JAMES W. HUNTER, Appellant, *v.* SOPHIA L. HUNTER, Appellee.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, GRAND BASSA COUNTY.

Argued April 2, 3, 1973. Decided April 26, 1973.

1. A party who fails to put in an answer must first appear in the action in order to participate in the trial as defendant under a general denial.
2. No judge of concurrent jurisdiction can review the acts of his predecessor.
3. In order to warrant review on appeal of a matter it must have come to finality in the lower court.
4. A judgment is final when it has completely settled the rights of all parties, though it leaves things undone which may be necessary to due execution of such judgment.
5. It will be presumed on appeal, in the absence of error affirmatively shown by the record, that the trial court acted correctly.
6. A person cannot urge a ground for relief on appeal which was not presented to the lower court by proper objection and exception thereto.

A petition for partition of real property was filed by appellee in the Circuit Court and granted by the judge presiding, who set up a Commission to effect the partition. Appellant excepted to the ruling, but took no further action. Subsequently, the matter came before another judge, who sought to resolve the difficulties in enforcing the first judge's ruling by dissolving the Commission and appointing a surveyor who was technically skilled to carry out the original order. To this ruling an exception was taken, but no appeal was pursued. Thereafter the same judge approved the report of the surveyor and as to one aspect of that report directed the surveyor to obtain assistance from another surveyor. No exception was taken by respondent nor an appeal announced. (A writ of certiorari, for some reason, may have been applied for before the decree approving the report, but it, too, was never pursued.) Somehow the same proceedings came up before two other judges of the same court, in sequence. Both took positions contrary to the

decree of the first judge and of the second, as well, which was in furtherance of the decree. Again, the matter came up before the fifth of the judges of the Circuit Court. He discarded the negating rulings of the prior two judges, declaring that they had attempted to review the acts of a colleague; he affirmed the position taken by the second judge and sought to implement and effect it. It was from this decree that the respondent appealed. The appellee moved to dismiss the appeal, contending primarily that an appeal should have been taken from the rulings of the first two judges and not the ruling of the last judge in furtherance of the decrees of those two, since it was interlocutory in nature and not final as the others were, certiorari being the proper remedy. The Supreme Court agreed, deciding an appeal was not properly before it and *granted* the motion, *dismissing* the appeal.

M. Fahnbulleh Jones for appellant, and appellant *pro se*. *O. Natty B. Davis and Joseph Findley* for appellee.

MR. JUSTICE HORACE delivered the opinion of the Court.

This case stems from an unfortunate controversy between brother and sister over property inherited by them from common ancestors.

For the purpose of this opinion we have deemed it necessary to recount briefly the facts of the case as revealed by the record certified to us from the court below.

James W. Hunter, appellant, and Sophia Hunter, appellee, are brother and sister, who inherited certain pieces of real property in Grand Bassa County from their grandparents, Thomas L. Hunter and Sophia A. Hunter, and great aunt, Laura Johnstone. Sophia Hunter, it appears, being dissatisfied with the way her brother, James W. Hunter, was handling the property owned by them in

common, filed a petition on May 26, 1969, in the Equity Division of the Circuit Court for the Second Judicial Circuit, Grand Bassa County, for partition of said property. James W. Hunter, respondent in said petition, was duly summoned but neither appeared nor answered.

On June 14, 1969, during the May Term of the Second Judicial Circuit, the petition was called for hearing before Judge Dessaline T. Harris, counsellor O. Natty B. Davis representing petitioner, and respondent, who had neither appeared in the matter nor answered, representing himself.

Although no injunction papers are in the record before us, it appears that prior to filing of the petition for partition, Sophia Hunter had instituted injunction proceedings against James W. Hunter, because when the partition case was called the record shows that respondent requested the court to give preference to the injunction proceedings on the ground that since the petition was pending the property subject to an injunction could not legally be partitioned. The request of respondent was resisted by petitioner's counsel, and the judge ruled that the injunction had no bearing on the suit for partition and was intended to preserve the property until partition, when the injunction would expire of its own terms.

We have taken pains to refer to the injunction proceedings because of what will be stated later in this opinion as to the position of respondent in this connection.

The court having disposed of the injunction as related above, the petition to partition was called, as the minutes of the trial court reflect.

