

JOSEPH HASSEN & SOEHNE, LTD., by and through its General Manager, J. VON WINDHELM, Appellant-Respondent, v. CLARENCE O. TUNING, Appellee-Movant.

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

Argued November 17, 1965. Decided, January 21, 1966.

1. The Supreme Court will deny a motion to dismiss an appeal for defectiveness of bond by reason of incapacity of sureties where the movant neglected to apply for relief to the Justice presiding in Chambers after the trial judge's jurisdiction to entertain a motion for verification of the bond expired.
2. Where an assigned circuit judge's jurisdiction has expired and a judicial act indispensable for appeal remains to be performed, an application for relief must be made to the Supreme Court or to the Justice presiding in Chambers.

Appellee's *motion* to dismiss the appeal was *denied*.

*Morgan, Grimes and Harmon Law Firm* for appellant-respondent. *Tilman O. Dunbar and Clarence O. Tuning, pro se* for appellee-movant.

MR. CHIEF JUSTICE WILSON delivered the opinion of the Court.

On the 28th day of June, 1963, appellee in this case instituted an action against appellant in the June 1963 term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, to recover the sum of \$600 as damages comprising the cost of a refrigerator and the value of provisions spoiled as a result of the defective condition and malfunctioning of said refrigerator, as well as damages for inconvenience sustained thereby, the appellee having purchased said refrigerator from the appellant.

To give force and effect to this action, attachment proceedings were instituted. Pleadings in the case having

rested, the case was ruled upon its merits when a jury was empaneled and tendered a verdict in favor of appellee awarding him the sum of \$300.

To this verdict, appellant noted exceptions and filed a motion for new trial. The motion was denied by the court and final judgment was rendered confirming said verdict. Appellant recorded exceptions and appealed to this Court.

During the present term of this court, appellee filed a motion for dismissal of the appeal on grounds stated as follows.

"1. Because appellee submits that the appeal bond filed in this case is fatally defective and bad and not a legal bond as is contemplated under the law, in that it carries the names of Waldron S. Wiles and T. N. Toby as sureties who are not legally qualified sureties in keeping with statutory laws of Liberia, as they are neither freeholders nor householders within the Republic of Liberia, as is shown from the certificate from the Real Estate Tax Division of the Bureau of Internal Revenues, R.L., hereto annexed and marked Exhibit A to form a cogent part of this motion, as well as a copy of the said defective and invalid bond hereto annexed also and marked Exhibit B to form a part of this motion also. Both of these exhibits appellee prays Your Honors to take judicial notice of.

*"All of which appellee is ready to prove."*

Appellant resisted the motion in a four-count submission, the full text of said resistance being as follows:

"1. Because said motion, aside from being without judicial precedent is in itself a violation of law and contrary to the practice and procedure of this Honorable Court in that the appellee has sought to introduce into this Court of last resort purported evidence which forms no part of the record of the court below, nor is it certified and transmitted under seal, thereby violating the law which provides that the Supreme Court takes

cognizance only of matters record upon the face of certified copies of the proceedings had in the lower court, transmitted through the proper channel and certified by the clerk of the trial court. There has been no certification of the alleged documents upon which appellee has based his motion.

"2. And also because appellant further submits that the motion should be vacated in that said motion violates the law of notice as well as appellant's right of confrontation in that the appellant has had no opportunity of being confronted with the alleged author of the purported certificate, nor to examine and cross-examine the appellee and his witnesses on said documents. For these and other legal reasons, appellant requests a denial of said motion with costs against the appellee.

"3. And also because the appeal bond is filed in the Office of the clerk of court and certified to this Honorable Court has met all of the legal requirements—that is to say, said bond carries a valid consideration of six hundred and 00/100 dollars (\$600.00); is duly signed by the principal and two sureties to the satisfaction of the court and its Judge D. W. B. Morris who signed and approved the same; is properly stamped and thereby meets all of the legal requirements of appeal bonds. The application, therefore, seeking to attack said bond in this Court is legally unjustifiable and should not be entertained.

"4. And also because appellant submits that appellee, in contending that the sureties to said bond are insufficient, should have filed a motion for verification of bail before the trial court requesting the judge to submit the principal and sureties to examination, in which case evaluation of the sureties' property might have been undertaken. Appellee's attempt to avoid and evade the provision of the law in such cases made and provided appears strange to the appellant who denies any factual validity to appellee's motion."

Arguing said motion and resistance before this Court, appellee, whilst conceding the point of not having attacked the insufficiency of said appeal bond in the trial court so as to make this issue a part of the appeal record transmitted to this Court, said that he could not have applied to the trial judge for verification of bail because the trial judge had gone out of the jurisdiction immediately after the approval of said bond and that hence there had been no fault on appellee's part.

Since this motion attacks in a one-count submission the insufficiency and ineffectiveness of the appeal bond, this is the only issue on which a decision can be made by this Court in passing on the merits of the motion.

Jurisdiction of all circuit judges is concurrent. But when a circuit judge is presiding by assignment, his term time is limited and hence he is not authorized to perform any judicial act within the circuit after the expiration of said assignment except upon a special assignment of the Chief Justice.

In a case such as the one now under review, where a trial judge loses jurisdiction over a circuit to which he has been assigned and a party appealing from his ruling and/or judgment desires the performance of an act relating to and indispensable to the appeal applied for and granted, which act the trial judge cannot perform because of loss of jurisdiction over the circuit, it has always been and continues to be the rule in this jurisdiction that the party seeking this right must apply to the Supreme Court or Chambers Justice for relief, after which any judge, the trial judge not excepted, may be ordered to perform the act if justice demands it. A party who, having this avenue of relief opened to him, fails to take advantage thereof, must be considered as having waived that right.

Upholding this principle and rule of procedure is the opinion of this Court in *Sherman v. Clarke*, 16 L.L.R. 242 (1965), wherein, at 16 L.L.R. 247, we quoted the following with approval.

“When the jurisdiction of a Circuit Judge assigned

to preside over and within a given circuit shall have expired either by his adjournment before the term normally expires, or by effluxion of time, he loses trial jurisdiction except for the purpose of hearing motions arising out of cases already determined and giving judgment thereon, or approving bills of exceptions all of which should be concluded within ten days." *Thomas v. Dennis*, 5 L.L.R. 92 (1936) Syllabus 8.

"He can exercise trial jurisdiction thereafter only in the event (a) a case in which a jury was empaneled before the end of the trial term had not been concluded, or (b) in the event he had received a special assignment from the Chief Justice which had extended his jurisdiction beyond the term." *Id.* Syllabus 9.

"Nor does the Special Jury Act of 1934 permit a Circuit Judge assigned to a Circuit to extend the term for which he was assigned without a special assignment previously made by the Chief Justice." *Id.* Syllabus 10.

In *Sherman v. Clarke*, *supra*, this court said at 16 L.L.R. 248:

"Under our statute and in a long line of decisions handed down by this Court, the right to restrain a judge from exercising jurisdiction in any manner other than that which the law expressly confers upon him has always been available as a remedy to the offended party, by recourse to the Chambers Justice for the necessary restraining process. Failing to take advantage of this right without any circumstances preventing it made known to the Court is tantamount to waiving it, especially so when the act goes beyond jurisdiction conferred by law."

This principle is applicable where, as in the present case, a judge's assignment has expired before the judge has performed a necessary act. There is no showing in the record or otherwise that appellant made any effort to apply for an order from this Court to have his appeal bond

verified, and the fact that the insufficiency was not raised in the trial court must be excluded from our consideration in this appeal. The motion is therefore denied with costs against appellee. And it is hereby so ordered.

*Motion denied.*