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JAMAICA

IN THE COURT OF APPEAL

R.M. CIVIL APPEAL NO. 46 OF 1972

BEFORE: The Honourable President
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Hercules

BETWEEN: ERIC CHRISTIAN - Appellant/Defendant

AND WESLEY BROWN - Respondent

Mr. Norman Wright for the Appellant/Defendant

Mr. Glen Cruickshank for the Respondent.

2nd FEBRUARY, 1973

Henriques, P.

At the conclusion of this matter, which was an action for the value of a sound system, tried by the learned Resident Magistrate for the parish of Manchester and resulted in judgment being given for the plaintiff, the learned Attorney-at-law who appeared for the defendant gave verbal notice of appeal. That was on the 6th of March, 1972. On the 18th of March, 1972 he filed a document which is to the following effect:

> "Take notice that further to notice of appeal given in open court on the 6th of March, 1972, further notice of appeal is hereby given;
> Take further notice that the sum of $25 as security for costs has been deposited with this notice"

and then his signature is appended thereto.

On the matter coming on for hearing the attention of the learned Attorney who appeared for the appellant was brought to the fact that from the record before the court the provisions of section 256 of Chapter 179 have not been complied with in two

respects by the Attorney for the appellant at the trial. That section, inter alia, is to the following effect:

> "The appeal may be taken and minuted in open court at the time of pronouncing judgment, but if not so taken then a written notice of appeal shall be lodged with the Clerk of the Court and a copy of it shall be served upon the opposite party personally, or at his place of dwelling or upon his solicitor, within fourteen days after the date of the judgment:" and

these are the material words -

> "the party appealing shall <u>at the time of taking or lodging the appeal, deposit in the court the sum of ten shillings as security for the due prosecution of the appeal;</u> and that further, within fourteen days after the taking or lodging of the appeal give security to the extent of twelve pounds for the payment of any costs that may be awarded against the appellant, and for the due and faithful performance of the judgment and orders of the Court of Appeal".

Learned Attorney for the appellant has admitted that payment of the ten shillings or one dollar for the prosecution of the appeal was not in fact made at the time at which the law demanded that it should have been made, but he has asked the court to invoke the provisions of section 266 of Chapter 179 that gives the court a power which is expressed in these terms:

> "The provisions of this Law conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right, and in case any of the formalities as prescribed by this Law shall have been inadvertently, or from ignorance or necessity omitted to be observed it shall be lawful for the Court of Appeal, if it

appear that such omission has arisen from inadvertence, ignorance or necessity, and if the justice of the case shall appear to so require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from".

The question which arises for consideration is whether or not the payment of the one dollar for the due prosecution of the appeal can be said to be a formality in respect of which the court can exercise its power under section 266. The answer to that question seems to lay in the case of Welds v. Montego Bay Ice Co. Ltd., and Smith, which is to be found at page 56 of 5 W.I.R. It is only necessary to refer to the head note to that case in order to arrive at the principle upon which it was decided:

"A preliminary objection being taken by counsel for the respondent to establish that a condition precedent to establish the jurisdiction of the court had not been complied with in that, there being two appellants, security for costs had only been given in one sum of ten pounds, instead of for two such sums as required by the provisions of section 256 of the Judicature (Resident Magistrates) Law, Chapter 179 -

Held: (1) that section 11(2) of the Judicature (Appellate Jurisdiction) Law, 1962, only gave the Court power to extend the time for giving notice of appeal and filing grounds of appeal. The giving of security for costs in accordance with the provisions of section 256 of the Judicature (Resident Magistrates) Law, Chapter 179, was still a condition precedent to the founding of the jurisdiction of the court and there was no power to treat it as a formality under section 266 of the said law;

(ii) that section 256 of the said law expressly required "the party appealing" to give security and as there were two parties appealing the securiry was required to be given by each party".

The principle in that case would apply to the instant case.

It seems to us, therefore, that this particular omission cannot be treated as a formality. Prior to the decision in Welds' case the original section 11(2) of the Judicature (Appellate Jurisdiction) Law, 1962 read as follows:

"The time within which notice of appeal may be given or grounds of appeal may be filed, in relation to appeals under this section, may be extended at any time by the court".

That section was amended as a result of the decision of Welds v. The Montego Bay Ice Co. Ltd., and Smith, in 1970, by Act 12 of that year. The amendment is as follows:

"Notwithstanding anything to the contrary, the time within which (a) notice of appeal may be given or served, (b) security for costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal may be given, (c) grounds of appeal may be filed or served, in relation to appeals under this section, may upon application made in such manner as may be prescribed by the rules of the Court, be extended by the court at any time".

It appears to us that it might very well have been an omission on the part of the Legislature not to include in that amendment provisions dealing with the extension of time within which payment of the one dollar for the due prosecution of the appeal might be made. This is a situation which ought to be remedied.

Before finally parting with this matter, there is one other point which arises and that is, namely, whether the written notice of appeal which was given on the 18th of March can be said to be an effective notice of appeal. It appears from the decision of

this court in R. v. Jim Maslanka, which was given on the 26th of May, 1972, that so far, at any rate, as a criminal case is concerned, there is only one notice of appeal, and there appears no valid reason for drawing a distinction in a civil case. I refer to a passage in the judgment of the learned judge who dealt with that particular matter:

> "Firstly, there is a mistake of failing to appreciate that a convicted person is given by the law one right of appeal only and not two, three, four, or so many rights of appeal as are numerically capable of development within fourteen days after convictions and following upon successive abandonments of appeal. The right of appeal is indivisible, when it is exercised it is expended....."

It seems to us that the effective notice of appeal was the verbal notice of appeal, and according to section 256 of the law it was at that time that the payment of the one dollar for the due prosecution of the appeal should have been made.

It is clear from the record that no amount whatever was paid for the due prosecution of the appeal. In the circumstances, therefore, the court is constrained to dismiss the appeal with costs thirty dollars.