LOUISE SAMUELS, Appellant, *v.* LEONARD EBENEZER SAMUELS, Appellee.

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

Argued November 5, 1952. Decided December 12, 1952.

1. Where a defendant has not been summoned properly the court has no jurisdiction and a court of coordinate jurisdiction may vacate the judgment as void.
2. A statute providing service of summons by publication must be strictly construed.

Appellee instituted divorce proceedings against appellant by an irregular service of summons by publication. The divorce was granted. Appellant petitioned the court below to vacate the judgment. On appeal from dismissal of the petition, *judgment vacated.*

Nete Sie Brownell for appellant. *A. B. Ricks* for appellee.

MR. JUSTICE BARCLAY delivered the opinion of the Court.

Petitioner, now appellant, instituted these proceedings in the equity division of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, by a bill to open and vacate an allegedly void and fraudulent judgment of divorce rendered against her by default some months ago.

Appellant charged that the judgment against her was void because she had not been duly summoned; that she and her husband were formerly residents of Nigeria; and that her husband had deserted her in Nigeria and proceeded to Liberia without providing maintenance for her or their two minor children. She alleged that, since Nigeria is beyond the jurisdiction of the Republic of Liberia,

her husband's attempt to obtain jurisdiction by publication of the writ of summons in a newspaper was irregular for the following reasons:

1. No order of a judge was obtained prior to the publication of the writ of summons.
2. Two weeks did not transpire between the alleged publications.
3. No returns of the sheriff were submitted to the court showing that, after due diligence, the defendant could not be found within the Republic of Liberia; and only upon such returns made to a judge and an order obtained, can a defendant be summoned by publication.
4. No affidavit was filed by anyone connected with the newspaper, nor did any affidavit accompany a copy of the writ as published.
5. No time was fixed in any writ giving a reasonable date after the expiration of publication for the appearance of the defendant. Instead the case was heard on March 20, 1951, and a verdict was brought the same day, three days after appellant, then defendant, received the only copy of the publication of the summons and complaint. Judgment was rendered on March 28, 1951, eleven days after appellant, then defendant, received a copy of the summons by publication.

Although respondent in the court below endeavored to controvert the charges, he was unsuccessful; for he could not show that the statute had been strictly followed; and his counsel, when confronted with the statute, was forced to admit before this Court that the charges contained in the bill were neither unfounded nor untrue.

The trial judge reviewed the facts and commented thereon, sustaining the allegations in the petition; but nevertheless he dismissed the petition with costs against appellant upon the jurisdictional ground that he did not have authority to review the acts of his colleague, Judge

Bright, another circuit judge who had presided over the same court in March, 1951, when the judgment of divorce was rendered.

After giving the history of the case upon the verdict and final judgment, the trial judge continued:

"On December 11, 1951, nine months after plaintiff and defendant were divorced, the petitioner entered an action in the equity division of the circuit court, praying said court to open and vacate the judgment of divorce because of fraud. In said bill the petitioner in these proceedings attacked the manner of the service of process on her, alleging that the publication was not in conformity with the statutes in such cases made and provided, in that (a) no orders were given for the publication; and (b) no reasonable time was allowed the petitioner within which to make her appearance. Apparently there was a great rush and hurry to secure the divorce, for, although the summons, issued on the 21st of February was returnable on the 24th, the sheriff made his return on the date of issuance, February 21. On the same day a purported writ of re-summons was issued. Strangely, the return of the sheriff to this re-summons stated that he had caused it to be published on the 5th, 12th and 19th of March. This is, in my opinion, a gross irregularity. The statute provides:

" 'Where the person against whom a writ of summons or re-summons has been isued, cannot, after due diligence be found within the Republic and that fact made to appear by the returns of the Sheriff to the satisfaction of the court or a judge thereof where the trial is to be had, such court or judge may grant an order that said defendant be summoned by publication.' Rev. Stat., sec. 281.

"By what legal authority, then, did the sheriff make a return to the writ of re-summons? It is not until after the court or judge is satisfied with the truthful-

ness of the sheriff's returns that an order may be granted for the publication to be made. The statute should be strictly adhered to.

> " 'Statutes everywhere exist authorizing constructive service of process by publication in certain cases where personal service cannot be had. These statutes are in derogation of the common law and hence are to be strictly construed and literally observed.' 32 Cyc. 467, *Process,* § II D.

"Our Supreme Court has said:

> " 'Although the statute laws of Liberia provide for a constructive notice to an absent defendant [f]or the purpose of instituting proceedings, it has been held that proceedings against absent defendants based upon constructive notice should be watched with much jealously, [*sic*] in consequence of the opening which they afford for fraud, and should be rigidly confined within the limits which are prescribed by the customary or statute law.' *Johns* v. *Pelham,* 2 L.L.R. 613, 616 (1926).

"It is thus clear that a court order is a necessary prerequisite to publication of a writ of summons, and the court must be satisfied that the return of the sheriff is correct. This requirement was breached by the respondent, who was bent on, and apparently overanxious to obtain a divorce by the shortest possible means.

