RENNEY PENTEE, Plaintiff-In-Error, v. **HIS HONOUR ALEXANDER B. ZOE,** Judge, Sixth Judicial Circuit, Montserrado County, and **GEORGE S. B. TULAY**, Defendants-In-Error.

PETITION FOR A WRIT OF ERROR TO THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: June 4, 1997. Decided: August 15, 1997.

1. The court is usually guided by the returns of the sheriff which are presumed to be correct for all intents and purposes unless they are challenged, in which case the court is to conduct an investigation into the manner of service.

2. A party is not brought under the jurisdiction of a court by means of a writ of attachment, but rather by a writ of summons which, when served, gives the court jurisdiction over the party.

3. A writ of attachment and a writ of summons are distinguishable, serve different purposes, and cannot be used interchangeably. The former is an order to seize a debtor's property so as to secure a claim of a creditor, or to enforce obedience to an order or judgment of a court, whereas the latter is an instrument used to commence a civil action or special proceedings and is a means of acquiring jurisdiction over a party.

4. A writ of summons must be directed to a ministerial officer of the court in which the action is brought; state the court and names of the parties and their addresses, if known; be signed by the clerk and bear the seal of the court; state the time the defendant is required to appear and defend; and notify him that in case of his failure to do so judgment by default will be rendered against him.

5. The insertion in a writ of attachment to have the defendant summoned while at the same time ordering the seizure of his property is not sufficient, without a writ of summons, to bring him under the jurisdiction of the court.

6. Averments in a pleading to which a responsive pleading is required are deemed admitted when not denied in the responsive pleading.

7. Averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided.

8. An applicatory affidavit is different from an ordinary affidavit, the former to secure an attachment and the latter being a voluntary declaration confirming by the oath or affirmation of the party making it as to the truthfulness of allegations in the document attached thereto.

9. A writ of error is a writ by which the Supreme Court calls up for review the judgment of an inferior court from which an appeal was not announced on rendition of judgment.

10. "Day in court" means the right and opportunity afforded a person to litigate his claims, seek relief; or defend his rights in a court of competent jurisdiction. It means not so much the time appointed for a hearing as the opportunity to present one's claims or rights in a proper forensic hearing before a competent tribunal.

11. A litigant has his "day in court" when he has been duly cited to appear and to be heard.

12. A writ of error, and not a motion for relief from judgment, is the proper remedy for one who claims to have been deprived of his day in court.

13. The withdrawal of an appeal and the payment of costs are positive indications of the appellant's submission to and compliance with the judgment appealed from, and confirms it as a conclusive adjudication of the issues between the parties.

14. The payment of costs is always by the losing party, and where such costs are paid in the subordinate court without review by the appellate court of the ruling or judgment, the losing party thereby admits legal justification for the said ruling or judgment.

15. Prior to the payment or satisfaction of a bill of costs, same must be taxed by both parties and approved by the judge.

16. The sheriff cannot issue a receipt for a bill of costs when no such bill was prepared by the clerk of the court in which the judgment was rendered.

17. A bill of costs is a certified, itemized statement of the amount of costs in an action or suit. Thus, in the absence of such bill of costs, a party cannot claim to have paid the bill of costs.

Plaintiff-in-error, against whom judgment was entered by default and execution served, applied to the Supreme Court for a writ of error, asserting that he did not have his day in court, in that he was never served with summons or assignment for the hearing of the case in which judgment was entered against him. Co-defendant-in-error S. B. Tulay had instituted an action of specific performance by attachment against the plaintiff-in-error. The action was subsequently dismissed by the trial court. Thereafter, a new action of specific performance by attachment was instituted by the co-defendant-in-error. The plaintiff-in-error asserted that the bailiff who claimed to have served the process on him in the second action had mistakenly served the summons on plaintiff-in-error's father, and that the lack of service was substantiated by the fact that he was never arrested prior to service of the execution although the action was one by attachment. The defendants-in-error denied that the plaintiff-in-error was not served with summons, stating that the document signed by the bailiff that he had served the plaintiff-in-error's father was untrue since the bailiff had inti-

mated that he had signed the said document under the misrepresentation by plaintiff-in-error's counsel that he was signing a receipt.

