HIS HONOUR JOHN H. MATHIES, Judge, Debt Court, Montserrado County, FIMA CAPITAL CORPORATION LTD. (FCC), by and thru its Joint Liquidator, MARK LEVY, by and thru his representative, P. RICHARD ROSCOE, Chairman, GLOBAL GROUP, et al. Appellants/Respondents, *v.* ALPHA INTERNATIONAL INVESTMENT, LTD., by and thru its Attorney-in-Fact, PIERRE, TWEH AND ASSOCIATES, Appellee/Petitioner.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE GRANTING THE PETITION FOR A WRIT OF PROHIBITION.

Heard: April 4, 2001. Decided: July 6, 2001.

1. The statute provides for an additional ten days to a non-domiciliary beyond the period ordinarily allowed for responding to a complaint, thus allowing a total of twenty days, where service of the precepts has to be made by mail outside Liberia.
2. The conducting of an *ex parte* trial by the court seventeen days after the mailing of process to a non-domiciliary defendant is a violation of the statute providing for filing of the answer twenty days after mailing of the summons and complaint.
3. A trial court acts prematurely in conducting a trial prior to the expiration of the twenty-day period allowed for filing of an answer by a non-domiciliary defendant, and by such trial prevents and obstructs a defendant in exercising his statutory right to file an answer within the prescribed statutory time.
4. The failure of a party to interpose an answer to a complaint shall be deemed as a general denial of the allegations in the complaint.
5. A defendant who has failed to interpose an answer to a complaint has the right to cross-examine witnesses of the plaintiff during the trial and to introduce evidence in support of his denial, but not in support of any affirmative matter.
6. In spite of the fact that a party has failed to appear or plead, the trial court still has the duty to have him notified of the trial proceedings, as a last or final chance of appearing in the matter.
7. No party can be said to have failed to proceed to trial who has not be duly informed of the hearing.
8. The failure of a trial court to have a defendant notified of the assignment of a case for hearing is good evidence of denial of the said party of his day in court.
9. It is not the title or caption of an action which is

controlling, but rather the averments in the complaint that determines the form of the action.

10. A complaint in an action of debt and a petition for the liquidation of a corporation are two separate and distinct actions. An action of debt is an action at law and is by statute cognizable before the debt court; a petition for the liquidation of a corporate defendant, on the other hand, is an equitable proceeding and is cognizable before a circuit court of competent jurisdiction.
11. The Debt Court for Montserrado County has no jurisdiction to entertain a petition for the liquidation of a corporation and to appoint a receiver to control and manage its assets.
12. The sole basis for a debt action is to recover an amount which a plaintiff is claiming from a defendant and not initially to liquidate a defendant corporation and appoint a receiver to take over and control the defendant's assets.
13. Liquidation proceedings are post judgment remedies available to a judgment creditor.
14. A petition for an involuntary judicial liquidation can be legally filed by a judgment creditor only in the following instances: (a) by the judgment creditor first obtaining a valid and enforceable judgment in the debt court against the corporation; (b) by the failure of the judgment debtor to satisfy the judgment; and (c) by the judgment creditor then filing post judgment proceedings against the judgment debtor to have the latter liquidated by a judicial decree and a court receiver appointed to identify the judgment debtor assets and use them to satisfy the judgment.
15. A court may appoint a receiver, upon motion of a judgment creditor, and upon such notice as the court may require, to administer, collect, improve, lease, repair, or sell any real or personal property in which the judgment debtor has an interest.
16. The appointment of a receiver is usually the last recourse and pre-supposes that other remedies are

inadequate or unavailable. Hence, a receiver need not be appointed where there is another safe, expedient, adequate, and less drastic remedy at law or in equity.

