D. W. BAROMA MORRIS, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

MOTION TO DISMISS APPEAL.

Argued April 12, 1934. Decided May 4, 1934.

1. Every appeal must be taken and perfected within sixty days after final judgment.
2. The service of a notice of appeal upon the appellee by the ministerial officer of the trial court completes the appeal and places appellee under the jurisdiction of the appellate court. When not completed within the statutory time, this Court will dismiss said appeal for want of jurisdiction.
3. The statute relating to the time within which appeals must be taken is imperative and includes everything necessary to be done to bring the appellee properly before the appellate court.
4. The failure to file an appeal bond duly approved by the trial judge within sixty days after rendition of final judgment is ground for dismissal of the appeal.

Appellant was convicted in the Circuit Court of the First Judicial Circuit, Montserrado County, of the crime of seduction. On appeal to this Court, appellee moved to dismiss the appeal. *Appeal dismissed.*

H. Lafayette Harmon for appellant. *The Attorney General* for appellee.

MR. JUSTICE DOSSEN delivered the opinion of the Court.

At the February term of the Circuit Court of the First Judicial Circuit, Montserrado County, one D. W. Baroma Morris was indicted, tried and convicted for the crime of seduction; and as he was not satisfied with the several rulings, decisions and the final judgment of the trial judge, he excepted and appealed here. At the call of the case, appellee moved the Court to dismiss the said appeal and affirm the judgment of the court below for the following legal reasons:

1. "In taking and perfecting appeals at law, time is an essential element; it is an indispensable requisite

that warrants its taking and perfection. Neglect to take and complete the appeal within the statutory period, makes void the right of appeal. This appeal was completed seventy-two (72) days after the time allowed by law; it should therefore be dismissed."

Inspecting the records filed, we find that final judgment was rendered on the 4th day of June, 1933, whilst the appeal was not completed, and notice served on appellee, until the 13th day of November, 1933,—full seventy-two days thereafter. The statute law of Liberia governing appeals declares that every appeal must be taken and completed within sixty days after final judgment. Statutes of Liberia (Old Blue Book), ch. XX, p. 78, § 6. The Court is therefore of the opinion that count one of appellee's motion to dismiss is supported by the records and should be sustained.

Count two of the motion reads:

"It is the service of the summons or notice of the completion of the appeal upon the appellee that gives the appellate court jurisdiction over the appellee and the cause of action; in the absence of said service, or when it is discovered that the said service was made beyond the appeal limit, the appellate court should refuse jurisdiction. Appellee submits that the notice of this appeal having been served upon him on the 13th day of November A. D. 1933, or seventy-two days after the time limit for consummating the appeal, it is void. Therefore there is no legal appeal before this judicature; the appellee moves the dismissal of what is filed as an appeal in this case."

By the statute laws governing appeals it is provided that the clerk of the court from which the appeal is taken shall, after bond is filed, forthwith issue a notice to appellee informing him of the time the appeal is taken and to what term of court; and that said appellee appear to defend same, which shall complete the said appeal.

1 Rev. Stat. 495, § 426; *McAuley* v. *Laland,* 1 L.L.R. 254 (1894); *Jackson & Co.* v. *Summerville, id.* at 339 (1899).

The language of the statute is mandatory and should be strictly followed, especially so, since said notice alone places appellee under the legal jurisdiction of the appellate court. *McAuley* v. *Laland, supra; Morris* v. *Gatlin, id.* at 252 (1893).

It is the duty of the appellant in taking out an appeal to see that every necessary requirement of the law to perfect and complete a legal appeal is fully complied with within the time prescribed by law, and, for failure or neglect so to do, upon application by the appellee, said appeal will be dismissed. Count two of appellee's motion to dismiss should therefore be sustained by this Court.

Passing on to count three of said motion in which appellee says that:

> "It is the duty of the appellant to see that every legal requirement of an appeal is carried out; the neglect of an officer of court to perform a duty necessary to complete an appeal within the statutory time renders such officer liable in civil redress; neglect of an officer of court does not bind the court."

The theory of the law in this particular is fully supported in the case *E. A. L. McAuley* v. *Laland, supra,* which ruled that the statute relating to the time within which appeals must be taken is imperative, and includes everything necessary to be done to bring the appellee properly before the appellate court. An appeal is not completed until the appellee has been summoned or notified, which must be done within the time allowed for the completion of the appeal or the court will refuse jurisdiction.