The Supreme Court agreed with the plaintiff-in-error, noting that there was only evidence of the service of a writ of attachment, which it said was distinguishable from a writ of summons and which, by itself, without a writ of summons, is insufficient to confer jurisdiction of the court over the person or a party. The Court also decried the inconsistent averments of the bailiff, noting that while the Court is generally guided by the returns of the sheriff which are presumed to be correct unless challenged, those inconsistent averments brought into question the truthfulness of the returns that service was made of the writ of summons.

As to whether a writ of error was the proper remedy, the Court held that it was, since the allegation was that the plaintiff-in-error had been deprived of his day in court and therefore did not have the opportunity to appeal from the judgment entered against him. In addition, the Court held that it had reservations regarding the payment of costs by the co-defendant-in-error, a requirement for institution of the second action against the plaintiff-in-error in which judgment was rendered, since there was no evidence that the clerk of the trial court had ever issued a bill of costs which had been taxed by the parties and approved by the judge. The Court noted that in the absence of such bill of costs, the co-defendant-in-error could not legally make payment to the sheriff of any amount claimed to be the costs of court.

The Court therefore opined that under the circumstances the writ of error should issue.

Flaawgaa R. MacFarland appeared for the plaintiff-in-error. *Ignatius N. Weah* of The Tulay and Associates, in association with *Frederick A. B. Jayweh* appeared for the defendants-in-error.

MRS. CHIEF JUSTICE JOHNSON-MORRIS delivered the opinion of the Court.

This case, which is before us on a petition for a writ of error, originated from an action of specific performance of a contract by attachment which was instituted by co-defendant--in-error, George S. B. Tulay, against plaintiff-in-error, Renney Pentee, in the Civil Law Court for the Sixth Judicial Circuit Court, Montserrado County during its September Term, A. D. 1994, presided over by His Honour Varney D. Cooper. The action of specific performance by attachment was, however, dismissed without prejudice by the Civil Law Court on the strength of a motion to dismiss filed by plaintiff-in-error. Codefendant-in-error, George S. B. Tulay, excepted to the ruling dismissing his action and announced an appeal therefrom to this Court for review at its March Term, A. D. 1995. Although the trial court granted his appeal, it appears from the record that Co-defendant-in-error Tulay did not perfect his appeal to this Court but abandoned same and reinstituted the action on December 30, 1994 in the same Civil Law Court during the December Term, A. D. 1994. The writ of attachment was issued by the clerk of the Civil Law Court on the same 30thday of December, A. D. 1994

and served on the 3r d day of January, A. D. 1995 by Bailiff David Rennie of the Civil Law Court on the within named respondent who received his copy of same, along with the relevant documents of complaint and signed the original. Returns to the effect was made by the Deputy Sheriff Richard Scott.

Following the issuance and service of the writ of attachment on the 30th day of December, A. D. 1994, the clerk of court issued a certificate to the effect that defendant had not filed any answer or return up to the date of the issuance of the certificate. The certificate which was signed by the assistant clerk of court, Jacob F. Nyumah, was dated 17t h January 1995. Subsequently, a notice of assignment was issued by the clerk of court on the 26t h day of January, A. D. 1995 for trial on the 28thday of January, A. D. 1995. The sheriffs returns to that notice of assignment reads thus:

"On the 27th day of January, A. D. 1995, court's Bailiff David Rennie carried out the within notice of assignment on the within named parties. The plaintiff signed same and received his copy thereof; but the defendant/respondent refused to sign and accept the notice of assignment. Hence, these are my official returns to the clerk of this Honourable Court. Dated the 27thday of January, A. D. 1995. Signed: the Deputy Sheriff for Mo. Co., Richard Scott.