17. A money judgment is generally enforced by execution, and a receiver cannot be appointed in the absence of a writ of execution being issued; nor can a receiver be appointed where there are no receivership proceedings subsequent to the service of the writ of execution.
18. There is no right to the appointment of a receiver unless an execution has been duly served, and a receiver cannot be appointed in supplementary proceedings where no supplementary proceedings exist.
19. A trial judge exceeds his jurisdiction and proceeds by wrong rule in assuming jurisdiction over an action of debt and liquidation proceedings, and appointing a receiver to liquidate a corporate defendant without the issuance and service of a writ of execution or notification of the appointment of a receiver.
20. Prohibition will lie to prevent the appointment of a receiver or to restrain actions by a receiver where the court appointing the receiver was without jurisdiction or authority to do so.
21. The writ of prohibition may legally and properly run against the receiver as well as the court which appointed him, where the appointment is void.
22. Prohibition will lie and give relief where a subordinate court proceeds in a manner contrary to known and accepted practice.
23. Prohibition will lie where a judge of a subordinate court has exceeded his authority.
24. Prohibition will undo what has not been legally done, and where anything remains to be done, prohibition will not only prevent what remains to be done but will also give complete relief by undoing what has been done.
25. Prohibition will lie to undo the illegal and unwarranted appointment of receivers in a case where the defendant

was not served a notice of assignment for the trial.

26. The Supreme Court will pass only on those issues it deems to be meritorious, worthy of notice, and germane to the legal determination of the case; it need not pass on every issues raised in the bill of exceptions or in the briefs filed.

The appellee/petitioner, a non-resident Liberian corporation, filed a petition for a writ of prohibition to prevent the trial court proceeding with liquidation of the corporation. The records in the case showed that the co-appellant, Fima Capital Corporation Ltd., had instituted an action of debt in the Debt Court for Montserrado County, in which it not only claimed the amount of US$267,000.00 which it said the appellee owed it, but it also prayed for the liquidation of the appellee corporation and the appointment of a receiver to handle its affairs, control its assets, and pay off its creditors. The writ of summons and complaint were served on The International Trust Company of Liberia, the registered agent for the appellee, for mailing to the appellee. Seventeen days after the service of the summons and before the filing of an answer by the appellee, the case was called and an *ex parte* trial was conducted and judgment entered in favour of the appellant, adjudging the appellee liable to the appellant in the amount prayed for in the complaint, and appointing a receiver to take charge of the assets of the appellee and discharge its liabilities to creditors. Thereafter, several other receivers were appointed and removed by the trial court.

The Justice in Chambers, before whom the prohibition had been filed, declared the action by the trial court to be illegal and void, both because the trial court lacked jurisdiction over the proceedings in liquidation and because of the entry by the trial court of a judgment prior to the expiration of the time allowed by the statute for the filing of

an answer by the appellee.

On appeal to the Full Bench, the Supreme Court affirmed the ruling of the Chambers Justice and granted the petition. The Court observed that the Civil Procedure Law grants to a non-resident corporation an additional ten days than is ordinarily given for the filing of an answer, which meant that the appellee was allowed twenty days to file its answer, and therefore the Court ruled that the trial court acted in error in conducting the trial of the case seventeen days after the service of the writ of summons. It held that the trial court's action not only deprived the appellee of the right to file an answer but also deprived the appellee of its right to appear and defend itself and of due process of law.

The Court rejected the argument that the appellee was not entitled to notice of the hearing of the case since it had failed to file an answer, noting that aside from the fact that the proceedings were prematurely had, even had the appellee not answered within the time allowed by statute, that failure was to be treated as a general denial by the appellee, who still by law retained the right to cross-examine the appellant's witnesses and to produce witnesses in its own defenses, except as to affirmative defenses. The Court emphasized that the judge should have issued an additional notice of assignment for the hearing of the case and have the said assignment served on the appellee. In the absence of such notice, the Court said, the trial court had committed a reversible error.

The Court also determined that the judgment of the trial court was void since the lower court did not have jurisdiction over the proceedings. The Court observed that liquidation of a corporate defendant initially is vested in a circuit court, not a debt court, and thus, as applied to the instant case, in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, rather than in the Debt Court for Montserrado County.

The Court pointed out that in order for the trial court to

have ordered the liquidation of the appellee corporation and appoint a receiver, the appellant would first have had to sue out in debt, get a judgment, have a writ of execution served, and then, only after the failure of the appellee to make payment, proceed to appoint a receiver and to liquidate the corporation. The Court accordingly declared that in the absence of the trial court following the prescribed procedure, its action and the judgment growing therefrom were illegal and null and void. Prohibition, the Court emphasized, would lie not only to prevent the appointment of such receivers, done under an illegal and unwarranted procedure and void *ab initio,* but also to undo the appointments already made as well as acts performed under the said appointment. The Court therefore ordered the *reversal* of all actions taken by the trial court, including the return of proceeds taken from the appellee by the receivers. It also ordered that a new trial be conducted, after the filing of an answer by the appellee and the disposition of the issues of law.

