# ELIE J. HAJ BROTHERS, Appellant, *v.* HON. JOHN A. DENNIS, Circuit Judge presiding by assignment over the June Term, 1970, of the Sixth Judicial Circuit, Montserrado County, and JAMES W. BROWN, Sheriff of Montserrado County, and FRED V. B. SMITH, Appellees.

APPEAL FROM RULING OF JUSTICE DENYING WRIT OF PROHIBITION TO THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued April 22, 1971. Decided May 27, 1971.

1. Generally, a copy of every paper served in a proceeding must be served upon every party affected thereby.
2. However, generally, upon default of a party for failure to appear, no such obligation results.
3. A writ of prohibition is sought to restrain a course of judicial action and a writ of error is sought to compel a judicial review not otherwise available; they are distinct remedies by their nature and cannot be combined in a single proceeding.
4. In the instant proceeding, though the wrong remedy had been pursued by appellant, the Supreme Court pointed out that a judge, under certain circumstances, can modify or reverse actions of his predecessor, and mistake, as herein where notice of assignment should not have been served on the party defaulting in appearance, is a ground for such exercise of a successor judge's power.

An action for infringement of a trade mark was begun by the respondent in these proceedings. The defendant failed to put in an appearance or serve an answer. Nonetheless, defendant's counsel appeared in court in its behalf, when the presiding judge assigned a trial date in April, 1970, and ordered a notice of assignment therefor to be served on defendant's counsel. On that date the case was continued to the June Term. It appears that in June, another judge was presiding, who assigned a trial date but ordered no notice of assignment to be issued and served as his predecessor had. When the case was called for trial, no one appeared for defendant, and a de-

fault judgment was entered, the amount being fixed by a jury which the judge ordered empanelled. The defendant thereafter applied for a writ of prohibition to the Justice presiding in chambers, which was denied. An appeal was taken from the *ruling*. *Affirmed* by the full bench.

The Tubman law firm, by *Nelson Broderick,* of counsel, for appellant. *Momo Jones* for appellee.

MR. JUSTICE WARDSWORTH delivered the opinion of the Court.

The appeal arose from a denial of an alternative writ of prohibition by the Justice presiding in chambers. The petition contains fourteen counts. The principal contentions in the petition are that a suit for damages for infringement of a registered trade mark "Orange Dry Gin bottled by Smith Brothers," had been instituted against petitioner. For reasons beyond its control, no appearance or answer was served, and when a lawyer had been obtained, time to serve had elapsed. Nonetheless, its counsel appeared at the call of the case, after notice of assignment had been duly issued by the trial judge, which was continued to another term before another judge. Thereafter, by a series of events, judgment was rendered against petitioner, without its prior knowledge and without notice, based upon a jury's verdict. The petitioner claims that in spite of its nonappearance formally, and its failure to answer, under all the circumstances it was entitled to notice and the right to be represented in court at the trial. The legitimacy of respondent's law suit is also contested.

Respondents deny the conclusions reached by petitioner and, moreover, deny a writ of prohibition is appropriate to the crcumstances, issuing only when a tribunal exceeds its authority.

It is not disputed that the petitioner failed to file an appearance or serve an answer in the respondents' suit.

> "Every order required to be served, every pleading, every written motion other than one which may be heard *ex parte* and every appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties affected thereby; but no service need be made on parties in default for failure to appear except as provided in section 902 (2)." Civil Procedure Law, L. 1963–64, ch. III, § 803 (1).

From the above it is evident that the trial judge acted in conformity with the provisions of the statute. He was not compelled, under the law, to have a notice of assignment served on the petitioner. In view whereof we regard the action of the trial judge in this respect proper.

The petitioner is contending that "he did not have his day in court," by which contention a writ of error would have been the proper process. Having raised this issue of not having his day in court, he introduces an element of doubt with respect to the propriety of or purpose in the writ of prohibition it seeks.

> Prohibition is a special proceeding to obtain a writ ordering the respondent to refrain from further pursuing a judicial action or proceeding specified therein. Civil Procedure Law, L. 1963–64, chap. III, § 1621 (3).

A writ of error is clearly distinguishable.

> "A writ of error is a writ by which the Supreme Court calls up for review a judgment of an inferior court from which an appeal was not announced on rendition of judgment." Civil Procedure Law, L. 1963–64, ch. III, § 1621 (4).

Prohibition, therefore, is a restraining process, whereas a writ of error is specifically for the purpose of reviewing a judgment, decree, or decision of an inferior court which has not been reviewed on appeal and which has not been

completely executed. Both, of course, being different in nature, cannot be employed in a single cause.

The issue is rendered academic, however, since the prohibition proceeding is unmeritorious.

> " '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 respect 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 adminstrative 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.' " *Jansen* v. *Modern Housing Constr. Co.,* 14 LLR 508, 513 (1961).

It is accepted that ordinarily a judge is not competent to review his colleague or one with whom he has concurrent jurisdicton, but he may, under the circumstances quoted, for the prohibition does not apply to "administrative orders, such as ordering the taking of testimony or a special jury term, to orders made through mistakes or fraud perpetrated on the court, to those working extreme hardship."

Judge Krakue erred by ordering the issuance and service of a notice of assignment on the petitioner herein, which his successor was not legally bound to honor, defendant in that case not having appeared or answered.

In view of the foregoing, the ruling of the Justice in chambers is hereby sustained.

*Affirmed.*