seen fit to disagree with us, and is consequently reading and filing a dissenting opinion, is doing so only because he is of the opinion that after having gone into the case we should

not entertain a motion to the jurisdiction based on the fact that the appeal bond was not filed. The Justice contends that appellee should be considered to have waived the point since said motion was not made and filed so as to be disposed of before going into the merits of the case. On the other hand, we hold that this Court has on several occasions enunciated the principle that every step incidental to an appeal is jurisdictional, that failure to take each and every step must result in dismissal of the appeal, and that the question of appellate jurisdiction can be raised at any time during the hearing of the case.

> "*Appellate jurisdiction* is that given by appeal or writ of error from the judgment of another court.
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> "The fundamental question of jurisdiction, first of the appellate court, and then of the court from which the record comes, presents itself on every writ of error and appeal and must be answered by the court whether propounded by counsel or not." 2 Bouvier, Law Dictionary *Jurisdiction* 1760 (Rawle's 3d rev. 1914).

In *Veldkamp* v. *Coffee,* 1 L.L.R. 232 (1890) this Court remarked that motions to the jurisdiction may be made at any time before final judgment.

Although we agree that there has appeared recently a lack of proper study and preparation of their cases by various counsel, which negligence should not be encouraged, nevertheless the same carelessness is also exhibited by appellant's counsel in the building of the foundation of the structure upon which the appeal must stand; and of the two to our minds the erection of the foundation of an appeal is more important.

In the case at bar the failure to file an appeal bond, a fundamental requisite, is woefully apparent; the notice of completion of appeal to be served and returned, which gives the Court jurisdiction over the case, is also not to be found in the records certified to us. Although this was not attacked by appellee earlier, in view of the fact

that the motion to dismiss for want of jurisdiction was not attacked, but practically acquiesced in, by appellants' counsel, and in face of the law controlling the case, no legal reason can be advanced by us for refusing to grant the motion. Hence, the motion is hereby granted and the appeal dismissed with instructions to the trial court to resume jurisdiction and execute its judgment; and it is hereby so ordered.

Motion granted.

MR. JUSTICE SHANNON, dissenting.

In the decision of causes for adjudication the courts, unlike practicing lawyers who invariably and necessarily direct their line of thinking and argument from a principle to a specific case, must if possible make sure that the application of a principle to a specific case also fits in with the application of that principle at large to other cases. It is because of this basic reasoning that I have found myself unable to agree with my colleagues in their decision to dismiss this appeal, and not because I am in disagreement with the principle that a motion to dismiss for failure to file an approved appeal bond or where the bond filed is defective, when timely made, is a good ground under our prevailing and controlling statutes.

This case was tried before the Circuit Court for the First Judicial Circuit, Montserrado County, with His Honor W. Monroe Phelps, Circuit Court Judge, presiding, and, the State having secured a conviction, the appellants prosecuted an appeal to this Court. Since that time Lottie Liberty, one of the appellants, died. When the matter was called before this Court, there was no effort made to test the right of the Court to enter into and hear it, so that the Court proceeded to hear the case. At the stage between completion of the reading of the records certified to us and commencement of argument of counsel, the State submitted the motion to dismiss the appeal for want of an appeal bond in the records, and styled same as a "motion for want of jurisdiction," obviously

intending thereby to bring itself within the principle already enunciated by this Court in the case *Veldkamp* v. *Coffee*, 1 L.L.R. 232 (1890), when it said:

> "[A]ll motions, except one to the jurisdiction, which may be entertained at any time before final judgment, should be made before the pleadings are read, and a defendant would be guilty of laches to allow the pleadings in a case to be read before offering for the consideration of the court any matter which would work injustice to his cause. . . ."

In another case this issue of jurisdiction that can be raised at any time before final judgment is limited to jurisdiction over the subject matter or cause only and not to other points of jurisdiction which are considered waived when not timely raised. Even though this Court has pronounced the point that the execution and filing of an approved appeal bond is one of the jurisdictional steps to be taken in the prosecution of an appeal, nevertheless it has not declared it a jurisdictional matter affecting the cause to be raised at any stage of the hearing. It is my opinion that just as equity aids the vigilant and discountenances the slothful, so does law also favor the watchful; the design in each case is always to promote diligence and discourage laches. To permit an appellee who is considered to have studied the case before filing his brief to come to Court at the stage when the matter is referred for argument, after reading of records, to file a motion to dismiss the appeal because there is an absence of an approved appeal bond is, to say the least, nothing short of an encouragement of lack of vigilance and of slothfulness which will find no parallel among the adjudicated cases of this Court, for in each instance where a motion to dismiss an appeal was granted for want of an approved appeal bond or where the bond filed was defective, the motion was filed before the call of the case in consonance with Supreme Court rules. *Delaney* v. *Republic*, 4 L.L.R. 251, 2 New Ann. Ser. 86 (1935);

