

HARRY A. GREAVES, Appellant, v.
C. F. WILHELM JANTZEN, Appellee.

APPEAL FROM THE DEBT COURT,
MONTSERRADO COUNTY.

Argued December 2, 1975. Decided December 31, 1975.

1. Lack of jurisdiction over the person is not a ground for a motion for relief from judgment.
2. The proper remedy for a person claiming he had not had his day in court by reason of the court's lack of jurisdiction over him, is by way of writ of error.
3. When a party to an action admits by some act or conduct the jurisdiction of the court, he may not thereafter deny the jurisdiction.

Process was left for service upon defendant in an action in debt. The sheriff thereafter made his return thereto. A few days thereafter defendant stated to court personnel that he had been served and would seek to satisfy the debt. However, he did nothing further and consequently plaintiff obtained judgment by default upon which a writ of execution was issued and accepted by defendant. Shortly thereafter defendant moved for relief from judgment, alleging improper service and the failure, therefore, of the court to have obtained jurisdiction over him. The motion was denied and defendant took an appeal.

The Court held that defendant had failed to establish grounds for the motion and moreover, had taken positions contrary to the grounds he had advanced for the lack of jurisdiction. The ruling was *affirmed*.

P. Amos George for appellant. *T. Gybili Collins* for appellee.

MR. JUSTICE HORACE delivered the opinion of the Court.

In October 1972, appellee instituted an action of debt for the amount of \$813.88 against appellant in the Debt Court for Montserrado County. After appellant had been summoned and filed an answer to the suit, appellee withdrew the action, paid appellant's costs, and reinstituted the action of debt on November 1, 1972. A writ of summons to this latter action was issued against appellant on November 3, 1972, and given to one of the bailiffs of the Debt Court for Montserrado County to take to the Debt Court sheriff for Bong County for service. Upon arriving in Gbarnga, Bong County, where appellant lives, appellant could not be found and so the bailiff left the writ with the said Debt Court sheriff for Bong County to be served on appellant and make a return to that effect.

It was reported to the Debt Court judge, by the clerk and typist of said court, that appellant came to Monrovia a few days thereafter and went into their office at the court, where he acknowledged service of the writ on him and promised to make arrangements for payment of his indebtedness to appellee.

After waiting from early November, 1972, to January 19, 1973, during which time appellant made no effort to pay the amount sued for or make satisfactory arrangements for payment, appellee applied to the Debt Court for judgment by default which was granted. The default judgment was perfected after the manager for appellee had testified and the written account showing appellant's indebtedness to appellee admitted into evidence. A writ of execution was prayed for and granted.

The writ was issued on January 26, 1973. It was served on appellant on February 2 by the sheriff of the Debt Court for Bong County who made his return thereto.

On February 6, 1973, the P. Amos George law firm, by Counsellor Raymond Hoggard, filed a motion for relief from judgment, contending appellant had not been properly served. The motion was opposed by appellee.

On March 23, 1973, the Debt Court entered the fol-

lowing ruling denying the motion for relief from judgment.

"The Court: Defendant in this case in the person of Mr. Henry Greaves, a resident of the County of Bong, having failed upon being served with process to appear or file an answer to a complaint filed in this court against him by the plaintiff in this case, judgment by default was rendered against him, on the 19th day of January, 1973. Subsequently a bill of costs embracing the principal and interest due thereon together with the sheriff's collection fees was prepared and an execution to enforce the judgment of the court was issued and placed in the hand of the sheriff for collection from the defendant the amount of \$986.98, upon being served with the execution along with the bill of costs. The defendant filed a motion praying for relief from said judgment, arguing that he had not been served with precept and hence the court had no jurisdiction over him. Plaintiff's counsel resisted the motion and argued that the defendant having been served with precept and failing to appear or file an answer within the statutory period is estopped from raising the issue of non-service of process and jurisdiction over his person. Recourse to the file back of the writ of summons shows that defendant was served with process by the sheriff for the Debt Court in the County of Bong. Nevertheless, there is a conflict in the date of service of the writ and the date of the endorsement placed on the writ by the sheriff for the Debt Court of Bong County. On the other hand the defendant personally appeared in court and in the office of the clerk of this court and informed the clerk and the typist that the writ was served on him and that he was making certain arrangements to the end of making settlement of plaintiff's claim against him. This acknowledgment by the defendant himself of the service of the writ renders his motion for relief from

the judgment dismissible. The motion is, therefore, dismissed and the sheriff of this court is instructed to proceed with the enforcement of the judgment of this court. And it is hereby so ordered."

Appellant excepted to the ruling and prayed an appeal to this Court, which was granted. The case is now before us on a three-count bill of exceptions.