That important prerequisite of the law not having been met or performed by appellant within the statutory time is fatal to the successful prosecution of the said appeal by appellant, as appellee is not legally under the jurisdiction of this Court. It is needless for this Court to enter into

extensive arguments to establish the well known requirements of the law, as it should be obvious to every reflecting mind that an appeal is not completed until the appellee is duly summoned, which summons alone places him under the jurisdiction of the court to which the appeal is taken; therefore the summons or notice forms a very integral part of an appeal and should be served within the time allowed for the completion of the appeal. And while we must admit the binding force of the legal maxim, "The acts of the court should prejudice no man," we are of opinion that the acts of the court should be carefully distinguished from the unauthorized, unlawful or neglectful actions of its officers or the parties to the suit. 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 to be made and withdrawn at the pleasure of his opponent. This principle of law in such case made and provided is substantially supported by stature as well as the common law. 2 B.L.D., "Jurisdiction"; 3 *id.*, "Waiver." Count three of appellee's motion to dismiss should therefore be sustained by this Court.

Count four reads thus:

> "Appellee submits that legal defects in an appeal bond vitiates the appeal; the nonapproval of an appeal bond by the court of first instance, and insufficiency of parties are legal defects that cannot be cured on appeal. The statutory provision with respect to appeals is imperative and should be followed strictly. Appellee submits that the bond in this action is totally defective."

Appellant in resisting said count strongly contended that during the trial below when an appeal bond was presented to the trial judge for his approval said judge re-

fused to do so and ruled: "The court refuses to approve of the appeal bond on the grounds, that it is the opinion of the court that in all criminal cases, an appeal bond is unnecessary because the indemnifying clause which is one of the essential requisites in all appeal bonds under our statute cannot be complied with when the Republic is a party." The records transmitted to this Court from the court below not containing said ruling, appellant made application for diminution of records which was granted by the court. That appellant was legally powerless to force the trial judge to perform an act which in his opinion was unnecessary is conceded, yet there being other remedies to which appellant could have resorted, to secure the benefits, which he needed to surround his appeal with such safeguards as the law in such case made and provided, neglecting and failing to avail himself of said right vouchsafed to all who desire to appeal and placed under similar circumstances amounts to waiver of said rights and tends as a bar to the benefits he intends to enjoy under the law from this Court. Judge Bouvier defines waiver to be a relinquishment or refusal to accept a right. "In practice, it is required of every one to take advantage of his rights at a proper time; and neglecting to do so will be considered as a waiver." 2 B.L.D., "Waiver."

A party appealing should superintend the appeal and see that all legal requirements are met. The Court will not entertain a case legally deficient in its records; the omission of a copy of the appeal bond in the records is fatal to an appeal. 1 L.L.R. 8–9. Where a bond filed in an appeal fails to contain the statutory requirements the appeal will be dismissed. *Morris* v. *Gatlin,* 1 L.L.R. 252 (1893); *McBurrough* v. *Republic, id.* at 385 (1901).

It is therefore the opinion of this Court that appellee's motion to dismiss appellant's appeal is sound and well supported in law and should be sustained, the appeal dis-

missed, and the trial court directed to resume jurisdiction; and it is so ordered.

Appeal dismissed.

MR. JUSTICE RUSSELL being the trial judge of the lower court, took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE GRIMES, dissenting.

During the hearing of a motion to dismiss the appeal in the above entitled cause, the Court allowed H. Lafayette Harmon, Esquire, counsel for appellant, to file an application for diminution of record, and suspended the further hearing of the said motion until a return to the said application could be made and copies of the missing record supplied.

Upon the return of said writ the following facts were brought to the notice of this Court: (1) On June 5th, 1933, appellant presented to the trial judge an appeal bond for his approval, whereupon he entered the following order:

> "In the case Republic of Liberia versus D. W. Baroma Morris, Seduction, the court refuses to approve of the appeal bond on the ground that it is the opinion of the court that in all criminal cases an appeal bond is unnecessary because the indemnifying clause which is one of the essential requisites under our statute cannot be complied with when the Republic is a party."