Cooper W. Kruah and *James C. R. Flomo* of the Henries Law Firm appeared for the appellants/respondents. *N. Oswald Tweh* and *Clarence Dixon* of Pierre, Tweh and Associates appeared for the appellee/petitioner.

MR. JUSTICE MORRIS delivered the opinion of the Court.

This appeal grows out of a ruling handed down by our distinguished colleague, His Honour Karmo G. Soko Sackor, while presiding in Chambers during the October Term, A. D. 2000. The certified records of these proceedings revealed that the appellee is a non-resident Liberian corporation, as defined under chapter 3, section 3.1(1), of the Liberian Business Corporation Act, and therefore, does not maintain a place of business within the

Republic of Liberia. By law, such corporation must maintain a local registered agent upon whom service of process may be made. In the instant case, the International Trust Company of Liberia (ITC) acted as the registered agent for the appellee.

On July 3, 1998, an action of debt was instituted in the Debt Court for Montserrado County by Co-appellant Fima Capital Corporation Ltd. (FCC), by and thru its Joint Liquidator, Mark Levy, by and thru his representative, P. Richard Roscoe, Chairman, Global Group, 35 Whitehall, London, SWIA 2BX, England ("Fima"), as plaintiff, against the appellee, as defendant, claiming the amount of US$267,000.00. The complaint contained a prayer for the liquidation of the appellee corporation and the appointment of a receiver to handle its affairs, control its assets, and pay off its creditors. Service of the writ of summons and complaint was made on ITC, as the registered agent of the appellee, on the same day as the filing of the complaint, for onward transmission by registered mail abroad to the appellee.

The records also revealed that no answer had been filed by the appellee on July 20, 1998, seventeen (17) days after the service of the writ of summons on ITC, when the case was called for hearing. We observed further from the certified records that no notice of assignment was obtained or issued for the hearing of the case. Notwithstanding, an *ex parte* judgment was rendered by the trial court against the appellee on July 20, 1998, as prayed for by Co-appellant Fima Capital Corporation Ltd. In addition to the rendition of the final judgment, as prayed for by the co-appellant, the trial court appointed David Ian Kappel as receiver and charged him with the responsibility of liquidating the appellee corporation and paying off its creditors. However, the trial judge subsequently replaced Mr. Kappel and substituted him with Daniel Lloyd Platt. He later discharged Mr. Platt and replaced him with Phillippee Blondin, whom

he also thereafter suspended.

On October 6, 2000, the appellee/petitioner filed a petition for a writ of prohibition before the Chambers Justice, alleging as the basis the following:

1. That when precepts are to be mailed abroad to a non resident defendant, chapter 1, section 1.7(3) of the Civil Procedure Law mandates and allows ten (10) additional days to the time normally required under Chapter 3, section 3.62 and chapter 9.92(3) of the said law for the filing of an answer from the time of service of the writ of summons in which such defendant may be permitted to file its formal appearance or answer to the complaint. The appellee therefore alleged that the hearing on July 20, 1998 was null and void *ab initio*.
2. That no notice of assignment for the trial was issued or served, although the writ of summons had been served on the appellee and the latter had been brought under the court's jurisdiction, irrespective of the fact that the appellee had not appeared or filed an answer; and,
3. That although the complaint purported to be an action of debt, yet the averments and the prayer contained in the complaint made it in reality a petition for compulsory liquidation of a corporation. The appellee's position is that a petition for liquidation is a post judgment remedy and not cognizable before the debt court.