> "The Court: At the call of this case respondent was found not to have appeared nor answered hence he is on bare denial. However he was in court at the call of this case in keeping with the minutes of court. The truthfulness of the parcels of land named in the petition was by question solicited from respondent, James W. Hunter, and he confirmed all of the listed prop-

erties except item five under count one of the petition which calls for thirty acres. In denying the existence of thirty acres behind the hospital in Lower Buchanan, respondent James Hunter informed the court that instead of thirty acres there were only six acres which he knew to have been given to him and his sister, petitioner. In the circumstances, the court will order the commission set up *infra* to take cognizance of all and singular the properties listed in count one of the petition except that in the case of thirty acres of land behind the hospital, Buchanan, said committee will consider six. In addition to these parcels of land petitioner informed the court that she has evidence of the existence of four acres of land in New Cess, Grand Bassa County. So during the deliberation of the commission referred to, to be set up, these four acres of land the commission is ordered to consider the same during their deliberation if evidence of existence thereof is produced by petitioner, because when notice of this New Cess land was given in court, respondent denied any knowledge about said parcel of land."

The court then proceeded to set up the Commission. Counsellor Joseph Findley was nominated by the petitioner. Hon. Joshua L. Harmon was nominated by the respondent, but because the court felt that Mr. Harmon was a Senator and immune from court process at the time, his nomination was rejected by the court. After taking exceptions to the court's ruling, respondent nominated counsellor Samuel W. Payne, and the Commission as named above, with the court's appointee, Mr. Joseph Sukun, as Chairman, was duly set up to partition the properties listed in the petition and ordered to report to court within sixty days, to which report either party in interest might file objections. Thus ended the first phase of this matter.

One peculiar feature of this case is how the respondent came within the jurisdiction of the court to participate in

the partition proceedings when he had neither appeared nor answered. The Civil Procedure Law requires that upon being summoned, an appearance shall be made within ten days after service of such summons or resummons. Rev. Code 1:3.62. Section 9.1(2) of the Civil Procedure Law provides: "If a defendant *appears within the time prescribed by Section 3.62* (emphasis supplied) his failure to interpose an answer shall be deemed a general denial of all the allegations in the complaint. At the trial, such a defendant may cross-examine plaintiff's witnesses and introduce evidence in support of his denial, but he may not introduce evidence of any affirmative matter." From the reading of this statute it seems to us that in order to qualify to participate in a trial as defendant or respondent, one must first appear.

During the February Term of the Second Judicial Circuit, Grand Bassa County, Hon. D. W. B. Morris presiding, the matter was again called, and the court asked for the report of the Commission, when it was informed by the Chairman that he was unable to get the Commission to meet. Counsellor Findley, a member of the Commission, informed the court that the nature of service required of them was technical and not being surveyors, the Commission could not execute the orders of the court appointing them to partition the property in controversy between petitioner and respondent.

In this situation, the court dissolved the Commission set up to partition the property and appointed surveyor Moses D. James to make a proper partition of the property in question and submit a report to the court by March 20, 1971, at which time the report would be passed upon and, if approved, distribution of the properties would be made to the parties concerned. The parties were ordered to turn over all deeds to the court-appointed surveyor.

Respondent excepted to the entire ruling and announced an appeal to the Supreme Court at its October

1971 Term. The trial court then observed that announcement of an appeal to an interlocutory ruling was a strange procedure, but since respondent had done so he would order the surveyor to suspend the survey for a limited time in order to give respondent time to appeal and petitioner time to properly defend her interest.

From this point, according to the scanty record available, it seems that the situation became more confused. As far as we have been able to gather it appears that instead of prosecuting an appeal, respondent filed in the office of the clerk of the Supreme Court a petition for a writ of certiorari venued before the full bench. There is no showing that the writ was ever authorized by the Supreme Court or a Justice thereof. In the meantime, counsellor for petitioner made representations to the Chief Justice, *ad interim,* of the situation, and the Chief Justice wrote a letter to Judge Morris instructing him to proceed with the matter and in case any party was dissatisfied he or she could appeal to the Supreme Court. After receipt of this letter and while the matter was proceeding, respondent obtained a certificate from the assistant clerk of the Supreme Court to the effect that a petition for a writ of certiorari had been filed in his office venued before the full bench sitting in its March 1971 Term which was "still pending undisposed of." Being confused with this turn of events, Judge Morris sent a radiogram to the Acting Chief Justice requesting clarification, because his letter and the clerk's certificate from the Supreme Court filed in the trial court seemed conflicting. To this radiogram from Judge Morris, Acting Chief Justice Mitchell sent a reply.

> "Your radiogram received. Have not deviated from instruction given you by letter and I informed Counsellor Hunter personally if not satisfied proceed by regular appeal. This is still maintained."

Upon receiving the radiogram, Judge Morris proceeded with the case. The surveyor made the partition

and reported to the court, which rendered a decree on the surveyor's report on March 19, 1971. Because of the importance both sides have attached to this decree, from different angles, of course, we will quote the part which begins after recitation of the facts.

