C. MUNAH SIO, Appellant, *v.* FRANCIS K. SIO, Appellee.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: July 1, 1986. Decided: August 1, 1986.

1. The appellant shall present a bill of exceptions signed by him to the trial judge within ten days after the rendition of judgment. The judge shall sign the bill of exceptions, noting thereon such reservations as he may wish to make. The signed bill of exceptions shall be filed with the clerk of the trial court.
2. Upon motion, a trial court of record has jurisdiction to dismiss an appeal to the Supreme Court on the ground of the appealing party's failure to tender a bill of exceptions for the trial judge's approval, or to have the bill of exceptions filed in keeping with the statute.
3. The controlling factor for a trial court in deciding whether or not to dismiss an appeal, is when was the bill of exceptions submitted to the trial judge for his approval and not necessarily when it was approved.
4. In a divorce case, the state is also a party.

In an action of divorce for incompatibility of temper in which a verdict was returned in favor of the appellee, judgment rendered thereon and an appeal announced to the Supreme Court, the appellee filed a motion to dismiss the appeal on the ground that the appellant did not file an approved bill of exceptions as provided by law. After a hearing, the Supreme Court held that the interest of justice and fair play dictated that motion should not be granted. It therefore denied the same and ruled that the case be heard on its merits.

Stephen B. Dunbar, Sr. and *Joseph Findley* appeared for the appellant. *Philip A. Z. Banks, III,* appeared for the appellee.

MR. JUSTICE BIDDLE delivered the opinion of the Court.

When this case was called for hearing, counsel for appellee informed the Court that there is a motion for the dismissal of the

appeal in the above entitled cause of action. From an inspection of the case file, we observed that the three-count motion was resisted by a two-count resistance. In addition to the motion, appellee also filed what he termed "appellee's answering affidavit" to the resistance and simultaneously with this answering affidavit, appellee filed a motion for diminution of record. The motion to dismiss was filed on March 1, 1986, and verified by (Mrs.) Veronica L. Corvah, Acting Clerk of this Court, as Justice of the Peace. Appellee's motion for diminution of record and the self-same appellee's answering affidavit were both filed on June 30, 1986. The certificate from the clerk of the court below, which in the opinion of this Court gave rise to the motion to dismiss the appeal, was issued on August 26, 1985, and signed by Johnny Blaine, as Acting Clerk of the Civil Law Court for the Sixth judicial Circuit, Montserrado County. In other words, appellee elected to wait for six months before filing the motion to dismiss the appeal and four months later filed the self-same answering affidavit and the motion for diminution of record. For a fair determination of the case at bar, we deem it necessary to traverse counts 2 and 3 of the motion, counts 3, 4 and 5 of the motion for diminution of record, as well as counts 1 and 2 of appellant's resistance, which we hereunder quote:

MOTION TO DISMISS APPEAL

> "2. That although an appeal was announced by the appellant and granted by the trial court on the 13th day of August, A. D. 1985, yet no approved bill of exceptions was filed with the clerk of court up to the 26th day of August, A.D. 1985, a period of quite thirteen (13) days after the rendition of the judgment from whence the appeal was taken. Appellee attaches hereto copy of the clerk's certificate, marked exhibit "A" to form a cogent part of this motion.
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> "3. That under the statute laws of this jurisdiction and the cases decided by the Honourable the Supreme Court of Liberia, the failure by a party to file the required bill of exceptions within ten (10) days from the rendition of judgment renders the appeal dismissible. As in the instant case, the appellant had not, up to August 26, 1985, thirteen

(13) days after the rendition of judgment, filed her bill of exceptions, contrary to the laws of this jurisdiction. The appeal is subject to dismissal and appellee prays that said appeal be dismissed."

"MOTION FOR DIMINUTION OF RECORD

"3. That the date inserted in the bill of exceptions is done by different ink than used by the judge in approving of the said bill of exceptions, and even the handwriting differs.

"4. That following the issuance of the clerk's certificate, the self-same clerk proceeds to file the appellant's bill of exceptions, backdating the same to August 20, 1986, when indeed both counsel for appellee, Counsellor Philip A. Z. Banks, III and Counsellor Roger C. H. Steele of the Steele & Steele Law Firm have on numerous occasions inspected the records and confirmed that no bill of exceptions had been filed. Appellee says that as a careful inspection of the records of the original file will reveal, the bill of exceptions was not taken to the clerk's office and filed until October 20, 1986. But that the date was inked out and a new date inserted in its stead.

"5. That the transcribed records carry on their face a filing date of August 20, 1985, which is untrue and reflect the misdeed and unethical conduct of the acting clerk of the Civil Law Court for the Sixth Judicial Circuit, and hence this motion and prayer by appellee to have the original records sent for inspection by this Honourable Court for the revelation of the true date the bill of exceptions was filed."

"APPELLANT'S RESISTANCE TO MOTION TO DISMISS APPEAL

"1. Because appellant says that whilst it is true that the judgment was rendered on 13th August, 1985, it is equally true that the bill of exceptions was presented to and approved by His Honour Judge Belleh on the 20th of August 1985, seven days after judgment. Copy of the bill of exceptions is attached and marked exhibit "A" to the resistance. The clerk of court also filed the bill of exceptions on the 20th August, 1985; hence, the certificate

marked exhibit "A" to the motion is a complete distortion of facts relating to the bill of exceptions filed by the clerk under his signature. Whereupon appellant says that count 2 of the motion be overruled.

