WILLIAM N. ROSS, Appellant, *v.* H. ARRIVETS, Agent for C.F.A.O., a French Firm doing mercantile Business in Monrovia and elsewhere in Liberia, Appellees.

APPEAL FROM JUDGMENT IN ACTION FOR DAMAGES FOR MALICIOUS PROSECUTION.

Argued December 29, 1938. Decided January 13, 1939.

1. The writ of summons must contain a specific day upon which service upon defendant is to be made and its return by the sheriff.
2. The written direction should set forth every instruction of the plaintiff to the clerk of the particular court in which the case is entered, as the legal existence of the writ of summons depends upon a proper written direction.
3. The Supreme Court is unwilling to upset the practice for more than 50 years based upon a law prescribing that a definite return day must be fixed.
4. A ministerial officer must act upon instructions and ministerial duty is defined as a duty in respect to which nothing is left to discretion. Discretion belongs to a judicial, not a ministerial officer.

On appeal from dismissal of action for damages for malicious prosecution, *judgment reversed and case remanded.*

L. Garwo Freeman for appellant. *T. Gibli Collins* of *Barclay & Barclay* for appellee.

MR. JUSTICE DOSSEN delivered the opinion of the Court.

Our statute prescribes that actions shall ordinarily be commenced and defendants brought before the courts by means of writs. A writ is a written or printed paper, authenticated by the seal of the court, and the signature of the clerk thereof, directed to the sheriff or other ministerial officer of the court before which the defendants shall be summoned to appear.

The writ will command the officer: 1) to summon defendant to appear at a day therein appointed (fixed) to

answer the complaint of the plaintiff; 2) to have the writ before the court at the day appointed for the appearance of the defendant.

Upon the receipt by the ministerial officer of the writ he shall proceed: 1) to execute the commands therein given; and 2) to produce to the court the said writ with his return endorsed thereon, either (a) that he has summoned the person therein commanded to have been summoned, or (b) that said party cannot be found to be summoned, or (c) that for some other reason, whatever the fact may be, he has not served the writ; and provision is made that whenever there is a plurality of defendants in one writ, there may be different returns as to each.

An essential prerequisite to the issuance of a writ by the clerk of the court shall be the filing by the party plaintiff, or his agent, of another paper commonly known as a written direction. Statutes of Liberia (Old Blue Book) ch. II, p. 33, §§ 1–4.

This Court has continuously held that the written direction "should set forth every necessary instruction of the plaintiff to the clerk of the particular court in which the case is entered [as] . . . the legal existence of the writ depends solely upon a proper written direction." *Attia* v. *Summerville,* 1 L.L.R. 215 (1888).

In the present cause defendant filed a special appearance in the trial court on October 28, 1937, and attacked the correctness of the service of the writ upon him for lack of certainty or definiteness, since the said writ, following a fundamental error in the directions, fixed no definite day upon which he was to make his formal appearance in the office of the clerk of court as is required by law and the practice of the said court.

Plaintiff replied in essence that the date for the return of the writ as well as for the formal appearance of the defendant was fixed at four days after service for the said writ on whatever day said service might be effected, and hence the date of service having been in effect left to the

discretion of the sheriff, the return date and the date for the return of the precept was intended to be ambulatory, being contingent upon various factors such as neglect of duty or other cause over which he had no control, as to the date when the Sheriff might eventually be able to serve the precept; and thus and thereby leaving the clerk of court as well as the plaintiff up in the clouds on what day to expect the writ to be returned to his office.

In the last two paragraphs are contained the issue, and the whole of the issue which, having in the court below been decided adversely to the contention of plaintiff, has been submitted for our consideration in this appeal.

We are unwilling to upset the practice of a court followed for more than fifty years, which practice, as we are convinced, is based upon a law prescribing that a definite return day must be fixed, especially when Rule XXXII of the Rules of the Circuit Court, in amplification of that statute, reads:

> "It shall be the duty of the Sheriff to serve and return all processes on the day therein specified, with statement endorsed thereon as to the service. The Clerk shall be governed by the written directions of the Plaintiff in specifying the return days."

And first of all we would like to premise that, as a general rule, a ministerial duty is defined as a duty:

> ". . . in respect to which nothing is left to discretion. A simple definite duty, arising under conditions admitted or proved to exist, and imposed by law . . ." 2 B.L.D. 2219.

Discretion belongs to a judicial, not a ministerial, officer. Our statute directs that the ministerial officer must "literally" execute the writ.

From a case decided in the United States, the following has been culled by Bouvier:

> "Where the settlement of a question involves the exercise of discretion and judgment, the duty is not min-

isterial and is beyond the review of the judicial department."

In anticipation of the chaos which will prevail should a definite return day be not fixed, we have already had an illustration, the case *Hawkins* v. *C.F.A.O.*, 6 L.L.R. 344. In that case the written directions were issued and the complaint filed on the 20th day of August, 1937, and the writ issued on the said 30th day of August, 1937, and sent to the sheriff for service. Meantime notice of the filing of her complaint was given defendants by plaintiff on the 31st day of August, 1937; and defendants having waited in vain for the service of the writ on the 2nd day of September, 1937, filed a special appearance to object to the jurisdiction of the court, and on the 7th day of September, 1937, filed their answer, while the writ, still ambulating, was not served until September 10th. What an anomaly! Here is a case in which the appearance was filed eight days and answer three days before the writ, having finished its peregrinations, was served, and in which, had the usual sequence been followed, defendant's four days would have expired twelve days after the date when normally he had been expected to appear and one day after the filing of the reply on September 11, 1938.