After the filing of the petition, the Chambers Justice ordered the issuance of the alternative writ of prohibition, to which the appellants thereafter filed their returns. After arguments were entertained, the Chambers Justice ruled granting the appellee's petition and ordering the issuance of the peremptory writ. The relevant portion of the Chambers Justice's ruling states as follows:

> "The final judgment of July 20, 1998, rendered by the trial judge, and the appointments of David Ian

> Kappel, Daniel Lloyd Platt, and Phillippee Blondin, as court appointed receivers to liquidate the petitioner are hereby declared illegal, null and void *ab initio,* and unenforce-able, and are hereby ordered vacated. Messrs. Platt and Blondin are also instructed to immediately return to Mr. Gamal Mohamed Marwan, the petitioner's shareholder and director, all monies, including the US$234, 000.00 received from Mr. Pierre Schifferli and other assets and records they may have received on behalf of or in the name of the petitioner...."

The appellants excepted to the ruling and announced an appeal from the said ruling to the Bench *en banc.* The following are the issues we have determined to be dispositive of this appeal:

1. Whether or not the trial judge's ruling of July 20, 1998 was in violation of chapter 1, section 1.7(3) of the Civil Procedure Law?
2. Whether or not it is a legal requirement that a notice of assignment be issued and served when there has been service of the writ of summons on a defendant?
3. Whether or not an application can also be made in a complaint in an action of debt for the liquidation of a corporate defendant's assets and the appointment of a receiver?
4. Whether or not prohibition will lie to prevent the appointment of a receiver or to restrain actions by such a receiver, where the court appointing the receiver is alleged to be without authority to do so?

We shall dispose of the issues in the order presented.

There is no disputing that the appellee was a non-resident Liberian corporation and that ITC was its registered agent, in keeping with the provisions of Chapter 3, section 3.1(6), of the Business Corporation Act, and that section 3.1(6) of the same Act requires that when service is made on the local registered agent, the latter by law is

required to immediately mail same by registered mail to its principal abroad. Chapter 1, section 1.7(3) of the Civil Procedure Law provides, *inter alia,* that "... ten days shall be added if mail is sent to him abroad...." Since the precepts were served on ITC on July 3, 1998, a minimum of twenty (20) days should have been permitted to elapse before any assignment could have been made for the trial. By statute, the appellee had at least until July 23, 1998 to file its answer. Therefore, the *ex parte* trial conducted by the trial court on July 20, 1998 - only seventeen (17) days after service of the writ of summons - was a clear violation of chapter 1, section 1.7(3) of the Civil Procedure Law. We hold, therefore, that the ruling by the trial court judge was prematurely entered, and that the court's action prevented and obstructed the appellee from exercising its statutory rights to file its answer within the prescribed statutory period of twenty (20) days after service of the writ of summons. We therefore find ourselves in agreement with the Chambers Justice when he ruled that "... the granting of the default judgment by the trial judge on July 20, 1998, less than 20 days, is illegal and erroneous. The petitioner was entitled to an additional ten (10) days to file its answer."

The second issue centers on whether or not the appellant was legally required to obtain a notice of assignment for the trial on July 20, 1998, irrespective of whether or not the appellee had filed its answer. The records confirm that although the writ of summons was served on the appellee's registered agent and returned served, thereby bringing the appellee under the jurisdiction of the court, yet no assignment was subsequently issued or obtained for the trial which was held on July 20, 1998. The appellants' position is that since no answer was filed, it was unnecessary to obtain or serve a notice of assignment for the trial. We disagree with the appellants' position. In that respect, the Chambers Justice properly cited the law controlling when he ruled as follows:

> "In the case *Mitchell v. The Testate Estate of the Late Robert F. Johnson,* 39 LLR 467 (1999), this Honourable Court held ". . . .that the failure of a party to interpose an answer to the complaint of a plaintiff shall be deemed a general denial of all the allegations in the complaint. A defendant in such a case may cross-examine witnesses of a plaintiff during trial and also introduce evidence in support of his denial, without introducing evidence in support of any affirmative matter."

The holding in the above cited case is consistent with the prior decision of this Honourable Court, handed down in the case *LAC v. Reeves and Tarr,* 36 LLR 867 (1989), wherein this Honourable Court ruled: "Despite the fact that a party has failed to appear or plead, the trial court has a duty to have him notified of the trial proceedings, even as a last or final chance of appearing in the matter. No party can be said to have failed to proceed to trial who has not been duly informed of the hearing. Failure by the trial court to have the defendant notified of the assignment of the case for hearing is good evidence of denial of the said party of his day in court."

