MARTIN R. FAGANS, Appellant, *v.* HORTENSE V. HARRIS-FAGANS, Appellee.

TWO CASES: APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued October 16, 1974. Decided November 15, 1974.

1. When a motion is based on facts not appearing in the record, the trial court shall decide the motion on the basis of oral testimony and depositions when necessary.
2. The return of a ministerial officer of a court constitutes prima facie evidence of service of process, but is not conclusively presumptive and may be rebutted by evidence extrinsic to the record before the trial court.

Judgment was rendered by default against appellant on October 1, 1968, in two related matrimonial actions brought against him by his wife, including a divorce suit on the ground of cruelty. He appealed from both judgments, alleging that he had not been served with the writ of summons in either case by the ministerial officer of the court. He attempted to show, but was denied the opportunity by the trial court, that the return of the bailiff to each of the writs was falsely executed and that, in fact, he had never been served with process.

On appeal the Supreme Court pointed out in its opinion that the return of a ministerial officer of a court to a writ of summons, or other pleading or process, is considered only presumptively true and can be rebutted by matter extrinsic to the record, if need be. Therefore, in view of the circumstances it found, the Supreme Court *vacated* both judgments and *remanded* the cases to permit appellant to plead anew.

P. Amos George and *Alfred J. Rayner* for appellant. *Joseph J. F. Chesson* for appellee.

MR. JUSTICE HORACE delivered the opinion of the Court.

On August 7, 1968, appellee filed in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, an action of divorce against appellant for cruelty. It appears that simultaneously with the filing of the divorce action she filed a bill in equity for suit money, stating therein that because she was unable to pay her legal counsel for prosecuting an action of divorce against her husband, the court should allow her $1,800.00 to pay her lawyer.

Writs of summons were duly issued in both cases on the said August 7. We find in the record that the writ, and the one which concerns us is the one in the suit money proceedings, was returned by the officer of the court on August 13, 1968, indicating that it had been served on the defendant on August 12, 1968, as shown by the return on it.

No formal appearance or answer by appellant, defendant in the court below, appears in the record before us.

It also appears that because of the nonappearance of appellant, appellee applied for judgment by default in both cases, which were granted and afterwards perfected on October 1, 1968.

With respect to the divorce case, it was brought to our attention in argument before us that the judgment has been satisfied, appellee paying the costs and other fees required to be paid in such actions. It is, indeed, strange that the plaintiff in the trial court, who prayed for suit money to pay counsel, would undertake to pay the costs of court which the law requires the defendant to pay. This is only mentioned in passing.

After a decree had been obtained in the suit money action, appellee applied for a writ of execution for the amount of $1,936.00, encompassing $1,800.00 for suit money and the costs of court. When the writ of execution was served upon appellant he contacted legal counsel, who moved the court to stay the execution. It should be stated that execution related to the suit money action

since the divorce action had been concluded with payment of costs and other fees by the plaintiff, who had instituted the action. We mention the foregoing to show that our concern is mainly with execution of judgment because if appellant wanted to challenge the validity of the divorce decree he cannot do so by a motion to stay execution where no writ of execution had been issued. Besides, he has precedent as to how he can get relief for an invalid divorce decree.

In the motion to stay execution, appellant raised arguments we have summarized.

(1) That the return of the ministerial officer to the writ of summons in said action which would have brought him under the jurisdiction of the court was false, because at the time he was supposed to have been summoned he was suffering from an attack of chicken pox, and he was in a native village adjacent to his home town of Bensonville, and that the bailiff who was supposed to have served the process never saw him.

(2) That not having been brought under the jurisdiction of the court, he cannot legally be made to satisfy the writ of execution on a judgment rendered against him under the circumstances.

(3) That evidence of his not being in the settlement of Bensonville at the time the summons was supposed to have been served, is the fact that the Clerk of the Civil Law Court out of which said summons was issued had written a letter of August 9 to the Commissioner of Bensonville enclosing the precepts to be served in both the divorce suit and the suit money action, with the request that he be sent for by the said Commissioner to have said writs served on him.

We assume that after the writ of execution was served on appellant he got in touch with the Commissioner of Bensonville, who, by letter dated October 5, 1968, assured him that he had never received any letter from the Clerk of the Civil Law Court. Profert was also made of this

letter, which further complicates the issue of service of the writ of summons on the appellant.

The motion to vacate was resisted by appellee's counsel on grounds we have summarized:

(1) That there was no statutory basis for a motion as entitled by appellant's counsel, who should have filed a motion for relief from judgment or order.