Based upon the above returns of the sheriff, the trial court, presided over by His Honour C. Alexander B. Zoe, conducted an *ex parte* hearing on the 28th day of January, A. D. 1995, with plaintiff, now Co-defendant-in-error George S., B. Tulay, producing evidence to substantiate his complaint. Thereafter, default judgment entered in favour of the co-defendant-in-error and against plaintiff-in-error was confirmed. The default judgment was entered on February 1, 1995.

Subsequent to the entry of the said default judgment against plaintiff-in-error, a writ of arrest and a commitment were issued on the 2nd day of February, A. D. 1995 by the clerk of court for the arrest and detention of plaintiff-in-error as per the directive of the trial judge contained in the court's final decree.

On the 14th day of February, A. D. 1995, Defendant Renney Pentee fled to this Court with a petition for a writ of error to the Justice in Chambers, the late Frank W. Smith. The sub-stance of the eight-count petition for the writ of error can be summarized as follows:

1. That plaintiff-in-error, Renney Pentee, and Co-defendant-in-error George S. B. Tulay were once party litigants in an action of specific performance of a contract by attachment filed April 21, 1994 by Co-defendant-in-error George S. B. Tulay against plaintiff-in-error.

2. That on November 24, 1994, the said action was dismissed by the trial judge, His Honour Varney Cooper during the September Term of court, A. D. 1994, from which ruling co-defendant-in-error appealed and his appeal was granted.

3. That plaintiff-in-error has no knowledge whether Codefendant-in-error Tulay has ever withdrawn his appeal from the court, as prayed for, and filed a new action since no notice of withdrawal has been served on him. Further, Plaintiff-in-error Pentee says his counsel and he have no knowledge whether or not Co-defendant-in-error Tulay ever paid the court's costs or party expenses prior to the institution of the subsequent suit, since he was ruled to pay the expenses and costs of court when the former action was dismissed on November 24, 1994. Accordingly, plaintiff-in-error contended that he had no knowledge of a subsequent suit, except the original complaint filed on April 21, 1994, already mentioned. Therefore, plaintiff-in-error maintained that he has been denied his day in court for the hearing of the second action.

In count four (4) of his petition, plaintiff-in-error averred that on February 13, 1995, he was served with three precepts by Bailiff David Rennie: a judgment, a writ of arrest, and a commitment for imprisonment, all from the Civil Law Court, Sixth Judicial Circuit, signed by Judge Zoe and upon his order. Plaintiff-in-error denied having any knowledge of the proceedings out of which the said precepts marked "exhibits 5, 6, and 7 respectively, grew.

In count five (5) of the petition, plaintiff-in-error buttressed his claim of having no knowledge of the second action by referring to his exhibit 8 in which the bailiff who allegedly served the summons on plaintiff-in-error confirmed in writing, in the presence of a witness, that he in fact never served him with the complaint but that he mistakenly served the complaint with the writ of attachment on the father of the plaintiff-in-error.

Further, in count six (6), plaintiff-in-error maintained, amongst other things, that it was legally and factually impossible for Co-defendant-in-error George S. B. Tulay to have filed and served a second action of specific performance by attachment without the knowledge of the plaintiff-in-error when such a writ of attachment requires that he files a bond or be arrested and imprisoned. Since he had never filed a bond in the subsequent action, or been arrested and imprisoned, this confirmed the fact that he had no knowledge of the subsequent suit against him.

In counts seven (7) and eight (8) of the petition, plaintiff-in-error recited the statutory averments which are required to be inserted in a petition for a writ of error, i.e. that the judgment had not been executed, that a certificate from another counsellor had been obtained confirming the correctness of the petition, that accrued costs had been paid, and that the petition had not been made for the mere purpose of harassment and delay but had been filed in good faith.