"In obedience to the judge's order the clerk issued notices which were served on both petitioner and respondent for the hearing of this matter at the hour of 10 o'clock. When the matter was resumed at 11 o'clock, petitioner, with her representatives, counsellors Davis and Findley, in compliance with said notice, were present. Respondent was absent and even up till now while the decree is being entered, 25 minutes to 12 o'clock, respondent is absent without excuse. The court therefore in passing upon the report of the surveyor, Moses D. James, decrees that same be hereby approved with reservation deleting the incited [*sic*] letter dated March 13, 1971, signed by respondent James W. Hunter addressed to Moses James, and further instructs the surveyor who stated that up to this point because respondent had failed to furnish him with the original deed of one of the pieces of property, he had not made a drawing [map] of the property on the Fair Ground. As to this piece of property and the rest shown in said petition, subject of these proceedings uncountered, the court directs him to get in touch with the oldest Public Land Surveyor in this county, Arthur P. Harris, who might be able to designate the points of commencement of said properties without encroaching on others of legal title, partition this particular property and prepare the necessary quit claim deeds covering same . . . to be presented both sides for their signatures and probation and registration. Meanwhile the said surveyor shall prepare and present his bill which may also include service rendered by surveyor Harris for our approval to be included in the bill of costs which is

hereby ruled to be paid by respondent. With this amendment, the report be and the same is hereby approved. It is so ordered."

We think it important to note that before surveyor James started the survey he requested respondent to be present in order to show him the corners, but respondent refused because, as stated by him, he had been enjoined from entering upon said property. It is difficult to understand respondent's attitude in this respect in view of Judge Harris' ruling in the injunction proceedings hereinabove referred to.

No action was taken by respondent after the rendition of the above decree, either to appeal or move by remedial process to the Supreme Court.

At the May Term of the Second Judicial Circuit, Grand Bassa County, Judge Alfred B. Flomo presiding, in some way not shown in the record, the partition matter came up again. Judge Flomo, after surveying the history of the case, and noting that neither of the parties had been placed in possession, appointed a Board of Commission to assist the appointed surveyor to conclude the matter. Levi R. Johnson was named Chairman, Rev. Oswald T. Dillon and Counsellor James G. Johnson, the other members. A report was to be made not later than July 17, 1971.

Again, during the August 1971 Term of the Second Judicial Circuit, Grand Bassa County, Judge Roderick N. Lewis presiding, the matter somehow came up again. According to the record, on August 19, 1971, Judge Lewis reviewed the facts and then decreed that the commission constituted by Judge Flomo proceed without delay.

During the November 1971 Term of the Second Judicial Circuit, Grand Bassa County, Judge William O. Kun presiding, this same matter was brought up again. Judge Kun commenced by making a thorough inquiry into the status of the matter, whereby it was shown what

roles his predecessors, Judge Morris, Judge Flomo, and Judge Lewis, had played. His inquiry also revealed that after Judge Morris' decree, before Judge Flomo constituted a new Commission, a surveyor had been nominated by respondent and appointed by the court to associate with surveyor James in effecting the partition. Further, the inquiry of Judge Kun revealed that James had made the partition and prepared quit claim deeds which had been passed upon by Judge Morris. Although respondent took no action by way of exception or otherwise at this time, when Judge Flomo was presiding at a subsequent term of court, respondent objected to the partition James had made, on the ground that the surveyor had allocated most of the improved properties to petitioner and the unimproved properties to him.

In passing, we should mention that it is indeed strange that respondent did not interpose his objections at the time the report was made and before Judge Morris passed upon it. It is also strange that he did nothing about this report which he considered prejudicial to his interest, or the decree based on that report, at the time he did raise objections.

After due inquiry into the matter, on December 21, 1971, Judge Kun ruled that the acts of Judge Flomo and Judge Lewis were improper in that they sought to review their colleague, Judge Morris and the decree made by him, which Judge Kun affirmed and ordered the parties to comply with.

Respondent excepted to Judge Kun's ruling and announced an appeal to the Supreme Court at its March 1972 Term. Petitioner complied with the ruling and signed the deeds. Respondent based his appeal on a four-count bill of exceptions.

Although, for reasons to be stated later, we cannot traverse the bill of exceptions, we deem it important, nevertheless, for the purpose of this opinion to quote Judge Kun's notation on the bill of exceptions.

"This court maintains that inasmuch as no appeal was taken from the decree made by Hon. D. W. B. Morris during the February 1971 Term of court, said decree is final and no other judge except authorized by the Supreme Court has the right to set aside the decree and reopen the case. With this observation, the bill of exceptions is approved in so far as it is supported by the records of the case."

