ROBERT SMITH, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

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

Argued January 21–23, 1941. Decided February 21, 1941.

1. In prosecutions for criminal offenses the criminal intent and the criminal act must simultaneously coexist.
2. In a case of assault and battery with intent to kill, the intent is the essence of the offense.
3. Admission of stipulation permitting a witness' testimony to be accepted as identical with testimony of an absent witness is admission of hearsay evidence, and therefore error.
4. Remand of case for amendment of indictment from assault and battery with intent to kill to affray will not be permitted for the offenses are not cognate.

Appellant appealed to Supreme Court from conviction of assault and battery with intent to kill. Appellee moved to dismiss on ground that appellant had not filed an approved appeal bond. On appeal, *motion denied and judgment reversed.*

H. Lafayette Harmon for appellant. *The Attorney General* and *M. Dukuly* for appellee.

MR. JUSTICE RUSSELL delivered the opinion of the Court.

By virtue of exceptions taken to the verdict and final judgment of the Circuit Court for the First Judicial Circuit, Montserrado County, which verdict found him guilty of the crime of assault and battery with intent to kill and which final judgment sentenced him to six months' imprisonment at hard labor, appellant has appealed this cause to this Court for final adjudication.

When the case was called for hearing at this bar, ap-

pellee through its counsel gave notice that it had filed a motion to dismiss said appeal. The principal ground for the motion was that appellant had not filed an approved appeal bond. To this motion appellant, through his attorney, filed a resistance.

While arguments were in progress, we received a letter written officially by His Honor Judge Smallwood, who had presided over the trial of said case, informing us that the appeal bond had been filed by appellant within the statutory time; that there was a regulation made by him that all bonds and bills of exceptions in causes appealed from his court should be filed with the clerk of the court, and the said clerk should make notations of the dates of filing and present them to him, whereupon he would dispose of them in such manner as the law directs; and that in this cause the clerk had failed to present to him appellant's appeal bond for approval although it had been filed within statutory time, but had sent forward a transcript of the record to this Court with a copy of said appeal bond unapproved.

His honor the trial judge gave further information in said letter that since the appeal record had been filed in this Court, the Honorable Attorney General had directed the said appeal bond to be forwarded to him for his approval *nunc pro tunc;* and that he had done so.

In these circumstances, we cannot agree with the act of the representatives of the Republic of Liberia, appellee, in moving us to dismiss the appeal on the ground that said appeal bond was not approved, when they had requested the trial judge to approve same *nunc pro tunc* and the said judge had actually approved same and they were hoping to benefit from said recent approval thereof.

Having due regard for: (1) The force of the legal maxim that "the acts of the court should prejudice no man," (2) The fact that the appellee through its counsel had, on its own initiative, applied to the trial judge, and had had said bond approved *nunc pro tunc,* and (3) Ap-

pellant's compliance with the local rule of the local trial court by filing his appeal bond within statutory time, namely, on September 2, final judgment having only been entered on the thirty-first day of August, 1940; the appellant had, we think, done everything which he reasonably could have done in the circumstances. We, therefore, decided to deny the motion to dismiss the appeal and proceeded to hear the appeal so as to be able to decide the matter on its merits.

Dealing now with the bill of exceptions, we are of the opinion that counts 2 and 3 are not of sufficient legal weight to claim our consideration. Consequently, we pass on to count 4 thereof in which the appellant contends that the evidence does not uphold or justify the verdict.

Going through the record of the testimony of the witnesses given at the trial, we find from all of the witnesses that on the nineteenth day of December, 1939, at the café of one Fredericks in the city of Monrovia, David M. Howard and appellant together with others were drinking beer and spirits and that during the period of their sojourn there a dispute arose between the two persons above named. The dispute developed, it would appear from the evidence, by degrees, one calling the other an ass and the other retorting, "You are an ass." According to the testimony of the private prosecutor, the appellant then threw his glass of whisky into the face of the private prosecutor which glass of whisky blinded him, and he, the private prosecutor, in turn threw his glass of beer into the appellant's face. The appellant then threw a bottle of beer at his antagonist which wounded him on the head. This testimony of the private prosecutor was not corroborated by any other witness insofar as is evidenced by the records of this case.

The appellant in his testimony said that the private prosecutor was the aggressor because he first threw his beer into appellant's face and he, the appellant, in retaliation threw his whisky into the face of the private prose-

cutor. He, the private prosecutor, again threw a glass tumbler at appellant which missed him, struck the wall, and broke in pieces which wounded his finger, arm, and head. The portion of this testimony in regard to the private prosecutor being the aggressor was corroborated by witness Dillon whose testimony was acccepted as the testimony of one Weeks, as is hereinafter explained, who was the only one present and awake during the affray. This purported evidence of Weeks as repeated by Dillon, although it was hearsay evidence which is not favored by the general rule of evidence, was accepted by the trial court by virtue of stipulations filed by the contending parties in this case. This in our opinion is a miscarriage of the law of evidence which ought not to have been allowed by the court, although suggested by the parties themselves.

