THOMAS E. BUCHANAN, Appellant, *v.* H. ARRIVETS, Agent for C.F.A.O., a French Firm doing mercantile Business in Monrovia and elsewhere in Liberia, Appellee.

MOTION TO DISMISS APPEAL.

Argued March 15, 1945. Decided May 4, 1945.

1. Neglect to serve a notice of appeal on the appellee and failure to return same by the sheriff is a good cause for the dismissal of an appeal, although the act of 1938 controlling appeals to the Supreme Court, in listing the reasons for dismissal, omits mention of this ground.
2. As a general rule where the Legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and a court will not introduce an exception by construction except where the necessity is imperious and where absurd or manifestly unjust consequences would otherwise result.
3. After the failure of an appellant to serve a notice of appeal has been attacked by motion to dismiss the appeal, the court may not cure the omission by an order to issue and serve such notice.
4. Appellee may appear for the purpose of moving to dismiss an appeal on the ground that the court lacks jurisdiction without submitting to the jurisdiction of the court.
5. Where a party in superintending the preparation of records on an appeal discovers that a notice of appeal is missing and has not been served and returned, a Justice presiding in Chambers may, upon application before the appeal is attacked by motion, issue an order for service and return of the notice of appeal.
6. The act of 1938 did not repeal that of 1894 with reference to notices of appeal, since the two acts are reconcilable and can subsist together.

On motion to dismiss an appeal to this Court on jurisdictional grounds in an action to recover damages for breach of contract, *motion granted.*

Benjamin G. Freeman for appellant. *H. Lafayette Harmon* for appellee.

MR. JUSTICE BARCLAY delivered the opinion of the Court.

A motion to dismiss the appeal was filed by appellee, the body of which reads as follows:

"Because there is no Notice of Appeal issued, served and returned in these proceedings, which forms an integral part of an appeal, and according to the Statute law and decision of this Honourable Court, should be served and returned with the time allowed for the completion of an appeal, in that, it is the writ of summons or notice of appeal served upon the appellee and returns thereto made which gives this court jurisdiction over the case, and the failure or neglect of the party taking the appeal to see that this legal requisite is met, is fatal to an appeal before this Court."

As against this motion to dismiss the appeal, appellant filed the following resistance which reads substantially as follows:

"1. Because appellant says that the act of serving notices of appeal on appellant and the filing of returns showing the service of same are acts of the officers of court, which if neglected, cannot legally affect the validity of an appeal, but such acts, mistakes or negligence, if found to exist, should be remedied by some appropriate order of the appellate court. Wherefore appellant prays that appellee's motion to dismiss be overruled and the case ordered to trial.

"2. And also because appellant says that the Act of Legislature entitled, 'An Act amendatory to the Act establishing the Judiciary and fixing the powers common to the several Courts and amending the Acts regulating appeals,' approved January 13, 1894, upon which the several decisions of this Honourable Court on the point of services of notices were based, that being the statute law on which appellee relies for his motion to dismiss, which act provided that the failure to serve notice of appeal would render the appeal fatal was repealed by the Act of Legislature, passed and approved 21st November 1938. The motion is there-

fore without legal merit and should be denied, and appellant so prays.

"3. And also because appellant says that because of gross injustices practiced by officers of court in retarding the progress of cases, especially against a party litigant whom an officer of court seems to disfavour, and the Legislature intending to remedy such gross injustices passed the Act mentioned in count two of this motion and specifically stated therein that an appellate court might dismiss an appeal on motion for the following causes, *only:*

1. Failure to file approved bill of exceptions;
2. Failure to file approved appeal bond or where said bond is fatally defective;
3. Failure to pay costs of lower court; and
4. Non-appearance of appellant.

It is therefore quite clear that the intention of the Legislature was that litigants should not suffer because of alleged neglect of any officer of court. Wherefore appellant respectfully contends that in keeping with the spirit and intent of the statute law cited in this count, a non-service of appeal on appellee, if true, would be an act of an officer of court, which would not constitute a ground for dismissal of the aforesaid cause. Wherefore appellant prays that the Motion be denied and an order of court issued to the Clerk of court below to perform the duty incumbent upon him in connection with this case in order that substantial justice might be rendered."

We have taken the trouble to insert in this opinion the substance of the motion and of the resistance thereto because it appears that appellant has inadvertently overlooked our opinion handed down in a similar case a year ago in which this Court took the view, with reference to the subject-matter of the motion to dismiss and the resistance thereto, that the motion should not be denied. We refer to and shall quote from the opinion in the cases

Johns v. *Pelham,* 8 L.L.R. 296, and *Pelham* v. *Witherspoon,* 8 L.L.R. 296, decided May 4, 1944, in which Mr. Justice Barclay, speaking for the Court, said *inter alia:*

"Our recent statute on appeals passed and approved in the year 1938 definitely provides:

"'"That no act nor omission of a Judge nor any officer of Court shall affect the validity of an appeal, but such act, mistake or negligence shall be remedied by some appropriate order of the appellate court so as to promote substantial justice.

