# COKER *v.* COKER

SUPREME COURT (Kingsley, J.): May 3rd, 1951
(Civil App. No. 20/50)

**[1] Civil Procedure—appeals—procedure—failure to fulfil statutory condition fundamental to appeal procedure is defect depriving appeal court of jurisdiction—no waiver of right to object by failure to take point:** Where an appellant fails to fulfil a statutory condition requisite for the purposes of his appeal so that that failure amounts to a fundamental defect, the effect is to deprive the appeal court of any jurisdiction over the appeal and, if the appeal is nevertheless heard, to render inapplicable any suggestion that the respondent waived his right to object by not taking the point at the proper time; and therefore failure to keep to a statutory time limit for the entering of an appeal, or for providing security to abide by the judgment of an appeal court, as provided in ss.5 and 9 respectively of the Appeals from Magistrates Ordinance (*cap.* 14), renders any appeal proceedings a nullity (page 131, line 37—page 132, line 39).

**[2] Civil Procedure—judgments and orders—rectification—person affected by null order entitled to have it set aside—court may set aside own null order in exercise of inherent jurisdiction:** A person who is affected by an order of the court which can properly be described as a nullity is entitled *ex debito justitiae* to have the order set aside, and the court which made the order can set it aside in the exercise of its inherent jurisdiction without it being necessary to appeal (page 133, lines 4–10).

**[3] Courts—jurisdiction—absence of jurisdiction—adjudication without jurisdiction nullity—non-fulfilment of statutory condition fundamental to appeal procedure deprives appeal court of jurisdiction:** See [1] above.

**[4] Courts—jurisdiction—inherent jurisdiction—court may set aside own null order:** See [2] above.

**[5] Courts—magistrates' courts—appeals—time limits laid down by Appeals from Magistrates Ordinance (cap. 14), ss.5 and 9—failure to observe time limit deprives appeal court of jurisdiction—no waiver of right to object by failure to take point:** See [1] above.

**[6] Time—time for appeal—time limit laid down by Appeals from Magistrates Ordinance (cap. 14), s.5—failure to observe time limit deprives appeal court of jurisdiction—no waiver of right to object by failure to take point:** See [1] above.

**[7] Time—time for providing security for appeal—time limit laid down by Appeals from Magistrates Ordinance (cap. 14), s.9—failure to observe time limit deprives appeal court of jurisdiction—no waiver of right to object by failure to take point:** See [1] above.

The respondent brought an action against the appellant in a magistrate's court to recover rent which had been collected.

At the trial judgment was given for the respondent, and on appeal the Supreme Court made an order remitting the case to the magistrate's court for rehearing. It was then brought to the court's attention that the appeal had not been entered within the 15 days laid down in s.5 of the Appeals from Magistrates Ordinance (*cap.* 14), and that the appellant had not deposited security to abide by the appeal court's judgment within the 15-day period specified by s.9 of the Ordinance.

**Cases referred to:**

(1) *Craig* v. *Kanssen*, [1943] K.B. 256; [1943] 1 All E.R. 108, applied.

(2) *Moore* v. *Tayee* (1934), 2 W.A.C.A. 43, followed.

(3) *Oranye* v. *Jibowu* (1950), 13 W.A.C.A. 41, *dicta* of Lewey, J.A. applied.

**Legislation construed:**

Appeals from Magistrates Ordinance (Laws of Sierra Leone, 1946, *cap.* 14), s.5:

The relevant terms of this section are set out at page 131, line 40—page 132, line 1.

s.9: The relevant terms of this section are set out at page 132, lines 2–4.

KINGSLEY, J.:

The claim in this case which was for rent collected was decided before Mr. Cummings-John, then acting magistrate, who on November 10th, 1950 gave judgment for the plaintiff for £18. 1s. 3d. and costs, and it was against this judgment that the defendant appealed to the Supreme Court.

The appeal came before me on April 12th last when the appellant was represented by counsel. The respondent appeared in person. Before the learned acting magistrate both parties had appeared in person. Assuming the papers to be in order, I heard the appeal and remitted the case for a new hearing by another magistrate, Mr. Cummings-John having by that time ceased to act.

