HON. JOHN A. DENNIS, Assigned Circuit Judge, Sixth Judicial Circuit, Montserrado County, and ST. PAUL HOTEL AND RESTAURANT, by and through its Manager, JOSEPH FARHART, Appellants, *v.* MR. AND MRS. HARDY HENDERSON, Appellees.

APPEAL FROM A RULING OF THE JUSTICE PRESIDING IN CHAMBERS GRANTING A WRIT OF ERROR TO THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued November 20, 1967. Decided January 18, 1968.

1. When a trial takes place on a date other than the day for which notice is given to defendants, the case will lend itself to the issuance of a writ of error for the defendants against whom a jury verdict was thus returned, and judgment therefor entered.
2. When no independent appraisal of seized property is made by two disinterested persons, but is made instead by a sheriff in the course of satisfying a money judgment, such act is illegal and will incline the Court toward issuance of a writ of error for the offended party.
3. When a judgment has not been fully satisfied, a writ of error may, on proper grounds, be issued, and the confinement to jail of a judgment debtor does not, by itself, constitute full satisfaction of the judgment debt.

A notice of assignment for the trial of an action of debt by attachment was served for a day on which the trial was not held, the actual day being five days thereafter, neither the defendants nor their counsel appearing on either day. The Sheriff subsequently attached property of the defendants pursuant to judgment, after a jury verdict for plaintiffs, and imprisoning a defendant for the deficiency in the satisfaction of the judgment after appraising the value of the attached property himself. Defendants sought a writ of error, claiming substantial injustice, the writ being ordered by the Justice in Chambers, and on appeal, the *ruling* was *affirmed* and the writ ordered issued to the lower court on behalf of the plaintiffs in error.

A. L. Weeks for appellants. *J. Dossen Richards* for appellees.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

After final judgment, and its subsequent execution, in an action of debt by attachment, sued out by St. Paul Hotel and Restaurant against Mr. and Mrs. Hardy Henderson, which final ruling and following proceedings defendants, now petitioners, regarded a miscarriage of justice, a petition for a writ of error was filed in the chambers of Mr. Justice Mitchell during the March 1967 Term of this Court. The petition consists of four counts which we have summarized:

"1. That during the December Term of the Circuit Court, Sixth Judicial Circuit, petitioners were sued on an action of debt by attachment. They accordingly appeared and filed their appearance and answer, which presented both issues of law and fact. Yet, on the hearing, the respondent judge rendered judgment by default against defendants, and committed Mr. Henderson to jail without an execution being first issued and served on him according to law, for the seizure of his property, which act is prejudicial to petitioners' interests and illegal.

"2. That a notice of assignment for a hearing of the case was issued and served upon them for the 2nd day of February, 1967, but the case was not heard and disposed of on that day. No subsequent assignment was made nor notice served on them or their counsel, yet, the case was called, heard and disposed of on the 6th day of the same month and year; thereby depriving petitioners of their day in court.

"3. That their failure to except to the judgment and take an appeal was due to the fact that they were not

notified and, therefore, were not present when the verdict and judgment were rendered. And, lastly,

"4. That the action was commenced by attachment and the sheriff illegally and arbitrarily served, attached, and valued the property attached to be less than the amount stated in the writ, by not conforming to the statute in such cases provided, because the property attached should have been appraised by a disinterested person, which was not done; hence, the levy and seizure were illegal and prejudicial."

Respondents contesting the petition, filed a thirteen-count return, which appears to be excessive. Two significant issues are raised. First, that a notice of assignment for the hearing of the case below was served for February 2, 1967, and although the case was not heard and disposed of on that day, no subsequent assignment for the hearing of the case was made and served on the petitioners or their counsel, yet, on February 6, 1967, the case was duly heard and disposed of, thereby depriving the petitioners of their day in court. Second, that the sheriff illegally and arbitrarily served, attached, and valued the property attached to be less than the amount stated in the writ, by not conforming to the statute in such cases made and provided, because the property attached should have been appraised by disinterested persons, which was not done, making the levy and seizure illegal.

Considering these two counts in their reverse order, a recourse to the record certified to us in this case makes clear that the properties seized on the writ of attachment on October 20, 1966, consisting of three medium-size trunks, five valises, ten cameras and parts, and one typewriter, were all seized and appraised for the sum of $700.00 by James W. Brown, Sheriff for Montserrado County. This makes self-evident that the property was appraised illegally.

