

C. F. W. JANTZEN, *et al.*, Appellants, *v.* MODERN
HOUSING CONSTRUCTION COMPANY, by and
through its Agent, H. WEIGAND, Appellee.

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

Argued November 6, 1961. Decided December 15, 1961.

1. A judgment by default in an action of debt may be reviewed, modified or reversed by a judge of the same court which rendered the judgment where it appears that the judgment was grounded on fraud practiced on the court.
2. Where an attempt is made to levy execution against the property of a non-party to a judgment, the court which rendered such judgment must pass upon a claim by the non-party to title to the property in question. 1956 Code, tit. 6, § 937.

On appeal from a judgment by default in an action of debt, and from an order of the court below refusing to entertain an application for release of property seized on execution, the judgment and order were *reversed and remanded*.

T. Gyibli Collins for appellant. *O. Natty B. Davis* for appellee.

MR. JUSTICE WARDSWORTH delivered the opinion of the Court.

This appeal is based on the institution of an action of debt by appellant, C. F. W. Jantzen, against Modern Housing Construction Company for the recovery of the sum of \$4,659.45, which matter was disposed of by His Honor, Joseph Findley, assigned judge presiding over the September, 1960, term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County. It would seem that the defendant, Modern Housing Construction Company, after being served with a copy of appellant's summons and complaint, failed to appear and file answer;

whereupon judgment by default and final judgment were rendered in favor of appellant on September 28, 1960. The said final judgment reads, in its body, as follows:

"This action having been filed against defendant, who neither appeared nor answered, a judgment by default upon application was granted. A jury was regularly empanelled and qualified to try the issue thus joined, and after hearing the facts for plaintiff as well as the court's charge, the jury retired to their room of deliberation and returned a verdict in favor of plaintiff.

"Wherefore the court affirms and confirms the verdict of the petty jury and adjudges defendant liable to plaintiff in the sum of \$4,659.45, to be forthwith paid in keeping with plaintiff's complaint; costs against defendant. And it is hereby so ordered."

By virtue of this judgment, appellant, plaintiff in the court below, was granted execution to recover the debt laid in his declaration or complaint, which execution was served, as evidenced by the sheriff's return which reads, in its body, as follows:

"I have seized on this writ within writ of execution on Chevrolet Sedan Car #465 from the dock where said car was kept to be shipped to Germany. I have same in my custody and make this as my return to His Honor, Judge Dennis, presiding, this 19th day of January, 1961."

The sheriff's return shows on its face that the execution was served and returned before His Honor, John A. Dennis, who was presiding over the December, 1960, term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County.

At this stage H. Weigand, through his counsel, M. M. Perry, made application to court for the release of the property seized by the sheriff, which application, in its body, reads as follows:

"1. Because applicant says that he is not the defendant

in the main debt case in these proceedings; and for which his property, that is a grey-beige Chevrolet four-door sedan, should not be held on an execution in an action against the defendant company, of which he, the said applicant, is only an employee, and his property described herein does not form a part of the assets of the defendant company.

- "2. And also because applicant further says that a similar action was instituted wherein his said car was seized by the Sheriff of Montserrado County, and in consequence of a similar application this court, sitting in its September, 1960, term, ordered the release of the very vehicle on the grounds herein outlined by the said applicant. Applicant submits that a perusal of the records of this court discloses the fact herein outlined.

"Wherefore, in view of the foregoing facts and circumstances, applicant, by and through his counsel, prays this court to order the sheriff of the County of Montserrado to strike out the sedan car hereinabove described and have the same returned to the applicant, and to grant unto your applicant any and such further relief as unto Your Honor may seem just and legal."

To this application, appellee made the following resistance:

- "1. Because the applicant has failed to present and file any semblance of title or ownership to the property in question, in support of his purported application for the release of said property, in keeping with the provision of the law; and
- "2. Because the former attachment proceeding made mention, in Count '2,' of the purported application, the said application to the property in question in support of his then alleged claim as in the present claim case, and his then act, being tainted with fraud, would not release the identical property from being seized on a subsequent execution by other creditors of the *bona fide* owner.

- “3. Because the vehicle in question, bearing Plate Number 465, was purchased and registered as the personal property of one Edward Giese as will more fully appear by attached certificates of ownership and registration, marked Exhibits ‘A’ and ‘B,’ as a further proof of said applicant’s fraudulent claim to said property.”

The ruling of the circuit court upon the application of H. Weigand, and the resistance to said application reads, in its body, as follows:

“The application addressed to this court is for the discharge of one Impala car, on the grounds that the same is not the property of Modern Housing Construction Company. They contend that the same is the property of applicant H. Weigand, and not that of the company; further that this action has been passed upon during the September, 1960, term, by His Honor, Judge Findley, at which time the car was ordered released.