When this case was called before us, our attention was drawn to a motion to dismiss the appeal filed by appellee and resisted by appellant. Appellee's chief contention is that appellant never appealed from the rulings of Judge Harris and Judge Morris, which Judge Kun's decree merely sought to enforce and that the appeal respondent has taken from Judge Kun's decree is improper in that he should have moved by certiorari, the correct procedure in the case of an interlocutory ruling.

Appellant charged in his resistance lack of legal sufficiency for the grounds of the motion and otherwise denied the allegations, as well as stressing laches on the part of movents.

Before proceeding with the issues raised, we feel that some comment should be made on the roles of Judge Flomo and Judge Roderick N. Lewis in this matter. We have already referred to the rulings of these two judges. From those rulings, the one of Judge Flomo setting aside Judge Morris' decree, and that of Judge Lewis confirming Judge Flomo's position, it can be clearly seen that these two judges were without legal authority to proceed as they did, without regard as to whether their positions were legally tenable or not. It has been held by this Court, *Republic* v. *Aggrey,* 13 LLR 469, 478–79 (1960), more than once that no judge of concurrent jurisdiction can review the acts of his predecessor in a given case.

"Now, summarizing both of these counts, this Court says that however sound the ruling of His Honor

Judge Weeks, might seem to be in substance, it cannot be upheld by any authority of legal jurisprudence; and, however, erroneous or sound might be the ruling of His Honor, Judge Samuel B. Cole, given at the February, 1959, Term of the court, the only judicial tribunal that would have been clothed with legal authority to review the same was an appellate court; and Judge Weeks, presiding over the May term of the aforesaid court, exercising concurrent jurisdiction with Judge Cole, was without legal authority to review his acts as such."

See also *Jartu* v. *Estate of Konneh,* 10 LLR 318 (1950).

We, therefore, have no hesitancy in declaring the acts of Judge Flomo and Judge Lewis legal nullities, because they run counter to both the common law and the decisions of this Court.

Coming now to the motion to dismiss, appellee has asked that we dismiss the appeal because actually there is no appeal before this Court, since appellant failed to appeal from the decree he should have appealed from, that of Judge Morris, and that appellant could not appeal from Judge Kun's decree enforcing Judge Morris' decree because Judge Kun's action was merely implementing the decree of Judge Morris.

Appellant on the other hand has argued the point that the motion to dismiss does not advance any of the statutory grounds for dismissal of an appeal and, therefore, the motion should be denied.

The points we deem necessary of consideration are: (1) what constitutes finality in determining a case, to warrant an appeal being taken therefrom; and if warranted in the case under consideration, whether the appeal was properly taken; (2) what the legal presumptions are with respect to the decisions of trial courts; and (3) whether in the circumstances there is an appeal regularly before us, that is to say, has appellant properly re-

served the points he desires us to pass upon in his appeal by proper exceptions?

With reference to the first point, most law writers are agreed that in order to warrant review on appeal of a matter, it must have come to finality in the trial court.

> "As a general rule, the face of the judgment is the test of its finality. . . . The fact that other proceedings of the court may be necessary to carry into effect the rights of the parties, or that other matters may be reserved for consideration, the decision of which one way or another cannot have the effect of altering the decree by which the rights of the parties have been declared, does not necessarily prevent the decree from being considered final, unless there is some further judicial action contemplated by the Court.
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> "A decree which decides the right to property in contest, directs it to be delivered by defendant to complainant by transfer, and entitles the complainant to have the decree carried immediately into execution, is a final decree, although it leaves to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership." 2 AM. JUR., *Appeal and Error*, §§ 24, 25.
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> "An appeal or writ of error will not lie, as a rule, unless there has been final disposition of the case as to all the parties.
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> "A reservation in a decree of a right to apply to the court for any order that may be necessary to the due execution of the decree does not destroy its appealability. It has been held that a judgment is final which completely settles the rights of the parties, although there is an order retaining the cause on the docket for the purpose of executing the judgment, which is discharged by the payment of the amount of a judgment into court." 2 CYC. 588.

In his argument at this bar, appellant contended that the decree of Judge Morris was not final because it left

something to be done. At the same time, he has contended that the decree of Judge Kun, which by its own wording was simply enforcing the decree of Judge Morris and which also left something to be done, was final. It is our view that this argument is inconsistent and illogical and seemed to be advanced because appellant did not avail himself of his legal rights with respect to Judge Morris' decree. We will say more about this later.

We consider next the point of what the law presumes with respect to actions and/or decisions of lower courts. It is generally held, in the absence of patent error by the lower court, that the law presumes that the actions of such court were correct.