"In order to ascertain the quantity of property which it is necessary to attach or seize, the sheriff (or constable) shall cause all property so attached or seized to be appraised by two disinterested persons upon their solemn affirmation to value the same to the best of their skill and ability. He shall also cause the appraisement or value of all such property to be listed on the inventory of the property, and such inventory to be annexed to the writ of attachment; he shall thereupon return such writ 'attached as per schedule.'" Civil Procedure Law, 1956 Code 6:399.

The statute is clear and unambiguous and anything done to the contrary is illegal and arbitrarily done.

Petitioners averred in their petition that they were served with a notice of assignment for the hearing of the case in the court below, for February 2, 1967, and at no other time were they notified of a subsequent hearing of the case. This allegation is also denied by respondents in their returns and is embraced in counts five and six. These two issues have led us to examine the record in the case, and for the benefit of this opinion we recite the last return made to the notice of assignment:

"On the 2nd day of February, 1967, I duly served the within notice of assignment on the within-named counsellors. I placed in their hands copies of said notice of assignment, and I now make this as my official return to the clerk's office. Dated this 2nd day of February, 1967. Notice of assignment served by court's bailiff, Daniel Greene."

Respondents in their attempt to deny this averment, state in count six of their return:

"And also because respondents further deny the truthfulness and legal sufficiency of the petition, and say that on the day of the assignment the defendants and counsel failed to appear, and the court took upon itself to make another assignment for the 31st day of

January, 1967, and still on that day of this assignment, defendants and their counsel, The Simpson Law Firm did not appear. The court again made another assignment for the hearing of this case for the 3rd day of February, 1967, and even on said day the defendants and their counsel did not appear; all these assignments being duly served on both parties and returned, whereupon plaintiffs-respondents' counsel moved the court to apply Rule 7 of the Revised Rules of the Circuit Court, as found on pages 37–38, which was granted and the court proceeded with the trial of said case with plaintiffs' witnesses, which ended with a verdict in favor of the plaintiffs, and about three to four days thereafter a judgment was rendered, confirming said verdict. Copies of the said assignments marked exhibits 'C' and 'D' are attached to this return to form a part thereof, therefore, respondents pray for the denial and/or dismissal of said petition, with costs against petitioners."

From the record certified to this Court, it is true that an assignment was issued on February 2, 1967, for the hearing of this case on February 3, but it is not true that the case was heard on February 3, after the invocation of the rule, the jury returning a verdict in favor of the respondents. Examining the records closely, there is no showing why the case was not gone into on February 3, the day assigned for the hearing thereof. Nevertheless, the record reveals that on the 32nd day's session of said court, Monday, the 6th of February, 1967, this case was heard and submitted to the jury, which brought in a verdict in favor of the plaintiffs, which was ordered recorded to form part of the record, the jury being discharged with the thanks of the court.

The record further reveals that on Tuesday, the following day, the 7th of February, 1967, the court made its final judgment, which we quote:

"At the call of this case, the plaintiffs were represented by Counsellor A. L. Weeks; the defendants, although returned summoned, failed to appear.

"A jury was selected, sworn and empaneled, and after hearing plaintiffs' evidence, retired, and after due deliberation returned in open court a verdict in favor of the plaintiffs in the sum of $822.89, which is hereby affirmed and confirmed by court.

"Wherefore, it is adjudged that the plaintiffs shall recover from the defendants their debt, and all costs of court, and it is so adjudged.

"Given under my hand in open court this 7th day of February, 1967.

"[Sgd.] JOHN A. DENNIS,
Assigned Circuit Judge Presiding."

It was after this that defendants' property was seized and illegally appraised for $700.00, which was not the total amount named in the judgment, and codefendant Hardy Henderson was ordered to jail without the right of tendering a bond to cover the difference in the amount.

It is a fact that under our statutes and rules of Court, where a judgment has been fully satisfied by execution, a writ of error will not lie. Respondents have averred in their returns that the judgment had been fully satisfied. An inspection of the record further convinces us beyond doubt that the judgment has not been fully satisfied because petitioner Hardy Henderson was committed to prison as a judgment debtor who had not fully satisfied the judgment. Nor does confinement in jail in our opinion, by itself satisfy a judgment. In this case we can see no reason why a writ of error will not lie. It is clear that the court below was in error in its conduct of the trial, and the defendants' property was not seized and appraised properly, and this Court has no alternative but to uphold the ruling of the Justice granting the preemptory writ of error. It is the opinion of this Court that

the ruling of the Justice presiding in Chambers is legally sound, and it is affirmed, with costs against the appellants.

And the Clerk of this Court is hereby ordered to send a mandate to the lower court informing it of this judgment. And it is hereby so ordered.

Affirmed.