With respect to count one of the bill of exceptions, appellant contends that the mere allegation that defendant personally appeared in the clerk's office and verbally acknowledged service of the writ of summons on him, as against the written returns of the ministerial officer that the defendant could not be found and that the writ was left with the sheriff for the Debt Court of Bong County, was insufficient for the court to deny his motion for relief from judgment and, therefore, reversible error was committed by the court. We note that he does not contend that the sheriff for the Debt Court for Bong County did not serve the precept on him, or that he had not had notice thereof, but rather as stated in count two of his motion, that "the same [meaning the writ of summons] was left by the sheriff with his colleague of Bong County, who, defendant maintains, was never authorized by him to receive and keep process on his behalf." Nor has he denied that he did go to the clerk's office in Monrovia and acknowledge the service of the writ, promising to settle the matter. He states that the verbal acknowledgment of service was contrary to the return of the ministerial officer. What is peculiar is that appellant would have no one believe anything except what he says, not even a sworn officer of the court, namely the clerk of court. Count one of the bill of exceptions being unmeritorious is overruled.

As to count two of the bill of exceptions, we do not find that the averment therein, that the writ was endorsed for service on November 6, 1972, by the Bong County sheriff when the return shows that it was served on November 4,

1972, two days prior to the endorsement, to be in accord with the record before us. What the return shows is that on November 4, when the bailiff from Monrovia and the Debt Court sheriff of Bong County could not find appellant, appellant's copy of the writ was left with the sheriff of Bong County to be served on appellant. The return thereto was filed in the clerk's office on November 6, 1972.

Count two of the bill of exceptions is, therefore, overruled. As we do not find the trial judge's ruling erroneous, count three of the bill of exceptions is also overruled.

Now let us look at our Civil Procedure Law on relief from judgment.

"Grounds. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment for the following reasons:

"(a) Mistake, inadvertence, surprise or excusable neglect;

"(b) Newly discovered evidence which, if introduced at the trial, would probably have produced a different result and which by due diligence could not have been discovered in time to move for a new trial under the provisions of section 26.4 of this title;

"(c) Fraud (whether intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

"(d) Voidness of the judgment; or

"(e) Satisfaction, release, or discharge of the judgment or reversal or vacating of a prior judgment or order on which it is based, or inequity in allowing prospective application to the judgment." Rev. Code 1:41.7(2)

We see none of the reasons stated for relief from judgment in appellant's motion except perhaps his averment that the judgment was void because the summons was

not properly served on him. We are not satisfied that the writ was not properly served according to the record before us. But even if he felt he had a defense in not having been served personally with the writ, he should have sought relief as provided in section 3.44 of the same Civil Procedure Law.

Our feeling is that if appellant did not have his day in court because the court had no jurisdiction over his person, he should have proceeded by applying for a writ of error. That is the remedy our statute provides for one who has not had his day in court.

Another point that strikes us is that when appellant accepted the writ of execution and made the expression he is alleged to have made as shown in the sheriff's return to the writ of execution, and sent a note to his counsel as averred in count four of his motion "to do the necessary," and he would settle on advice of counsel, to all intents and purposes he, though belatedly, submitted himself to the jurisdiction of the court. The Court addressed itself to the point in *King v. Williams*, 2 LLR 523, 525 (1925).

"The general rule is that if a defendant, though not served with process, takes such a step in an action, or seeks such relief at the hands of the court as is consistent only with the proposition that the court has jurisdiction of the cause and of his person, he thereby submits himself to the jurisdiction of the court and is bound by its action as fully as if he had been regularly served with process. Likewise if a defendant has been served with process, any objection he may have to the irregularity of the service, must be made promptly. Otherwise his failure to appear and object will amount to a waiver of his right to do so. Where a party to a judicial proceeding admits by some act or conduct the jurisdiction of the court, he may not thereafter, simply because his interest has changed, deny the jurisdiction, especially where the

assumption of a contrary position would be to the prejudice of another party who has acquiesced in the position formerly taken. A court which is competent to decide on its own jurisdiction in a given case may determine that question at any time in the proceedings . . . to its satisfaction, either before or after final judgment."

Moreover, we must emphasize that nowhere in these proceedings has appellant denied the debt; instead, he has advanced argument which we do not think is meritorious.

In view of all the facts and circumstances attending this case and the law applicable as we understand it, the position of the appellant is held to be untenable. We hold, therefore, that the judgment of the court below should be and is hereby confirmed, with costs against appellant. The Clerk of this Court is hereby directed to send a mandate to the court below to resume jurisdiction and enforce its judgment. It is so ordered.

Affirmed.