In view of the above facts and circumstances, plaintiff-in-error prayed this Court to grant him a writ of error for the correction and review of the ruling of co-defendant-in-error, Judge Zoe, in order to confirm that the plaintiff-in-error had no opportunity to be present in

court and to announce an appeal, and to grant unto him all other rights deemed fit under the law.

To the above petition of the plaintiff-in-error, defendants-in-error, George S. B. Tulay, et al. filed a six-count returns containing twenty-five (25) paragraphs. We shall consider only those counts which we deem important to the determination of this case.

In count 2, paragraphs (a), (b) and (c) of the returns, Codefendant-in-error George S. B. Tulay argued that he satisfied the judgment of November 21, 1994 by paying the bill of costs in said case. Hence, he contended that there was no need to file a notice of withdrawal of the appeal and to serve a copy on the plaintiff-in-error or his counsel as the payment of the bill of costs put finality to the case. Co-defendant-in-error Tulay proferted a photocopy of the receipt for the payment of the bill of costs, marked exhibit "A", to form a part of the returns. Defendants-in-error further maintained that plaintiff-in-error and his counsel had full knowledge that Co-defendant-in-error Tulay paid the bill of costs because they received their expenses in said case from the sheriff of the Civil Law Court for Montserrado County.

In paragraphs (d) and (e) of count two (2), defendants-in-error contended that plaintiff-in-error was duly served with the writ of attachment on January 3, 1995, in the office and residence of Counsellor R. Flaawgaa MacFarland on Camp Johnson Road by Bailiff David Rennie and that the plaintiff-in-error signed the original writ. Therefore, defendants-in-error argued that plaintiff-in-error, having been served and returned served, he had sufficient and full knowledge of the action out of which these error proceedings grew. Consequently, his failure to appear and file his returns or defend the action does not constitute a denial of his day in court.

In paragraph (f) of count two (2), defendants-in-error observed that even assuming, without admitting, that the allegations of count three (3) of the petition for a writ of error are true, that is, that Co-defendant-in-error Tulay failed to file a formal withdrawal of his appeal before instituting the second action, that fact does not constitute a ground for the granting of a writ of error.

In count three (3) of defendants-in-error returns, they confirmed that plaintiff-in-error was served and returned served with the pleadings in the second action on January 3, 1995, and was again served with a notice of assignment for the hearing of the case on January 27, 1995. They attached copies of the writ of attachment and notice of assignment, marked exhibits "A" and "C" respectively.

Defendants-in-error, in count four (4) of the returns, denied the averments of count five (5) of the petition to the effect that Bailiff Rennie confirmed in writing that he never saw plaintiff-in-error but instead mistakenly served the complaint, with the writ of attachment, on the father of the plaintiff-in-error, and not the plaintiff-in-error. To the contrary,

defendants-in-error argued in count 4(b) of their returns to the petition that Bailiff Rennie was misled and fooled by the plaintiff-in-error and his counsel to sign the affidavit which is plaintiff-in-error's exhibit 8, after they told the Bailiff that they wanted him to witness a receipt for some money that the plaintiff-in-error was paying to his counsel, Counsellor MacFarland. Defendants-in-error referred the Court to their exhibits "D", "E", and "F" as evidence of this allegation.

