

C. F. WILHELM JANTZEN, by and through his Agent W. FRITZ, Plaintiffs-in-Error, v. SIM BURNEY, and His Honor AARON J. GEORGE, Judge of the Circuit Court of the First Judicial Circuit, Defendants-in-Error.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued April 12, 1934. Decided April 20, 1934.

1. It is error for a trial court to dismiss a case upon the ground that plaintiff, in his written directions, gave only three days for the appearance of defendant and the return of the writ.
2. If within four days after the writ of summons or of resummons shall have been served, defendant shall not have appeared, plaintiff is by statute entitled to ask for further process.
3. There is, however, nothing in the statute which can be construed as fixing four days as a period which must necessarily be given a defendant within which to appear, or a sheriff within which to return a writ.

Plaintiff-in-error, plaintiff in the court below, brought an action of debt in the Circuit Court of the First Judicial Circuit against the defendant-in-error, Sim Burney. The case was ordered dismissed in the lower court and is before this Court on writ of error. *Judgment reversed and case remanded* to be tried on the merits.

Barclay & Barclay for plaintiffs-in-error. No appearance for defendant-in-error.

MR. JUSTICE DIXON delivered the opinion of the Court.

This cause is before this Court upon a writ of error issued by Mr. Justice Dixon against Sim Burney, defendant in the court below, and His Honor Aaron J. George, Judge of the Circuit Court of the First Judicial Circuit, Montserrado County, defendants-in-error, upon the application of the law firm of Barclay & Barclay repre-

sending the mercantile firm of C. F. Wilhelm Jantzen through their agent in Monrovia, W. Fritz, now representing the plaintiffs-in-error.

Upon the call of the case for hearing in this Court on the 11th day of April, 1933, in accordance with an assignment previously made and duly bulletined, the law firm of Barclay and Barclay appeared for the plaintiffs-in-error, but the defendants-in-error were not represented in person, nor by counsel, hence the Marshal was ordered to call for the defendants-in-error, who failed to answer. The plaintiffs-in-error, therefore, submitted their brief, and cited Rule III of this Court which reads as follows:

“If the parties, or either of them, shall be ready to proceed when the cause is called, the same will be heard, unless otherwise ordered.” Revised Rule III, sub-section 3.

The issue upon which this cause was appealed to this Court may be stated briefly as follows:

On the 11th day of April, 1933, the firm C. F. Wilhelm Jantzen, through their agent at Monrovia, W. Fritz, filed in the clerk's office of the law division of the Monthly and Probate jurisdiction of the Circuit Court of the First Judicial Circuit, Montserrado County, a written direction requesting said clerk to issue a writ of summons directed to the sheriff, commanding him to summon Sim Burney, defendant, and requiring him to appear on the 14th day of April, 1933, to answer the complaint of C. F. Wilhelm Jantzen by and through their agent, W. Fritz, plaintiffs, in an action of debt.

On the next day, which was the 12th day of April, 1933, Edward Summerville, Esq., counsellor at law, filed an appearance in behalf of Sim Burney, defendant, giving notice that Sim Burney would defend himself in said action both in person and by counsel.

Now on the 24th day of April, 1933, Counsellor Edward Summerville, on behalf of Sim Burney, defendant, filed an answer to the plaintiffs' complaint in which, aside

from some issue of fact, he pleaded that the action should be dismissed for the reason that the writ of summons, which is the foundation of the case, was "materially wrong and defective due to the misdirection of the plaintiffs in his written directions which does not allow four days for the appearance of the defendant after he had been summoned, nor four days for the return of the Sheriff to be filed in the office of the clerk, as is emphatically and imperatively enjoined by statute in such cases made and provided; on the contrary said written directions and writ of summons only gave three days for the appearance of the defendant, and three days for the Sheriff to file his returns."

The late Judge Aaron J. George, on hearing the arguments *pro et con* on the issue joined, on the 21st day of July, 1933, handed down his ruling on the question, to the effect that the contention of defendant in his answer as to the defect in the written directions on which the writ of summons was issued, was sustained, and the case ordered dismissed.

The Statute on this question reads as follows:

"All actions, except injunction and replevin, shall ordinarily be commenced by a writ of summons, directed to the sheriff (except in Justices' courts), requiring him to summon the defendant or defendants to appear at a day appointed, to answer the complaint of the plaintiff or plaintiffs, without specifying such complaint. The writ of summons shall also contain a clause requiring the sheriff to have the writ before the court, at the day appointed for the appearance of the defendant or defendants. It shall only be issued on the written direction of the party or his agent." Statutes of Liberia (Old Blue Book), ch. II, p. 33, § 3; see also 1 Rev. Stat. 424, § 277.

It can clearly be seen that the statute gives no number of days to be allowed within which the defendant must have notice of the filing of the action, but specifically sets

out, as will be seen *infra*, the number of days within which, if the defendant shall not have made his appearance, plaintiff is entitled to ask for further process.

“If the defendant, having been returned summoned on a writ of summons, shall not appear within four days after the time therein appointed for his appearance, or if after the return of a writ of re-summons the defendant shall not appear, within four days after the time therein appointed for his appearance, whatever the return may have been, it shall be the right of the plaintiff or plaintiffs, having first filed his or their complaint, unless the complaint be in ejectment to move for a writ of attachment. . . .” Statutes of Liberia (Old Blue Book), ch. II, p. 33, § 7; see also 1 Rev. Stat. 426, § 282.

Carefully considering the question submitted to us, this Court is of the opinion that the four days referred to have no reference whatever to the court's taking jurisdiction of a cause as was argued and decided in the court below. They are, as aforesaid, only to determine how soon after a writ of summons or resummons has been served upon defendant, plaintiff can move for further process.

In the case under consideration the written directions required, and the writ ordered, defendant to appear within three days from the date of issuance; the record shows that the defendant actually did appear on the day following the issuance of the writ which, to our minds, is conclusive proof that he could appear within the three days given; hence the contention in the pleadings upon which the action was dismissed is without merit.

Therefore this Court says that it was error on the part of the trial judge to dismiss the case after defendant had filed a general appearance and submitted to the jurisdiction of the court. The case therefore should be remanded to be tried on its merits; and it is so ordered.

Reversed.