(2) That the motion was confusing and ambiguous in that appellant had held that he had not had his day in court and also that he was never summoned, the two contentions being entirely different in contemplation of the law, one signifying being under the jurisdiction of the court but being denied a hearing and the other that he had never been brought under the jurisdiction of the court.

(3) That appellant's motion related to two cases, one in law, the divorce action, and the other in equity, the suit money action, embracing two separate and distinct divisions of court.

(4) That the court had to be governed by its record, that is, in the instant case, the return to the writ of summons which showed that appellant had been summoned and had been returned summoned.

On February 20, 1969, the judge presiding over the December 1968 Term of the Civil Law Court entered a ruling denying the motion to stay execution. In ruling, the trial judge stated that the court takes judicial notice of its records and they include returns to writs, which are prima facie evidence of service.

The exceptions of appellee have, in effect, been set forth above, relating to failure to serve and objecting to the court's attitude in not ordering an investigation.

The trial judge correctly stated that all matters of form should apply to motions, when ruling on the point of the title of the motion to stay execution, meaning thereby, we presume, that the motion should have been titled motion for relief against judgment or order. We,

however, feel that this only entails nomenclature and not substance, for appellant was seeking relief from what he considered a void judgment. Moreover, we are of the opinion that taking into consideration that appellant had averred that he was never summoned, which averment was duly verified, section 361, entitled "Evidence on motion" should have applied. This section of our former Civil Procedure Law states that when a motion is based on facts not appearing on the record, the court shall decide the motion on the basis of oral testimony, including depositions in appropriate circumstances. 1956 Code 6:361. The 1956 Code is applicable because the action was commenced before the revised Civil Procedure Law came into effect.

The trial judge also correctly stated in his ruling as a general principle of law that the return of the ministerial officer of court constitutes prima facie evidence of service of the writ and every officer is presumed to have done his duty within the time prescribed by law. This has been the position of this Court in many decisions. But here, too, there are exceptions to the rule. For it must be remembered that the neglect to serve any original process, by which means only an action of law could be commenced, is a default that cannot be cured by the application of any principle of law. *Liles* v. *Batam,* 1 LLR 70 (1874). A sheriff's return is proof of service unless shown to be false. *Perry* v. *Ammons,* 17 LLR 58 (1965). However, this Court has often held that the return of the sheriff constitutes presumptive evidence as to the fact of service and may be rebutted. *Sawyer* v. *Freeman,* 17 LLR 274 (1966).

> "The rule of conclusiveness of the sheriff's return, although tending to the security of the record, often imposes hardship, and many courts have discarded the idea that such return must be accepted as verity, in favor of the more liberal rule that the return is only

prima facie evidence of the facts therein stated, and may be impeached by competent extrinsic evidence in a director proceeding." 42 AM. JUR., *Process*, § 127.

Therefore, as a general rule universally accepted the return to a writ of summons is considered prima facie evidence of the service. Appellee's counsel very ably presented the general rule with supporting citations of law, but as stated before, this rule, like almost all rules, has exceptions depending upon the attendant circumstances.

There are circumstances in this case which raise a doubt as to whether appellant was, indeed, served with process, such as, for instance, the letter from the Clerk of the Civil Law Court to the Commissioner of Bensonville enclosing the precepts and asking him to send for appellant to serve them on him in order to bring him under the jurisdiction of the court. We wonder why this novel procedure had to be adopted in this case. The duty of the clerk is to issue the precept and place it in the hands of the ministerial officer. The clerk has absolutely nothing to do with the service.

The learned trial judge, in dilating on this point, held that since the return's date on the writ of summons was later than the date of the letter of the clerk to the Commissioner, the court would refuse to hear evidence touching the service because if the service shown by the return had been prior to the clerk of court's letter, that would have suggested something spurious. With this line of reasoning we disagree because we find it contrary to the provision of section 361 already cited in this opinion.

After going through the record and listening to the able argument of counsel for both sides, we feel that the circumstances of this case, without abrogating the general rule that the ministerial officer's returns constitute prima facie evidence of service, in the interest of justice to both parties warrant remand of the cases in order that the appellant may be brought under the jurisdiction of the court

by the issuance of a summons for his appearance and permit him to plead *nunc pro tunc* to the petition for suit money, if he so desires. Costs to abide final determination of the cases. It is so ordered.

Judgments vacated, cases remanded.