“Since this issue has been raised with respect to a holding of a law court having concurrent jurisdiction, this court is legally prohibited from reviewing the same, particularly since Counts ‘1,’ ‘2,’ and ‘3’ of the resistance to the application contest the right of ownership of the property, as to which, according to the minutes of the September, 1960, term the said court, after an investigation of this matter, ordered that the said car be released.”

To this ruling appellant excepted and has brought the matter to this Court for a review based upon a bill of exceptions containing the following two counts which we shall consider together, the said two counts being, in substance, the same:

- “1. Because, notwithstanding the alleged claim of ownership of the vehicle in question as presented to Your Honor during the investigation, was found to be fraudulently asserted to deprive the creditors of their just debts, and notwithstanding it was

established in evidence that the alleged transfer of said property was made simultaneously with the filing of an attachment proceeding against the *bona fide* owner; yet still, in the face of the facts and circumstances brought out in the evidence, Your Honor ruled that said vehicle be delivered to the purported claimant solely because said claim of ownership was interposed in previous attachment proceedings, and was ordered to be released by the then assigned judge; and that said release order cannot be reviewed at any subsequent term, as to do so would be reviewing the doings of your colleague.

- "2. And also because, notwithstanding fraud is presumed from the alleged transfer of the vehicle in question pending attachment proceedings against the *bona fide* owner, and notwithstanding the alleged previous decision of order of court to discharge said property from levy of execution was not a bar to other creditors so as to prevent any of them from levying on the property by a subsequent writ of execution, yet still, Your Honor held that the issue of the ownership of the vehicle is *res judicata*, and that therefore Your Honor lacks jurisdiction to review the acts of your colleague on that score. To which said opinion and ruling of Your Honor, the respondents except and pray an appeal to the Supreme Court at its ensuing March term, 1961."

The trial judge predicated his refusal to investigate the alleged fraud perpetrated on the court which led to his colleague Judge Findley to order the property in question turned over to the applicant, H. Weigand, contending, substantially, that he and Judge Findley having concurrent jurisdiction, he was "legally prohibited from reviewing the same." We are in disagreement with His Honor, Judge Dennis, that he is prohibited from review-

ing the acts of his colleague when it is alleged that fraud is perpetrated on the court. In support of appellants' contention that the application of H. Weigand was unfounded, not only did Weigand fail to produce any evidence in support of his ownership to the car, but the statement of a certain German official submitted and forming a part of the records in this case is considered a strong link in the chain in establishing fraud. We quote said statement, word for word, for the benefit of this opinion as follows:

"I herewith confirm that Mr. Edward Giese, on December 2, 1960, when I met him at Robertsfield on his departure to Germany, explained the situation of the Impala car at that time located at Monrovia Free Port, as follows:

"That he has always been the owner of said car, and that the transfer of the car to Mr. Weigand was arranged only to prevent the creditors of Giese and the W. H. Co. from seizing the same."

[Sgd.] DR. HELMUT YURK,
First Secretary, German Embassy.
"MONROVIA, January 26, 1961."

Aside from the fact that the alleged fraud was practiced on the court, the party-plaintiff, in whose favor an execution was issued and served, by virtue of which the car in question was seized by the Sheriff of Montserrado County, is not the same in these proceedings, in that, in the instant case, C. F. W. Jantzen is the plaintiff in whose favor an execution has been granted against the Modern Housing Construction Company in settlement of his claim against the said defendant.

In 23 CYC., page 566, Section "C" we have the following:

"While in some jurisdictions, however, the office of judge is regarded as a continuing one, and a succeeding judge has the same right to review, modify, or reverse the orders of his predecessor as he has in re-

spect to his own orders, the weight of authority is that as a general rule a succeeding judge cannot review, modify, or reverse the orders of his predecessor; but the rule does not apply to administrative orders, such as the ordering the taking of testimony, a special jury term, to orders made through mistake or fraud perpetrated on the court, to those working extreme hardship, or where there is a change of circumstances." 23 CYC. 566 *Judges*.

It is provided by statute that:

"If the property which the sheriff or constable has seized as prima facie that of the judgment debtor is afterwards claimed to be that of another, the person so claiming shall be required to present his claim to the court or judge and to prove his bona fide title to said property. If he makes such proof and there is no fraud, the court shall order the property stricken from the schedule and returned to the actual owner. . . ." 1956 Code, tit. 6, § 937.

In view of the foregoing and the law quoted, *supra*, we are of the considered opinion that the trial judge erred in refusing to pass on the alleged fraud presented for his consideration by appellant. The judgment in said case is hereby reversed and the case remanded with instructions that the Circuit Court of the Sixth Judicial Circuit, Montserrado County, resume jurisdiction immediately upon receipt of a mandate from this Court, and investigate the alleged fraud. Pending the said investigation and final determination of said cause, the said court is hereby further directed to cancel the bond given by appellee's counsel whereupon the car in question is ordered to be taken into the custody of the sheriff for the county aforesaid; and he shall retain custody thereof until otherwise ordered. Costs to abide final determination. And it is hereby so ordered.

Reversed and remanded.