> "While there are limitations on the power of an appellate court to indulge in presumptions in support of orders or judgments, it is a general rule of wide application that an appellate court will indulge all reasonable presumptions in favor of the correctness of the judgment, order, or decree from which the appeal was taken. In other words, it will be presumed on appeal, in the absence of a showing to the contrary, that the trial court acted correctly, that the trial court did not err or rule erroneously, and that the court will correctly settle questions as may arise in further proceedings in the cause. Indeed, error is never to be presumed by an appellate court on an appeal thereto, but must be affirmatively shown by the record; and in attempting to show affirmatively that an error exists as reflected by the record the appealing party must be guided by the rules of law and of equity applicable to the record produced." 5 C.J.S., *Appeal and Error,* § 1533.

Other authorities have addressed themselves to the point.

> "It may be stated as a general principle that reviewing courts indulge presumptions very freely for the purpose of sustaining the action of lower courts,

> and very sparingly for the purpose of overthrowing them. Generally speaking, presumptions unfavorable to the judgment and for the purpose of reversing it will not be indulged in. A record will not be interpreted to show error if it is susceptible of reasonable interpretation to the contrary but must be given such construction as will support the judgment if such construction can reasonably be made."

The motion to dismiss avers that appellant did not take an appeal from the decree which settled the controversy, that is, the decree of Judge Morris. Neither in his resistance to the motion to dismiss nor in his argument before us has this averment been denied on the part of appellee. On the contrary, appealing from Judge Kun's decree, appellant, to all intents and purposes, makes a tacit admission that he did not appeal from Judge Morris' decree and the record confirms this. The law will presume, therefore, that the decree of Judge Morris, which was only implemented by Judge Kun, was not appealed from. Appellant in his argument emphasized that he wanted the partition made by surveyor James upon orders of Judge Morris vacated because of its inequities, that is, it awarded most of the improved portions of the property to appellee and most of the unimproved property to him. Be that as it may, and if so it does seem unfair, but has appellant safeguarded his rights in the trial court? We think not.

It seems to us that if appellant felt that Judge Morris' decree was interlocutory, he should have at least excepted to it and thus reserved this point for appeal. Better still, he should have applied to the Justice in chambers for a remedial writ to correct what he considered error on the part of the judge. He did not do this. He did file a petition for a writ of certiorari but that was when Judge Morris dissolved the Commission set up by Judge Dessaline T. Harris and appointed surveyor Moses D. James to make the partition and not when Judge Morris passed

on the report of the surveyor. Even the petition for certiorari was never followed through.

In some jurisdictions in reviewing an appeal from a final judgment there may be a review of interlocutory rulings, but in order to have a review of such interlocutory rulings they must have been properly reserved for review. Proper preservation and reservation of an interlocutory decision for appellate review may require, among other conditions, proper objection and exception to the decision and embodiment thereof in the record on appeal. Therefore, even if we assumed that Judge Morris' decree was interlocutory, how can we review it, either by itself or conjointly with Judge Kun's ruling which merely implemented it, when no exceptions were taken to reserve the issues for review?

> "A party cannot in the appellate court, urge a ground for relief which was not presented to the court below, especially where the new ground is inconsistent with the theory on which he proceeded at the trial." 2 CYC. 674.
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> "Within the rule that questions not presented in the trial court in some appropriate manner will not be considered on appeal or error, it is a rule of nearly universal application that objections must be made in the trial court in order to reserve questions for review." 2 CYC. 677.

All in all, the whole case as handled in the court below presents the situation of a comedy of errors. One fact stands out, however, quite plainly: that the bone of the controversy is the decree of Judge D. W. B. Morris, upon which the appeal hinges. Equally clear is the fact that appellant neither excepted to, nor appealed from, that decree.

Because of what has been hereinabove stated we are of the considered opinion that the decree of Judge Morris was a final decree which should have been appealed from if appellant wanted review by the Supreme Court. It

was not Judge Kun's decree from which an appeal should have been taken, for it merely implemented Judge Morris' action in the case. Our holding in this regard is further borne out by the fact that the appeal from Judge Kun was to the report of surveyor Moses D. James upon which Judge Morris had passed. The motion to dismiss the appeal is, therefore, granted. The Clerk of this Court is hereby commanded to send a mandate to the court below to resume jurisdiction and enforce the decree of Judge D. W. B. Morris as implemented by the ruling of Judge William O. Kun. Costs in these proceedings disallowed, except for an amount of $300.00 to be paid to the surveyor by both parties equally. It is so ordered.

Motion granted, appeal dismissed.