"'"That the appellate court might dismiss an appeal upon motion properly taken for any of the following reasons only:

1. Failure to file approved Bill of Exceptions.
2. Failure to file an approved Appeal Bond or where said bond is fatally defective.
3. Failure to pay cost of lower Court.
4. Non-appearance of Appellant."' L. 1938, ch. III, § 1.

"To all intents and purposes it is obvious that the intention of the Legislature in passing that act was to discourage the dismissal of appeals on technical legal grounds and to give to appellants an opportunity to have their cases heard by this Court on their merits in order that substantial justice be done to all concerned, for in many instances prior to the passage of said act important and far-reaching cases had been dismissed on mere technicalities and appellants had suffered seriously and irreparably because of the fact that from this Court there was no other appeal. Hence it is that the Legislature in said act not only set out definitely the causes for which an appeal should be dismissed, but also went further and gave this Court full authority under certain circumstances to correct or amend errors in order that substantial justice be done.

"In *Cyclopedia of Law and Procedure* with refer-

ence to the construction of statutes it is definitely stated that:

" 'Every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended.' 36 *Id. Statutes* 1110–1111 (1910).

"In the act of 1938 above quoted which controls appeals to this Court, it is obvious that the Legislature did not intend to make exceptions, for when it inserted the word 'only' it clearly meant that the causes for dismissal set out therein were those which would authorize and warrant the Court legally to dismiss an appeal. It might be contended and was so submitted that the Legislature in framing the act could not foresee every eventuality and consequently did not include other probable good causes. We have no hesitancy in agreeing with that contention, but those causes must be such that to do otherwise would bring about injustice, oppression, or an absurd consequence. The reason of the law should in such cases prevail over the letter. For example, the neglect to serve a notice of appeal on the appellee and the failure to return same by the sheriff has been consistently by this Court upheld as a good cause for the dismissal of an appeal. The Court takes this position because such notice of appeal is considered in the nature of a summons to the appellee, and the service upon him and its return by the sheriff places said appellee within the jurisdiction of this Court. Otherwise an injustice would result to said appellee who might not appear, not having formal knowledge of the notice of appeal, and this Court without the notice of appeal, its service, and return

included in the records sent up would not be advised as to whether or not the appellee had been summoned to appear and defend himself and the position or several rulings and judgment of the judge in the court below from which the appeal emanates. Consequently, the failure or neglect to have served and returned a notice of appeal has been by this Court upheld as a jurisdictional ground for dismissal of an appeal.

" 'The record must show that notice of appeal was served as the statute required, and that a proper filing was made, or the appeal will be dismissed for lack of jurisdiction.

. . . . .

" 'Since service in the statutory manner is jurisdictional, a failure to comply with a material requirement of the statute defeats its operation. The appellate court acquires no jurisdiction for any purpose, and cannot therefore supply the omission or rectify the defect in the notice.' 2 Encyc. of Plead. & Prac. *Appeals* 230–31 (1895).

"The rule laid down in *Ruling Case Law* is as follows:

" 'As a general rule, where the legislature has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is not the province of a court to introduce an exception by construction. And it is an invariable rule that an exception cannot be created by construction where none is necessary to effectuate the legislative intention. The power to create exceptions by construction can never be exercised where the words of the statute are free from ambiguity and its purpose plain. It is only where the necessity is imperious, and where absurd or manifestly unjust consequences would otherwise certainly result, that the courts may recognize exceptions. The courts have no dispensing

power over statutes. Where statutes contain no exceptions, and it cannot be said with certainty that exceptions were contemplated by the legislature, the courts can recognize none. . . . To illustrate, courts cannot engraft on a statute of limitations an exception which the statute does not contain. But the general rule against the introduction of exceptions by construction is subject to qualifications to obviate a construction that would be unjust, oppressive and unreasonable. It will always be presumed that the legislature intended exceptions to its language which would avoid injustice, oppression or an absurd consequence. The reason of the law, in such cases, should prevail over the letter. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular case. Hence, where the whole context and the circumstances surrounding the adoption of an act show a legislative intention to make an exception to the general terms of the act, the exception will be recognized by the courts. Although a statute providing a penalty for interfering with the transmission of the mails does not contain any exception, yet an officer may lawfully arrest a mail carrier upon a warrant charging him with the crime of murder. An act punishing as piracy a robbery committed "by any person or persons" on the high seas was held not to include the subjects of a foreign power who in a foreign ship committed robbery on the high seas. The operation of the statute of limitations was suspended during the existence of the civil war, on the ground of public

policy, although no exception was made on that account in the statute.' 25 *Id. Statutes* § 224, at 972–73 (1919)." *Id.* at 304. See also *Lartey* v. *Lartey,* 8 L.L.R. 194 (1944).