(2) An order from the clerk of this Court dated October 19, 1933, directing the clerk of the trial court to send up records in the above entitled case, and incidentally all other criminal cases pending, without awaiting the payment of costs, until the legality for the demand for payment of costs could be settled by this Court.

These two extracts from the records of the court below, brought up by permission of this Court upon the applica-

tion of counsel for appellant, in my opinion threw an entirely different complexion upon the merits of the motion to dismiss, especially when taken in conjunction with the case *Coleman* v. *Republic*, 2 L.L.R. 137 (1913), hereinafter more specifically referred to. Hence it is that I have found it necessary to differ with, and dissent from, the three of my colleagues who have agreed to allow the motion and dismiss the appeal.

I have endeavored to make it very clear to my colleagues that I did not agree with the position taken by the trial judge in ruling that an appeal bond was not necessary in a criminal case. I explained to them that this view of mine was largely predicated upon the fact that although whether or not an appeal bond could be given in a criminal case had been a moot question until the decision of the case *Warner* v. *Republic* decided by this Court in January, 1892, 1 L.L.R. 525, yet the passage of the amendatory statute on appeals in January, 1894, following the decision of the *Warner* case, and without making any exceptions as to appeal bonds in criminal cases, was to my mind evidence of the intent of the Legislature that appeal bonds should be filed and approved in all cases both civil and criminal.

It is true that had the judge refused to approve the appeal bond for reasons that might have appeared to the appellant as arbitrary or otherwise illegal, the latter would have had a remedy by writ of mandamus. But in this particular case the action of the trial judge was not arbitrary; the reason given for his refusal was to say the least plausible, and, until the decision of the *Warner* case in 1892, and the amendatory statute on appeals in 1894, might have had to be upheld. According to our statute of 1894 there are two separate and distinct categories of things to be performed in bringing an appeal to this Court, viz.: 1. Those actions which must be taken by the party himself to complete the appeal; 2. And those

which are to be taken by the clerk for transferring the appeal from the trial to the appellate court. Acts of the Legislature of Liberia, 1894, p. 10, § 1.

According to this classification the acts for which the party is responsible are the tendering of the bill of exceptions within ten days, the presentation of the appeal bond within sixty days, and the payment of all costs within the said period of sixty days. But there are no costs to be paid in criminal cases on appeal. *Coleman* v. *Republic, infra.* Every other act such as issuing the notice of appeal and the transferring of the records from the trial court to the appellate court, is a responsibility which rests upon the clerk.

However, the judge of the trial court having given it as his opinion that the filing of an appeal bond was unnecessary, and the records of the trial court having shown that said appeal bond was presented for approval, and the said ruling given within one day of the trial, I hold that the appellant was misled by the acts of the court, and it is a maxim that goes back to the foundation of our judicial system that "the acts of the court shall prejudice no man."

In the case *Coleman* v. *Republic,* decided by this Court on December 18, 1913, 2 L.L.R. 137, the point before the Court for decision was:

> "The Clerk of the trial court did not issue the notice of appeal within sixty days from the date of final judgment."

Mr. Justice McCants-Stewart speaking for the Court said:

> "The statute provides that upon the signing of the bill of exceptions and the approval of the appeal bond by the trial judge, the clerk of the trial court shall 'forthwith' issue the notice of appeal and such notice shall complete the appeal. The moving party contended that this notice of appeal must be issued within sixty days as this is the time fixed by the statute within which

the appellant must perform the last act on his part in connection with the appeal, namely, the filing of the appeal bond duly approved by the trial judge. The Attorney General conceded on the argument, however, that under certain circumstances the clerk could issue notice of appeal after sixty days but that he would be compelled to show that a pressure of business in his office prevented him from doing so within the sixty days.

"Now such an admission itself is fatal to the contention that this appeal should be dismissed, and we could well deny the motion on such admission, but it may guide us in all such proceedings in the future if we would consider what is the meaning of the word 'forthwith' when applied to the discharge of a duty enjoined upon a public officer." 2 L.L.R. 137, 3 Lib. Semi-Ann. Ser. 4–5 (1913).

After commenting extensively upon the flexibility of the term "forthwith," the motion to dismiss the appeal in the case cited was denied.

It appears to me therefore that we have both law and precedent for dismissing the motion in this case and allowing the appeal; hence my dissent to the judgment of the majority of my colleagues.