We further hold that the Chambers Justice's conclusion was in harmony with the law when he ruled: "We are therefore in disagreement with the argument of respondents that petitioner is not entitled to a further notice of assignment for the hearing of the case. The petitioner was entitled by law to be given a further notice of assignment for the hearing of the case on July 20, 1998, and to cross-examine the witnesses of the plaintiff during the trial, failing which, the trial judge denied petitioner its day in court."

The third issue relates to the question of whether an application can be made in a complaint in an action of debt for the liquidation of a corporate defendant's assets and the appointment of a receiver to do so. A recourse to counts 8,

9, and 10 and the prayer of the complaint in the debt action revealed that the plaintiff therein requested the trial court to have the appellee liquidated and a receiver be appointed to be in charge of the appellee's assets. In *Blamo v. Zulu,* 30 LLR 586 (1982), this Honourable Court held that it was not the title or caption of the action which was controlling, but rather that it was the averments in the complaint which determined the form of the action. It is clear to us that although the complaint purported to be for an action of debt, yet, from the averments and the prayer therein, it appear to be a petition for the compulsory liquidation of a corporate defendant and the appointment by the court of a receiver to control and manage the corporation's assets and pay off its creditors.

We agree with the appellee that a complaint in an action of debt and a petition for the liquidation of a corporation are two separate and distinct actions. An action of debt is an action at law and is by statute cognizable before the debt court. A petition for the liquidation of a corporate defendant, on the other hand, is an equitable proceeding and, in this instance, is cognizable before the Sixth Judicial Circuit Court, Montserra-do County. The Debt Court for Montserrado County therefore has no jurisdiction to entertain a petition for the liquidation of a corporation and to appoint a receiver to control and manage its assets.

Moreover, the appellee contended that it had assets which far exceeded the amount of the final judgment and that had the judgment been legal and proper and a writ of execution served on it, the judgment would have been satisfied without the need to resort to having the corporation liquidated and a receiver appointed to manage its assets and pay off its creditors. We are of the considered opinion that the sole basis for a debt action is to recover an amount which a plaintiff is claiming from a defendant and not to liquidate a defendant corporation and appoint a receiver to take over and control the defendant's assets. It

should be emphasized that after the rendition of the final judgment, the trial court made no attempt to have the judgment satisfied by the issuance of a writ of execution for service on the defendant.

In any event, this Court holds that liquidation proceedings are post judgment remedies available to a judgment creditor. As a matter of law, procedure, and practice, a petition for an involuntary judicial liquidation could have been legally filed by Co-appellant Fima as a judgment creditor only in the following circumstances: (a) by the judgment creditor first obtaining a valid and enforceable judgment in the debt court against the appellee/petitioner, a corporate defendant; (b) by the failure of the judgment debtor to satisfy the judgment; and (c) by the judgment creditor then filing post judgment proceedings against the judgment debtor to have the latter liquidated by judicial decree and a court receiver appointed to identify the judgment debtor's assets and use them to satisfy the judgment.

Section 44.38 of the Civil Procedure Law provides that a court may appoint a receiver, upon motion of a judgment creditor, upon such notice as the court may require to administer, collect, improve, lease, repair, or sell any real or personal property in which the judgment debtor has an interest. The certified records in these proceedings show that Co-appellant Fima Capital Corporation Ltd. did not file any motion for the appointment of a receiver as required by statute. Hence, prohibition will lie. However, it should be emphasized that the appointment of a receiver is usually the last recourse and that it presupposes that other remedies are inadequate or unavailable. The law is that "[a] receiver need not be appointed where there is another safe, expedient, adequate, and less drastic remedy at law or in equity." 75 C.J.S., *Receivers,* §9. The law states also:

> "It is an elementary principle of law, practice, and procedure that a money judgment is generally enforced

> by execution..." 35 C.J. S., *Execution,* § 9; and that "[a] receiver cannot be appointed in the absence of a writ of execution being issued, and a receiver cannot be appointed where there are no receivership proceedings subsequent to the service of the writ of execution. It is a universal principle of law that there is no right to the appointment of a receiver unless an execution has been duly served, and obviously a receiver cannot be appoint-ed in supplementary proceedings where supplementary proceedings have not been had." 33 C. J. S., *Execution,* §386 (b).