Both appellant and private prosecutor went to their respective doctors, had their wounds dressed, and procured certificates of the nature of the injuries received by each of them respectively.

The certificate, identified and marked by the court as "B," reads as follows:

"DR. SAJOUS,
BROAD STREET,
MONROVIA.

"December 20th 1939.

"TO WHOM IT MAY CONCERN

"This is to certify that from my examination Mr. David Howard received a severe knock on his head with a blind instrument which caused a "hematoma" that is to say collection of blood under the skull and which instrument by breaking caused a wound on the top of his head.

"Presently I cannot say what would arise from this injury. The patient is under my treatment.

"(Sgd) DR. SAJOUS

"yesterday the 19th instant
as he reported for treatment.

"Certified and true copy of the original.

"Clerk of Court."

The certificate, identified and marked by the Court as "1," reads as follows:

"MONROVIA, *22nd August, 1940.*

"Certificate.

"This is to certify that Mr. Robert Smith was brought to me on the night of the 19th day of December, 1939, with the following injuries:

"1) One haematoma on the right side of the skull, about 2 inches in diameter;

"2) One superficial bruise on the skin of the right forearm;

"3) One cut wound, with sharp edges and approximately one inch long on the second finger of the right hand, which was probably caused by a sharp instrument.

"These wounds were at once attended.

"(Sgd) SCHNITZER

"A. Schnitzer, M.D.

"Certified true and correct as per original filed in my office.

"Clerk of Court."

During the arguments at this bar, so much emphasis was placed upon the nature and extent of the wounds reciprocally inflicted that what we consider the more important aspect of this case from the legal point of view was relegated to the background.

In prosecutions for criminal offenses, especially those of the grade of the one now under review in this Court, the criminal act and the criminal intent must simultaneously coexist; for should there have been a criminal act without a criminal intent, or vice versa, the crime charged is not proven.

And, particularly in the case of assault and battery with intent to kill,

". . . [T]he intent is the essence of the offense. Unless

the offense would have been murder, . . . had death ensued from the stroke, the defendant must be acquitted of this particular charge. And, as a general rule, in all cases of assaults with intent, the intent forming the gist of the offense must be specifically averred and satisfactorily proved." 2 Wharton, Criminal Law § 839, at 1051–53 (11th ed. 1912).

"To justify charge of 'assault with intent to kill,' state must prove assault was made with such intent, and not accidentally; and with malice, and not as a result of sudden heat of passion caused by sufficient provocation so that had death ensued it would have been murder in the first degree.

"Assault with intent to kill being charged, it is necessary that the intent to kill be alleged and proved beyond a reasonable doubt." *Ibid.*, n. 1.

It is regrettable that the most important witness in this case, one J. W. Weeks, was not brought to the stand, and unfortunate that the court denied a motion for continuance filed by defendant, now appellant, praying that the cause be continued until the attendance of said missing witness could be outlined since, although he was one of those upon whose testimony the indictment had been presented, the state had subsequently shown a disinclination to use him, and defendant desired to use him as a witness for the defense instead. And it is also incomprehensible to us that the court below should have allowed stipulations to be filed by the prosecution and defense agreeing that, in the absence from the jurisdiction of the witness J. W. Weeks, whatever the witness Edmund Dillon might testify to should be accepted as identical with the testimony Weeks would have given were he present. The effect of this stipulation was to admit hearsay evidence, depriving appellant of the right of confrontation. 1 Greenleaf, Evidence §§ 98, 99, at 182–85 (16th ed. 1899). See also *McCarthy* v. *Weeks*, 2 L.L.R. 39 (1911). Inasmuch as we are now considering an ap-

peal based upon an exception that the verdict was contrary to law and evidence, we may here condemn such a patent violation of law.

When the argument was being made by the prosecutor, the Honorable Attorney General for the appellee stated officially to the Court that from the evidence the prosecutor was of the opinion that the crime of assault and battery with intent to kill charged against appellant had not been proved, but that from the evidence an affray had occurred between appellant and private prosecutor; and the Honorable Attorney General requested the Court to reverse the judgment of the lower court and remand the case so that an indictment might be founded upon the proper offense.

We have not been able to agree with the Honorable Attorney General that the case should be remanded for an amendment of the indictment, for the crime assault and battery with intent to kill and the offense affray are not cognate.

The Criminal Code of 1914, the statute upon which the indictment in this case is predicated, defines assault and battery with intent to kill as follows: "Committing an assault and battery with a deadly weapon, and cutting, stabbing or wounding with intent to murder." Crim. Code of 1914, § 48, at 10. Bouvier defines an affray as "the fighting of two or more persons in a public place to the terror of the people." 1 Bouvier, Law Dictionary *Affray* 161 (Rawle's 3d rev. 1914).

This principle was enunciated by us at the present term in the case *Dennis-Mitchell* v. *Republic,* 7 L.L.R. 134 (1941), when the Court dismissed and ordered discharged without day a defendant charged with embezzlement, where the evidence tended to prove malicious mischief.

We are of the opinion that the judgment of the trial court should be reversed and appellant discharged without day; and it is hereby so ordered.

Reversed.