Defendants-in-error, further traversing the petition of plaintiff-in-error, submitted in paragraph C of count four (4) that even assuming, without admitting, that plaintiff-in-error was not personally served, which is contrary to the returns of the sheriff, the writ of error is not the proper remedy; rather, a motion for relief from judgment, filed before the trial court, would have been the proper remedy. For reliance, defendants-in-error cited 1LCLR, page 212, sec. 41.7, sub-sections 2(a) to (e), pp. 54-55, and sections 3.4 and 3.62. Arguing this point further, defendants-in-error said that information or a motion before the trial court to investigate the bailiff and the sheriff as to the manner of service of the precepts would have been proper, since the plaintiff-in-error was not before court or the court did not have jurisdiction over his person. Hence, the court would not have denied him his day in court. Therefore, they say, error will not lie. Defendants-in-error further maintained that plaintiff-in-error failed to challenge the sheriff's returns in the court below because he was personally served in the presence of his counsel. In addition to this, defendants-in-error contended that the co-defendant-in-error judge relied upon the returns of the sheriff to conduct the trial on January 26, 1995 since the returns were not challenged. Also, defendants-in-error observed that plaintiff-in-error should have made the sheriff and the bailiff parties to the proceedings so that this Court could summon them to have jurisdiction over them in order that this Court may deal with them. Plaintiff-in-error having failed to do so, defendants-in-error submitted that this Court lacks jurisdiction over them and cannot legally investigate or deal with them. Consequently, defendants-in-error prayed that the entire petition should be dismissed. For reliance, they cited the Civil Procedure Law, Rev. Code 1: 112 (1)(b); *Donzoe v. Thorpe et al.,* 27 LLR 166 (1978), text at pages 171 173; *Thomas v. Dennis, 5* LLR 92, 102-104 (1936).

Countering count six (6) of the petition further, defendants-in-error contended that the fact that plaintiff-in-error was not confined does not mean that he was not personally served because plaintiff-in-error similarly did not file a bond, and was not confined in the first action that was dismissed on November 1, 1994 by Judge Cooper. Defendants-in-error further asserted that plaintiff-in-error was taken to court but not to prison when arrested on January 3, 1995 because of the intervention of his counsel, Counsellor McFarland.

Finally, relative to count seven (7) of the petition, defendants-in-error denied the averments contained therein, in that, ac-cording to defendants-in-error, the petition of the plaintiff-in-error was filed for the mere purpose of harassing the defendants-in-error and

delaying and baffling justice, in bad faith. Defendants-in-error therefore prayed this Court to overrule, deny and dismiss the petition, sustain their returns and order the co-defendant-in-error judge's final decree, rendered on February 1, 1995, executed and enforced, and to rule costs of the proceedings against the plaintiff-in-error.

In the opinion of the Court, the petition and the returns thereto present three key issues which are decisive of the controversy between the parties. The issues are:

1. Whether or not a court can acquire jurisdiction over a party by service upon him of a writ of attachment;

2. Whether or not a writ of error is the proper remedy available to a person who claims he was not brought under the jurisdiction of a trial court by service of precepts upon him; and

3. Whether or not the payment of costs in an action by the appealing party to the sheriff in the absence of a taxed and approved bill of costs can legally abate the appeal.

Under the practice and procedure in this jurisdiction, the court is usually guided by the returns of the sheriff which are presumed to be correct for all intents and purposes unless they are challenged, in which case the court is to conduct an investigation into the manner of service. In the instant case, notwithstanding the sheriffs returns to both the writ of attachment and the notice of assignment, as alluded to *supra,* to the effect that the plaintiff-in-error was served and returned served with both precepts, there also appears in the records of the case an applicatory affidavit dated February 11, A. D. 1995, signed by David Rennie as deponent, and marked "exhibit 8". This "exhibit 8" was proferted with the petition of plaintiff-in-error. Because of the vital importance of this document to the case, we shall quote same verbatim for the benefit of this opinion. The said affidavit reads thus:

REPUBLIC OF LIBERIA MONTSERRADO COUNTY, IN THE OFFICE OF THE JUSTICE OF THE PEACE FOR AND IN MONTSERRADO

IN RE: George S. B. Tulay of the City of Monrovia PLAINTIFF/PETITIONER Versus Renney Pentee, also of the City of Monrovia, Liberia DEFENDANT RESPONDENT / ACTION OF SPECIFIC PERFORMANCE OF A CONTRACT BY ATTACHMENT

APPLICATORY AFFIDAVIT

PERSONALLY APPEARED BEFORE ME, a duly qualified Justice of the Peace for and in Montserrado County, at my office in the City of Monrovia, County of Montserrado, Republic of Liberia, Bailiff David Rennie, Bailiff, Sixth Judicial Circuit, Montserrado County, and made oath that:

1) I never saw and served plaintiff-in-error Renney Pentee any precepts growing out of the above case.