Morris v. *Republic,* 4 L.L.R. 369, 2 New Ann. Ser. 203 (1935); *Melton* v. *Republic,* 4 L.L.R. 115, 1 New Ann. Ser. 117 (1934); *Morris* v. *Republic,* 4 L.L.R. 125, 1 New Ann. Ser. 126 (1934).

The relevant rules are:

> "All motions to dismiss appeals, and writs of error, must be submitted in writing; and the party moving or intending to move to dismiss shall serve notice of the motion with a copy thereof at least twenty-four hours before the time fixed for presenting the motion." Rules of Sup. Ct. (1888–99), 37, 1 L.L.R. 541.
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> "The party filing a motion shall serve upon the opposite party notice of the same with a copy thereof at least twenty-four hours before the hearing is desired." Rules of Sup. Ct. (1915), II, 2, 2 L.L.R. 662.

In the face of the above decisions and of the provisions of the Supreme Court Rules, the submission by appellee, after the reading of the records and just before commencement of argument, of a motion to dismiss the appeal because of the lack of an approved appeal bond would be in contravention of these rules, and it would therefore be legally improper to sustain said motion; so that whilst to do so might be fitting the principle to a specific given case, I am afraid it would be rather difficult to apply the principle to cases at large and under such circumstances.

Again, whilst it is true that in *Delaney* v. *Republic, supra,* it was held on page 254 that "the Court will not entertain a case legally deficient in its records; and the omission of a copy of the appeal bond in the records is fatal to an appeal," nevertheless another fixed principle in the same opinion confronts us:

> "The neglect or omission of one of the parties to do, or to cause to be done, any act essential to the progress of a cause must be taken as a waiver of his rights; and it would be decidedly prejudicial to the lawful rights

of the opposite party for the Court to allow such waiver without so pronouncing when the point is properly raised by the other party." *Id.* at 252.

To declare that the appellee is not guilty of a waiver or of laches in the presentation of the motion to dismiss at the stage he did would be stretching a point, and this point of procedure should not be yielded despite the fact that the appellant conceded the propriety of the manner and time of presenting same.

I am not in agreement with my colleagues who have introduced into the case the point of appellants' failure to see that a notice of the completion of the appeal, which is required to be issued by the clerk of the trial court, was included in the records certified to us, for in the recent Criminal Appeals Statute of 1938 (L. 1938, ch. XXIV), perhaps the only governing procedure in the taking of appeals in criminal matters, there is no provision as in civil matters for the issuance of a notice of the completion of appeal. The only notice required by said statute is notice to be given within forty-eight hours after rendition of final judgment by the party against whom the judgment runs who intends to appeal. L. 1938, ch. XXIV, § 7(a). Hence there is no dereliction of duty or laches in this respect.

That my colleagues have agreed with me that there was laches on the part of the counsel for appellee in the manner and time of presenting said motion is easily seen from their opinion. To this Justice the only justification for their position is that they have chosen the apparently lesser of two evils; they have overlooked the evil of the appellee in not timely submitting his motion and they have penalized the appellants who failed to have included in their records a copy of their approved appeal bond, a fact to which our attention was not called until after the reading of the records in the case and before submission for argument by counsel. This Justice believes that under such circumstances and in such a case

the position of the person charged should be preferred.

This case is not analogous to the case *Ammons* v. *Republic,* 9 L.L.R. 413, decided this term, involving assault and battery with intent to kill; although the same principle appears to be involved the case can be distinguished. In the *Ammons* case the motion to dismiss was filed before the call of the case for hearing, whereas in this case the motion was filed after the completion of the reading of the records and at the stage when the case was submitted for argument.

A motion to dismiss an appeal is intended to go against the entertainment of the appeal by the Court, and it is obvious that the stage for its entertainment has passed when the entire record has been read and opened up to the Court for its decision on the merits and demerits appearing therein; therefore, in my opinion, a motion of this nature to dismiss at this stage should not lie and should not be sustained since indeed the issue of jurisdiction would not go to the cause or subject matter but rather to a deficiency appearing in the records.

Because of the above, I have refrained from associating with my colleagues in the decision and conclusion that they have come to and therefore withhold my signature to the judgment.