After I had left the Bench, it was then brought to my notice that the appeal had been out of time. The relevant sections of the Appeals from Magistrates Ordinance (*cap.* 14) are ss.5 and 9 respectively. The former provides that—"every appeal against any judgment . . . of a Magistrate's Court established in the Colony

shall be entered within fifteen days of the date of such judgment"; the latter provides that where the appellant as in this case gives security to abide by the judgment of the appeal court "he shall pay the amount thereof within the fifteen days allowed for appealing."

In this case the necessary security was not deposited until December 22nd, 1950, nearly a month after the expiry of the statutory period. The record of course should not have been transmitted to the Registrar, as it should have been noticed in the magistrate's office that the appellant was out of time. Not only was this not noticed, but everybody likewise failed to observe that 18 + 1 = 19, and not 29.

The appellant having failed to comply with the statutory requirements, the appeal was thus wrongly admitted, and the proceedings before me accordingly a nullity. In *Oranye* v. *Jibowu* (3), Lewey, J.A. said (13 W.A.C.A. at 41):

> "It should have been quite clear, when this case came from the Magistrate to the Supreme Court Judge, that the defendant appellant was out of time, and also that no steps had been taken to extend the time . . . . Those were two very serious defects, although they appear to have escaped the notice of everybody concerned with the result that the Judge proceeded to hear the appeal. In my view, however, they constitute an irregularity so fundamental that there was no appeal which the learned Judge could entertain, and, therefore, the mere fact that the irregularity was not noticed or that no objection was taken to it, is not an argument which can be put forward with any effect when the matter comes before this Court.
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> The irregularity is not one of those of which it can be said that the parties have waived their right to object owing to the matter not having been brought up at the proper time. On the contrary, it seems to me beyond doubt that failure to comply with these statutory requirements deprived the Supreme Court of any jurisdiction to hear the appeal. In other words, there never was an appeal before the Supreme Court at all."

The learned judge then went on to refer to the case of *Moore* v. *Tayee* (2), in which the Privy Council decided that where an appellant failed to fulfil certain statutory conditions requisite for the purposes of his appeal, that failure of his deprived the appeal court of any jurisdiction.

In short then the proceedings before me were a nullity, and the question now arises: Can I myself set aside my own decision?

The answer I think is in the affirmative. In *Craig* v. *Kanssen* (1), it was there held, to quote from the Law Reports headnote ([1943] K.B. at 256):

> "A person who is affected by an order of the court which can properly be described as a nullity is entitled ex debito justitiae to have it set aside . . . . The court can set aside such an order in its inherent jurisdiction and it is not necessary to appeal from it."

I accordingly set aside my own order remitting the case for a fresh hearing. It follows that the judgment in the court below must stand and the appeal is struck out. In the circumstances I will make no order as to the costs of the appeal.

*Order accordingly.*

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## ROBERTS v. COLE

SUPREME COURT (Smith, C.J.): June 15th, 1951
(Civil Case No. 258A/50)

[1] **Land Law—joint tenancy—incidents—unity of possession, interest, title and commencement:** A joint tenancy is distinguished from a tenancy in common by unity of possession, unity of interest, unity of title and unity of commencement of such title; and therefore where a testator devises property to named children for life but directs that his daughters' interests should cease on marriage, there is no unity of interest between sons and daughters and, notwithstanding the absence in the will of words of severance, all the children named take as tenants in common (page 135, lines 11–20).

[2] **Land Law—tenancy in common—creation—devise to all children for life with daughters' interests to cease on marriage creates tenancy in common:** See [1] above.

[3] **Succession—wills—construction—joint tenancy and tenancy in common—devise to all children for life with daughters' interests to cease on marriage creates tenancy in common:** See [1] above.

The plaintiff brought an action against the defendant to recover possession of certain properties to which he claimed entitlement under a will.

A testator devised certain properties to his sons by one wife and their heirs and his children by another wife. He stipulated that "the whole of his children should have a life interest in the