2) Besides that, no summons was ever given me and served on Plaintiff-in-error Renney Pentee; only writ of attachment was served, together with the complaint, on plaintiff-in-error's father by mistake.

That all and singular the allegations of both law and facts as are set forth and contained in the foregoing, and annexed to plaintiff-in-error's petition, are true and correct to the best of my knowledge and belief; and as to those matters of information received, I verily believe them to be true and correct.

SWORN and SUBSCRIBED TO
BEFORE ME THIS 14th DAY OF
FEBRUARY, A. D. 1995.
SIGNED: _____
JUSTICE OF THE PEACE, MONT. CO .
SIGNED_____
DAVID RENNIE/DEPONENT
$3.00 stamps affixed on original"

The above scenario is just a sample of the diverse designs and tactics employed by both officers of court and members of our noble profession to thwart and pervert justice and the truth. It is indeed sad and regrettable that truth and justice which are the object of any judicial inquiry are so often suppressed by those trained to defend and uphold these virtues.

The issue of the service of the precepts upon the plaintiff-in-error is further complicated in that Bailiff Rennie, after swearing to the affidavit, quoted above, again swore to another affidavit, this time in favor of the defendants-in-error, to the effect that he was misled and fooled by Counsellor MacFarland to issue the first affidavit. The second affidavit which is dated February 27, A. D.1995, is defendants-in-error exhibit "F". Because the said affidavit is so lengthy, containing 9 counts, we shall only quote counts two (2) and eight (8) thereof:

Count two reads as follows:

" I received and signed for the writ of attachment and the defendant/respondent's copy of the plaintiff/petitioner's petition in the above captioned case from the sheriff of the Civil Law Court, Sixth Judicial Circuit, Montserrado County on December 30, 1994 and served same on the defendant/respondent, Renney Pentee, in the presence of Counsellor Flaawgaa R. McFarland, right in the office and home of Counsellor McFarland on Camp Johnson Road, Monrovia, Liberia, on January Pi 1995 and he, Renney Pentee, signed or wrote his name on the original copy of said writ and received his copies of said writ and petition and I

made my returns to the sheriff of said court as to the manner of service of this writ on January 3, 1995. Attached hereto are photocopies of the sheriff dispatch books where I signed for the writ of attachment and returns to the sheriff of court and marked as exhibits 'A' and 'H' respectively, to form parts of this affidavit."

COUNT 8 reads thus:

"I know Renney Pentee and his father very well. Renney Pentee lives in Logan Town and his father lives in Gardnersville. I have not seen his father for more than eight months now. I never served any paper on his father, but himself."

The sheriffs returns clearly state that he served a writ of attachment on the plaintiff-in-error on 3rd January, 1995 followed by a notice of assignment for trial of the case which notice of assignment the plaintiff-in-error refused to sign for and receive. In the Court's mind, the sheriffs returns confirm the claim of the plaintiff-in-error that he was never summoned to appear in the second action because one is not brought under the jurisdiction of a court by means of a writ of attachment; rather it is a writ of summons which, when served upon a party, gives the court jurisdiction over that party.

These two writs are distinguishable. A writ of attachment is defined as an order to seize a debtor's property so as to secure the claim of a creditor; a writ employed to enforce obedience to an order or judgment of the court. It may take the form of taking or seizing property to bring it under the control of the court. In its generic sense, any mens or civil process in the nature of a writ on which property may be attached, including trustee process. BLACK'S LAW DICTIONARY 1906 (6thed). A summons is defined as an instrument used to commence a civil action or special proceeding and is a means of acquiring jurisdiction over a party; a writ or process directed to the sheriff or the proper officer, requiring him to notify the person named that an action has been commenced against him in the court from where the process issues and that he is required to appear on a day named, and answer the complaint in such action. Upon the filing of the complaint the clerk is required to issue a summons and deliver it for service to the Marshal or to a person specially appointed to serve it. *(Ibid.,* 1436).