But to revert to our first proposition, the law prescribed as aforesaid, that the sheriff shall have the writ before the court at the day appointed for the appearance of the defendant; that the sheriff shall on that day produce to the court the said writ with his return endorsed thereon, 1) either that he has summoned the person therein named as defendant; or 2) that the defendant connot be found to be summoned; or 3) in the event there is a plurality of defendants named in one writ, that defendant X has been summoned, that defendant Y cannot be found to be summoned, and that defendant Z has for the last five years to the best of his knowledge and belief been without his bailiwick, or whatever the facts may be. On said day,

let us say for illustration,—January 13, 1939, the writ gains new potency as regards defendant X, but becomes dead with respect to defendants Y and Z. If, notwithstanding the premises, it should still become necessary to bring defendants Y and Z under the jurisdiction of the court two different modes of procedure would have to be followed, viz.: 1) as regards Y,—a writ of resummons would be ordered issued, probably giving a longer period for the return day, and this writ of summons would be based upon the sheriff's return *non sum inventus* as to defendant Y, based upon the return of the sheriff when he had served the first writ of summons. As regards defendant Z who had been out of the sheriff's bailiwick for five years, obviously a resummons would be impotent to reach him, hence a writ of attachment, called in the common law a *distringas,* or the procedure of posting notices and advertising in a newspaper, as prescribed by recent statutes, would have to be followed so as to bring all the defendants under the jurisdiction of the court, and, in the hypothetical case assumed, defeat defendant's plea of non-joinder. But let us not forget that in each of the last two cases these extraordinary modes of procedure could only have been based upon the sheriff's original return of *non sum inventus* as aforesaid, and the reasons therefor as to defendants Y and Z. To proceed in any other way would leave the original writ in an ambulatory state indefinitely. And besides, as his honor the trial judge pointed out, it would never fix a date when by effluxion of time plaintiff would be entitled to apply for further process. His ruling is in our opinion so cogent, and so logically sound, that we are quoting same verbatim, as follows:

> "As to count three of the Answer, the Court is of opinion that the written directions filed in the case are fatally defective and bad, and consequently, the writ of summons issued and formulated in the tenor of said written directions. It is true that the Honourable

Supreme Court of Liberia has decided in the case *Jantzen* v. *Burney,* 4 L.L.R. 119, 1 Lib. New Ann. Ser. 121, that defendant is given four days after being summoned to make his returns, but in our Opinion said decision does not set aside or nullify the statutory as well as common law requirement that 'a day appointed' for returns must be stated within the writ as to the period within which the Sheriff is to serve the writ and make his returns to the Clerk's Office. It is from the date appointed in the writ that the four days allowed for the defendant's appearance begin to run, and after which plaintiff would be entitled to a new process in case defendant is not found to be summoned. The written directions in this case contained no such time. It is our opinion that the writ had to set a time for its service and return, since cases must generally be commenced within fifteen days before the commencement of a term of court. If the writ contains no specified time of the service and return, there can never be an effluxion of time necessitating the issuance of a writ of resummons. Further, the writ, if the defendant is not found to be summoned, must remain in the Sheriff's Office indefinitely, and he may serve it after the term of court at which defendant was to have been summoned to appear had passed. What then would be the status of the case? It could not be continued indefinitely and returned in another term of court other than that for which it was commenced without a renewal of the whole case.

"The weight to be given to written directions in the institution of legal proceedings is set forth in the case *Attia* v. *Summerville,* 1 L.L.R. 215, decided January term A.D. 1888. It says *inter alia:* 'that in respect to the written direction we are of the opinion that it should set forth every necessary instruction of the plaintiff to the clerk of the particular court in which the case is entered. The legal existence of the writ

depends solely upon a proper written direction. . . . See 1 L.L.R. 216.

"Revised Statutes, sec. 277: All actions except injunctions or replevin shall ordinarily be commenced by a writ of summons directed to the sheriff, except in the court of a Justice of the Peace, requiring him to summon the defendant to appear before the Court at a day appointed to answer the complaint of the plaintiff. The writ shall also contain a clause requiring the sheriff to have it before the court on the day appointed for the appearance of the defendant. It shall only be issued on the written direction of the party in whose favour it is issued, his attorney, or agent, without specifying such complaint.

"Revised Statutes, sec. 278: It shall be the duty of the Sheriff to summon the defendant if he can be found, and produce to the Court on the day named therein the writ of summons with his returns endorsed thereon, either that he has summoned the defendant, or that he cannot be found. . . ."

Nevertheless, we hesitate to dismiss a case on a point so technical since heretofore the practice in the several Circuit Courts of this Republic on this point has not been uniform and this is the very first time that this Court has been called upon to settle the principle, and the more as, from the records, no material harm has been shown to have been done to defendants by this technical defect, although had such a confused state of affairs followed as, for example, in the case *Hawkins* v. *C.F.A.O.,* above pointed out, and which has been this day decided, we would have had no option but to confirm the judgment of the court below.

In view of the foregoing we have decided to reverse the judgment of the court below and remand the case for such further proceedings as shall not be inconsistent with this opinion; and it is hereby so ordered.

Reversed.