"2. And also because appellant denies that the statute provides that "failure by a party to file a bill of exceptions within 10 days from the rendition of judgment renders an appeal dismissible, notwithstanding appellant's bill of exceptions was filed within 7 days after rendition of the judgment". The statute prescribes the following:

> See. 51.7. Filing of the Bill of Exceptions:
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> " . . . The appellant shall present a bill of exceptions signed by him to the trial judge within ten days after rendition of the judgment. The judge shall sign the bill of exceptions, noting thereon such reservations as he may wish to make. The signed bill of exceptions shall be filed with the clerk of the trial court". Rev. Code I: 51.7.

"Appellant submits furthermore that the bill of exceptions having been approved and filed on the 20th of August, 1985 as shown on its face, appellee's contention in count 3 of the motion is unavailing and should be overruled.

In passing on this motion and resistance, the following issues are raised for our consideration:

1. Whether or not the certificate of the clerk of the trial court to the effect that a bill of exceptions has not been filed within statutory time should take precedence over the identical bill of exceptions approved by the trial judge and filed by the same clerk of court, which filing date shows that same was filed within the time allowed by statute?
2. Whether or not failure to file a bill of exceptions without ten days renders the appeal dismissible?
3. Whether or not a motion to dismiss an appeal on the ground that the appellant has failed to tender his bill of exceptions to the trial judge within ten days for his approval is cognizable originally before the appellate court?

We shall traverse these issues in the reverse order.

In the case *Mensah et. al. v. Wilson,* motion to dismiss an appeal in an ejectment suit just decided by this Court, this identical issue was raised. We observed in that case, after a careful examination of opinions relied upon by appellee/movant and the statute extant, that hitherto, almost every motion for the dismissal of appeal for failure to tender a bill of exceptions to the trial judge or have same filed within the time allowed by statute, had been venued originally before the appellate court. According to the statute then in vogue, it was provided that: "An appeal from a court of record may, upon proper motion taken, be dismissed" for failure to file an approved bill of exceptions in keeping with the provision of the repealed statute.

We have held and still hold that under the current statute, it is clear that the Legislature did confer original jurisdiction on a trial court of record to dismiss an appeal on the ground of appellant's failure to tender a bill of exceptions for approval or have same filed in keeping with provision of the statute controlling, upon motion by appellee before the trial court. Rev. Code 1: 51.16.

We now come to the next issue which is whether or not failure to file an approved bill of exceptions after ten days renders said appeal dismissible. In the *Mensah et. al. v. Wilson* case mentioned *supra,* it was held that the controlling factor in deciding such issue is when was the bill of exceptions submitted to the trial judge for his approval and not necessarily when it was approved; for a bill of exceptions could have been posted within statutory time to the trial judge who for some justifiable reason or good cause had left the trial jurisdiction for a far away distance before the bill of exceptions was tendered for his approval. Count 2 of the resistance, being in harmony with the statute, is hereby sustained and, therefore, count 3 of the motion is hereby overruled.

Count 2 of the motion to dismiss stressed on the certificate issued by the clerk of the trial court to the effect that after 13 days of the rendition of final judgment, appellant had not filed her bill of exceptions with the clerk which, according to appellee, is contrary to statute and thus renders the appeal dismissible.

Appellee principally and wholly relies on the authenticity of the self-same clerk's certificate and the integrity of the said clerk; otherwise, appellee would not have dared to file this motion. Count 1 of the resistance strongly contends that count 2 of the motion is a falsity because the identical clerk of court received and filed appellant's bill of exceptions seven days after judgment and same was filed within statutory time. Again, since this issue was raised in the *Mensah et. al. v. Wilson* case already decided by us, we therefore hold that the certificate issued by the clerk of the trial court, having been issued against the prevailing rule of honesty, is null and *void ab initio.*

One important issue which we dare not overlook is appellee's motion for diminution of record, especially counts 4 and 5 thereof herein above quoted, in which appellee strongly attacked the identical clerk of court in these words:". . That following the issuance of the clerk's certificate, the self-same clerk proceeds to file the appellant's bill of exceptions, back dating the same to August 20, 1985. . ." "5. That the transcribed records carry on their face a filing date of August 20, 1985, which is untrue and reflects the misdeed and unethical conduct of the acting clerk of the Civil Law Court. . . ." The paradox is very glaring.

Having relied on the integrity of the said acting clerk of court who issued the self-same certificate upon which appellee would have this Court dismiss the appeal growing out of a divorce case, the very appellee has come right back to tell this Court that the identical clerk of court, on whose certificate he relied, is a man of "misdeed and unethical conduct." Also, having accused the said clerk of backdating the bill of exceptions, and having now known that the clerk is a man of "misdeed and unethical conduct", is it not equally true that the clerk, as a man of "misdeed" could have also predated appellee's certificate? We therefore hold that under the doctrine of "FALSUS IN UNO FALSUS IN OMNIBUS" (BLACK'S LAW DICTIONARY 727 (4th ed)), the motion cannot be favorably considered by this Court as same would not be in the best interest of fair play and justice, especially in a divorce case in which the state is a party. *Bryant v. Bryant,* 4 LLR 328 (1935).

This Court considers appellee's purported "answering affi-

davit" to appellant's resistance unworthy to pass upon. Count 1 of the resistance is therefore sustained.

Wherefore, and in view of the foregoing facts and circumstances and the law controlling, the motion to dismiss the appeal is hereby denied and the cause ruled to be heard on its merits. Costs to abide final determination. And it is hereby so ordered.

Motion denied.