Under our Civil Procedure Law, at section 3.32, entitled *Summons to be issued forthwith,* it is provided, as follows: "On the filing of a complaint, the clerk of the court, or in a court not of record, the magistrate or justice, shall issue the writ of summons or other writ forthwith." Also, section 3.33 of the same law, entitled *Forms of Summons,* throws further light on the function of the writ of summons. Section 3.33 reads thus:

"The summons shall be directed to the ministerial officer of the court in which the action is brought; shall state the court and names of the parties, together with their addresses, if known; shall be signed by the clerk and bear the seal of the court; shall state the time within

which the defendant is required to appear and defend; and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. In a court not of record, a statement of the substance of the complaint shall be included in the summons.'"

Given the foregoing distinction between a writ of attachment and a writ of summons, it is clear that these two writs serve different purposes and cannot be used interchangeably as was done in the instant case. Further, the mere insertion of a clause in the writ of attachment to have the defendant summoned while at the same time ordering the seizure of his property is not sufficient. It is a misapplication of the legal precepts.

Now, what is the effect of the two conflicting applicatory affidavits sworn to by the ministerial officer, Mr. David Rennie, regarding the service of the writ of attachment and the notice of assignment by him upon the defendant/plaintiff-in-error.

Defendants-in-error strongly argued that the failure of the plaintiff-in-error to file a responsive pleading, i.e., answering affidavit to the averments contained in the second applicatory affidavit issued by Bailiff Rennie in his favor, amounts to an admission of the averments in that affidavit to the effect that plaintiff-in-error was in fact served with precepts. This argument is tenable in law. The Civil Procedure Law, Rev. Code 1: 9.8, states thus:

"Effect of failure to deny. Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading. Averments in a pleading, to which no responsive pleading is required shall be taken as denied or avoided."

But the question is whether the service of a writ of attachment alone upon a party brings him under the jurisdiction of a court without a writ of summons as required by law. We think not, and it is obvious that this cannot be done in view of the distinction between the two writs as outlined above. Besides, under our Civil Procedure Law, Rev. Code 1:7.15, an applicatory affidavit is that which is subscribed and sworn to by a plaintiff applying for an order of attachment. In that applicatory affidavit, the plaintiff, his attorney or agent states his claim and the damages that he believes he has sustained, thereby showing that one or more of the grounds of attachment provided by section 7.11 of 1 LCLR exist, and that he fears that the defendant cannot be found to be summoned or will not appear or answer if summoned, and therefore he may be unable to enforce a judgment against the defendant without an attachment. A copy of the complaint shall be presented to the judge with the application. This is the office of an applicatory affidavit. This affidavit is different from the ordinary one which is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.

Hence, what we see in the case of the two applicatory affidavits subscribed and sworn to by Bailiff Rennie is a misapplication of the applicatory affidavit.

Against this background, we are of the view that plaintiff-in-error was not brought under the jurisdiction of the court and therefore he did not have his day in court in the second action of December 30, 1994.

A writ of error is described by the Civil Procedure Law, Rev Code 1: 16.21, paragraph 4, sub-chapter E, as a writ by which the Supreme Court calls up for review the judgment of an inferior court from which an appeal was not announced on rendition of judgment.

The plaintiff-in-error in the instant case, as already stated herein above, claimed that he was neither summoned to appear and defend his interest nor notified of the hearing of the second action of December 30, 1994, after the dismissal of the first action on November 24, 1994. Therefore, plaintiff-in-error contended that he was denied his day in court. The defendants-in-error refuted this claim and requested this Court to take judicial notice of the sheriff's returns to the writ of attachment dated 3rd January 1995.