We are therefore in agreement with the Chambers Justice's ruling that "...the trial judge exceeded his jurisdiction and proceeded by the wrong rule when he assumed jurisdiction over an action of debt and liquidation proceedings and appointed a receiver to liquidate the petitioner corporation without the issuance and service of the writ of execution, as well as by not notifying the petitioner of the appointment of the receiver".

The final issue is whether or not prohibition will lie to prevent the appointment of a receiver or to restrain actions by such a receiver where the court appointing the receiver was without authority to do so. We hold that prohibition will lie to prevent the appointment of a receiver and to restrain actions by a receiver where the court appointing the receiver was without jurisdiction or authority to do so. The writ of prohibi-tion may legally and properly run against the receiver as well as the court which appointed him, where the appointment is void. *65* AM. JUR. 2d, *Receivers,* §127 (1972). Further, this Honourable Court has held in the past that prohibition will lie and give relief where a subordinate court proceeds in a manner contrary to known and accepted practice. *Montgomery v. Findley,* 14 LLR 463 (1961). This Court has also held that prohibition will lie further where a judge of a subordinate court has exceeded his authority. *Dweh v. Findley,* 15 LLR 638 (1964), text at 645-

646; *Thomas v. The Ministry of Justice,* 26 LLR 134 (1977), text at 134; *Aminata Shipping Lines v. Hellenic Cruising Holidays,* 37 LLR 91(1992). Moreover, we have consistently said that prohibition will undo what has not been legally done and that where anything remains to be done, prohibition will not only prevent what remains to be done but will also give complete relief by undoing what has been done. *Boye v. Nelson,* 27 LLR 174 (1978), text at 179; *Fazzah Brothers v. Collins,* 10 LLR 261 (1950), text at 267-268; *Ayad v. Dennis,* 23 LLR 165 (1972), text at 181; *Aminata Shipping Lines v. Hellenic Cruising Holidays,* 37 LLR 91(1992). The Chambers Justice was therefore correct when he ruled that "the procedure and method adopted by the trial court in the trial and the appointment of receivers in this case without affording the petitioner a further notice of assignment is illegal and unwarranted. Hence, prohibition will lie to undo what has already been illegally done under the authority of the trial court."

As to the contention that several issues were raised in this case but may not have been passed upon, it has always been the practice of this Court to pass upon only those issues it deems meritorious, worthy of notice, and germane to the legal determination of the case; it needs not pass on every issue raised in the bill of exceptions or in the briefs filed. In this case, the Chambers Justice acted in keeping with practice and precedence in addressing himself to only the germane issues and questions. *Lamco J. V. Operating Company v. Verdier,* 26 LLR 445 (1978).

Wherefore, and in view of the foregoing, the ruling of the Chambers Justice is hereby affirmed. The final judgment of July 20, 1998, rendered by the trial court, is reversed. The appellant is ordered to pay the appellee the amount of US$294,286.00, and the appointments of David Ian Kappel, Daniel Lloyd Plait, and Phillippe Blondin, as receivers to liquidate the appellee, are hereby declared illegal, null and void *ab initio,* and unenforceable, and are hereby ordered vacated. Messrs. Plait and Blondin are instructed to immediately return to Mr. Gamal Mohamed Marwan, the appellee's shareholder and director, all monies, including the US$234,000.00 received from Mr. Pierre Schifferli and all other assets and records they may have received on behalf of or in the name of the appellee. The matter not having been tried on its merits, and prematurely tried on July 20, 1998, before the time statutorily allowed, it is the considered opinion of this Honourable Court that the case be and is hereby remanded to the trial court for trial on its merits, commencing with instructions to the presiding judge that the appellee be allowed and permitted to file an answer within three days after the reading of this Court's mandate, and that thereafter the trial court proceeds with the disposition of the law issues, upon the issuance and service of a notice of assignment. The Clerk of this Honourable Court is ordered to send a mandate to the trial court commanding the judge presiding therein to resume jurisdiction over the case and to give effect to this opinion. Costs are ruled against the appellants. And it is hereby so ordered.

Petition granted.