"When this point was urged by the petitioner, the respondent's counsel did not convince this Court by any evidence that an order was given. No reasonable time was allowed petitioner to appear, she being without the Republic, since the last publication was made on the morning of the very day the case was adjudicated. Had the respondent exercised patience and followed the provisions of the statute, this unhappy consequence would have certainly been avoided.

"The procedure adopted by the respondent was manifestly erroneous and unquestionably prejudicial

to the rights of the petitioner. But I am of the opinion that I lack competency to open, vacate or set aside a judgment rendered by another judge with whom I exercise concurrent jurisdiction. Notwithstanding what might be my personal convictions, my unwillingness and refusal to do so finds support in the passage which I quote hereunder from *Ruling Case Law:*

" 'The power to open, vacate or set aside judgments is restricted to the court in which they have been rendered, and it is an elementary principle of high importance in the administration of justice that the judgment of a court of competent jurisdiction is final as to the subject-matter determined, and that it cannot be opened before any court of concurrent jurisdiction.' 15 R.C.L. 68, *Judgments,* § 140.

"Again, in *Cyclopedia of Law and Procedure,* this principle is laid down:

" 'The authority to vacate a judgment is incident to all courts of record, or of general jurisdiction, including not only the *nisi prius* courts, but also courts of equity, and appellate courts and probate or surrogates' courts. The power to vacate a judgment must be exercised by the court which rendered the judgment, and no other court can take cognizance of such an application. As between courts or coördinate jurisdiction, such as two country courts or circuit courts of the same state, the rule is that neither has power to vacate a judgment rendered by the other which is not void upon its face.' 23 Cyc. 890, *Judgments,* § IX A.2."

We have quoted from the opinion of the trial judge in order to point out where he erred. This was not a review of a trial, such as is restricted to an appellate court; instead, there was an application in the equity division of the lower court to vacate a judgment void on its face; and this the law permits.

The record before us shows that the judgment is void

on its face. The writ of summons, issued February 21, was returned the same day; appellant was not within the bailiwick of the sheriff and was beyond the borders of Liberia; whereupon a writ of re-summons was immediately issued. However, instead of compliance with the provisions of the statute, the sheriff was made to state in his returns that he had published the writ of re-summons in three consecutive issues of the "Liberian Age." This was without appellee's having obtained a court order for publication. Not having followed the provisions of the statute controlling the service of process, appellee did not bring appellant within the jurisdiction of the court. As summarized in *Ruling Case Law:*

> "It is an established principle in all courts that the method of acquiring jurisdiction by publication is in derogation of the common law, and that the statutory requirements must be successively and accurately taken in order to confer on the court jurisdiction over the defendant." 21 R.C.L. 1293, *Process,* § 36.

A practice aimed to deprive another of a right by means of some artful device contrary to common honesty constitutes fraud. "The rule is that equity will grant relief where by deceit and fraud a successful litigant prevents his adversary from presenting the latter's cause of action or defense." 15 R.C.L. 764, *Judgments,* § 216.

The record before us shows that fraudulent representations were made to Judge Bright; and such misrepresentation is one of the grounds on which equitable relief may be invoked in regard to judgments. The court below overlooked the statutory language which stipulates that a court has no power to vacate a judgment "not void on its face." The court, therefore, may vacate a judgment void on its face. As set forth in *Corpus Juris:*

> "In the absence of a statute controlling the time of application to a court of equity for relief against a judgment, no particular time will be marked off as barring complainant's right to relief, the question be-

ing merely one of laches or diligence; and statutes authorizing courts of law to vacate their own judgments for fraud, mistake, or other causes do not generally preclude relief in equity." 34 C.J. 481, *Judgments,* § 752.

"During the term, a judgment may be opened or vacated for errors of law. But after the term at which a judgment was rendered, it cannot be vacated or set aside upon the sole ground that it is erroneous in matter of law, except by a court exercising appellate or revisory jurisdiction, unless authorized by statute, or unless the error is one going to the jurisdiction." 34 C.J. 289, 290, *Judgments,* § 501.

"Courts of equity have no supervisory jurisdiction over courts of law, and, accordingly a suit in equity for relief against a judgment at law cannot be made to serve the purposes of an appellate review of the judgment with reference to alleged errors therein. But where one or more recognized grounds of equity jurisdiction exist, by reason of which it would be inequitable to allow the judgment at law to stand, or to be enforced, relief against the judgment may be had in equity." 34 C.J. 433, *Judgments,* § 681.

In this case, the bill in equity for relief against a void judgment raises no issue as to whether the evidence adduced at the trial of the divorce case was sufficient to support the verdict and judgment, a review of which could only be exercised by an appellate court. The bill attacks the judgment on the ground that it was rendered against one who had not been placed within the jurisdiction of the court. Since there were recognized grounds of equity stated in the bill, and clearly and convincingly shown on the face of the record, the trial court should properly have entertained the bill.

It is therefore evident that the ruling below must be reversed and the judgment vacated and set aside. Consequently all the proceedings in the court below with

reference to the divorce case are to be held void and a nullity. It is to be understood, however, that this opinion does not bar appellee from instituting another action for divorce in accordance with law. Costs are adjudged against appellee; and it is hereby so ordered.

Reversed.