At this point, it is necessary to be clear on what is meant by day in court. "Day in court" has been defined as "the right and opportunity afforded a person to litigate his claims, seek relief, or defend his rights in a competent judicial tribunal. The time appointed for one whose rights are called judicially in question, or liable to be affected by judicial action, to appear in court and be heard in his own behalf. This phrase, as generally used, means not so much the time appointed for a hearing as the opportunity to present one's claims or rights in a proper forensic hearing before a competent tribunal.

A litigant has his "day in court" when he has been duly cited to appear and to be heard". See BLACK'S LAW DICTIONARY 396 (6thed 1990). In keeping with this definition of "day in court", the records in this case established the fact that the plaintiff-in-error was not served with summons to bring him under the jurisdiction of the trial court. Hence, the writ of error would be the proper remedy and not a motion for relief from judgment as argued by defendants-in-error because under the Civil Procedure Law, Rev. Code 1: 1.1.7, Relief from Judgment, it is stated that a motion for relief from judgment does not affect the finality of a judgment or suspend its operation. It would therefore be unreasonable for one who claims to have been deprived of his day in court to resort to a remedy that would enforce a judgment against him, growing out of a matter to which he was not a party.

Regarding the third issue, the answer to this issue is in the affirmative. In the case *Liberia Trading Corporation v. Abi Jaoudi and Azar Trading Corporation,* 14 LLR 43 (1960), at syllabi 7 and 8, this Court held that withdrawal of an appeal and payment of costs is positive indication of the appellant's submission to and compliance with the judgment appealed from, and confirms it as a conclusive adjudication of the issues between the parties. The

court went on to say that payment of costs is always by the losing party; and when costs are paid in a subordinate court without review by the appellate court of the ruling or judgment, the losing party thereby admits legal justification for the said ruling or judgment.

In the instant case, the plaintiff-in-error has denied the payment of the bill of costs in the original action by Codefendant-in-error Tulay prior to the institution of the second action. On the other hand, co-defendant-in-error, George S. B. Tulay con-firmed that his second action was legally filed because he paid the bill of costs on December 30, 1994, and that plaintiff-in-error and his counsel are in full knowledge of this fact because they received their expenses in the said case from the sheriff of the Sixth Judicial Circuit Court, Montserrado County. Defendants-in-error further averred that a photocopy of the receipt issued by the plaintiff-in-error and his counsel to the sheriff for their expenses was attached to their returns. An inspection of the records of the case, how-ever, showed that no bill of costs was made in the case and no such receipt from plaintiff-in-error and his counsel was attached to the said returns of the defendants-in-error as alleged in count 2(c), because there appeared none in the records of the case. However, co-defendant-in-error George S. B. Tulay was issued a receipt for the amount of $132.00 by the sheriff as payment for the bill of costs. The date of the said receipt is December 30, 1995, the same date on which the new action was filed. It is the practice and procedure in our courts that prior to payment or satisfaction of a bill of costs, same must be taxed by both parties and approved by the judge. We are therefore at a loss as to how the sheriff of the Civil Law Court could have issued co-defendant-in-error, George S. B. Tulay, a receipt for payment of a bill of costs when no such bill of costs was prepared by the clerk of court in the case. A bill of costs is a certified, itemized statement of the amount of costs in an action or suit. See BLACK'S LAW DICTIONARY 164 (6thed 1990). Consequently, in the absence of a taxed bill of costs in the case, the argument of co-defendant-in-error, George S. B. Tulay, that the payment by him of the bill of costs in this case legally abated or that he withdrew his appeal, is not sustained.

In view of the foregoing facts and circumstances of this case and the legal authorities cited and relied upon, it is just and equitable that the peremptory writ of error be and the same is hereby granted, the judgment reversed, and the case remanded to the trial court for retrial. Costs are to abide final determination of the case. And it is hereby so ordered.

Petition granted.