Appellant in his resistance has not taken the position that a notice of appeal is unnecessary, but contends that this Court under the act cited is empowered to give the necessary order *now,* after he is attacked by motion, in order that the said notice be issued, served on appellee, and returned, so as to give this Court jurisdiction over appellee. In our opinion the act of 1938 cited by appellant does not give us authority to correct an error, such as a neglect to issue, serve, and return a notice of appeal, by an order appropriate to give us jurisdiction over appellee after appellee has attacked the jurisdiction of this Court by motion to dismiss the appeal. The causes so clearly stated in the act for which an appeal might be dismissed refer to cases in which we already have jurisdiction, not to cases in which jurisdiction is wanting. The prayer of appellant that we should give some appropriate order for the issuance, service, and return of the notice of appeal is evidence that he still holds the view that the notice of appeal is in the nature of a writ of summons and that therefore only its service upon appellee and its return by the sheriff would give this Court jurisdiction over appellee.

It is apparent also that appellee's appearance and motion to dismiss the appeal are not for the purpose of submitting to the jurisdiction of the Court, but only to attack the jurisdiction of the Court over him. This is permissible. Would it then be within the pale of justice and right, at that stage of the case, for us to make an order to the clerk of the court below to issue and have served on appellee a notice of appeal, thereby depriving him of a legal right which has accrued to him through the neglect not only of the clerk of court but also of appellant him-

self? We think not, for substantial justice should be given to both parties alike.

In the case *Brownell* v. *Brownell,* 5 L.L.R. 76, 3 Lib. New Ann. Ser. 53, decided by this Court January 3, 1936, Mr. Justice Dossen, speaking for the Court, quoted the case *Moore* v. *Gross,* 2 L.L.R. 45, 46 (1911), in which opinion Mr. Justice T. McCants-Stewart said:

> " 'While a party cannot be held responsible for an immaterial error or omission made by a clerk of court in transcribing the records on appeal, yet material errors and omissions in the preparation of the record on appeal resulting from the neglect of the party to the action, or his counsel, is ground for the dismissal of the appeal.' " 5 L.L.R. 82.

In the case *Johnson* v. *Roberts,* 1 L.L.R. 8 (1861), this Court laid down the rule that the party appealing should see that all legal requisites are completed.

Continuing in the case *Brownell* v. *Brownell, supra,* Mr. Justice Dossen said:

> "It was in pursuance of this rule that when Counsellor Wolo in the case *Richards* v. *Coleman* [5 L.L.R. 56, 59], decided on December 13th last, urged that there was a hiatus in the records and we should bridge same by reading thereinto what he considered the missing part of said record, our very able colleague, Mr. Justice Russell, then speaking for all of us, said:
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> " 'There is always a Justice presiding in our chambers who will, if properly applied to, issue the necessary order to a court below to correct any error of that kind inadvertently made by ordering the abridged record sent up, or other necessary act done.' " *Id.* at 82–83.

And so it appears to us that where a party in superintending the preparation of the records on appeal, or even after the records are forwarded to this Court, discovers that a notice of appeal is missing and has not been served

and returned, upon application properly and timely made to the Justice presiding in Chambers before an attack by motion, the said Justice would hardly hesitate to give the necessary appropriate order for the issuance, service, and return of the said notice of appeal, inadvertently or negligently omitted by the clerk of the lower court.

As to appellant's contention that the act of 1938 repealed that portion of the statute of 1894 with reference to notices of appeal, we shall quote what was said by this Court through Mr. Justice Johnson, later Chief Justice Johnson, in the case *Brumskine* v. *Vietor,* 2 L.L.R. 123, decided June 13, 1913. Said he:

> "As to the question raised by appellant that the amendatory Act repealed that portion of the prior Act, which referred to justices of the peace, we must observe that ordinarily express language is used where a repeal is intended, and a repeal by implication is not favored, unless the two Acts are irreconcilably inconsistent. The rule is that if two statutes on the same subject can stand together without destroying the evident intent and meaning of the latter one there will be no repeal. . . . In Sedgwick's work on the Construction of Statutory and Constitutional Law, it is said that 'laws are presumed to be passed with deliberation and with full knowledge of existing ones on the same subject; and it is therefore but reasonable to conclude that the Legislature in passing a statute did not intend to interfere with or abrogate any prior law relating to the same matter unless the repugnancy between the two is irreconcilable; and hence a repeal by implication is not favored. On the contrary courts are bound to uphold the former law if the two Acts can well subsist together.'" *Id.* at 125.

In our opinion the two acts, that of 1894 and that of 1938, are not irreconcilable with reference to the notice of appeal and can well subsist together. We are therefore adhering to the position heretofore taken by us in numer-