RASAMNY BROTHERS, INC., et al., Appellants, *v.* FRANCIS R. T. GARDINER, SR., Appellee.

APPEAL FROM RULING OF JUSTICE.

Argued November 17, 1975. Decided January 2, 1976.

1. Every officer of a court is presumed to have done his duty properly unless the contrary is shown.
2. Lack of jurisdiction over a party by reason of defective process can only be raised by a motion alleging impropriety of service.

Appellee instituted an action of debt against the corporate defendant. A motion was made before the Debt Court which addressed itself only to issues of law. At the hearing the issue of lack of jurisdiction arose, over allegedly defective service of the writ of summons. The court indicated it would order an investigation and reserved judgment. At that time the plaintiff sought a writ of prohibition from the Justice presiding in chambers, contending the lower court had no power to order an investigation of service by the court's ministerial officer unless the issue was properly raised in a motion addressed to it expressly. The Justice granted the writ of prohibition and the respondents appealed to the full Court.

The Supreme Court agreed with the appellant and *affirmed* the ruling of the Justice.

P. Amos George for appellants. *M. Fahnbulleh Jones* for appellee.

MR. JUSTICE AD HOC JOHN A. DENNIS * delivered the opinion of the Court.

* Appointed pursuant to Judiciary Law, Rev. Code 17:2.8.

Petitioner applied for a writ of prohibition to Mr. Justice Wardsworth in chambers, who allowed the writ. This proceeding rose from an action in debt commenced in the Debt Court for Montserrado County.

The core of this matter hinges around an alleged irregularity in the service of summons.

There seem to be two basic legal prongs that have been very comprehensively dealt with by the Justice in ruling granting the petition, which have been appealed by the respondents. The salient issues to which we shall address ourselves are summarized: (A) whether or not a writ of summons was issued in the action of debt filed against respondent Rasamny Brothers, Inc., and served by the ministerial officer of the court on the said Rasamny Brothers, Inc.; (B) what constitutes proof of service thereof; (C) whether or not the issue of jurisdiction over the person was raised and disposed of. In disposing of these issues, we shall proceed so to do in the inverse order.

The record indisputably answers the question in the affirmative of issue of jurisdiction over the person of appellant, since it was argued in a motion to set aside service of the summons, which was denied by the lower court.

We are in complete agreement with the ruling of the Justice herein, declaring violation of rules and statutory requirements by the trial judge.

After the issuance of the writ of summons in this case, it was given to the court bailiff, who made his return thereto.

> "On the 24th day of January, 1973, Bailiff John Hall served the within writ of summons on the within named defendant who read same but refused to accept his copy of the writ of summons together with the complaint and told the Bailiff to take same to his lawyer, the P. Amos George Law Office. I now

make this as my official returns to the office of the Clerk of Court.

"Dated this 25th day of
January, 1973.
[Sgd.] JOSEPH W. ROBERTS,
Sheriff of the Debt Court, Mo. Co."

The above return conclusively indicates the service of the writ of summons on defendant, Rasamny Brothers, Inc., on January 24, 1973.

We proceed to the second question, what constitutes proof of the service by the ministerial officer of the Court, and how the falsity thereof is to be proved. This Court has continuously upheld the principle that every officer of court is presumed to have performed his duty unless the contrary is shown. *Russ* v. *Republic,* 5 LLR 189 (1936).

The return of the ministerial officer of the court constitutes prima facie evidence of service and unless attacked or rebutted by a motion, stands unhindered. *Ross* v. *Arrivets,* 6 LLR 364 (1939).

We can turn to legal authority on the point.

"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 returns must be accepted as verity, in favor of 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 direct proceeding. In those jurisdictions where the defendant is allowed to contradict the officer's return in the same action before judgment is rendered, he must proceed by motion or plea in abatement before pleading to the merits." 42 AM. JUR., *Process,* § 127 (1942).

It is expressly stated in numerous opinions of this Court that all demurrers to a complaint should be made by a motion to dismiss, accompanied by an answer, raising

specifically both issues of law and fact, the former that of jurisdiction over the person and other legal issues, to be first resolved. *Hill* v. *Tetteh,* 2 LLR 492 (1925).

By deciding to investigate the validity or truthfulness of the return of the ministerial officer of the Court, an issue not raised in the motion herein, the judge was committing error by introducing and passing upon such an issue. This leaves us with no other alternative but that of affirming the ruling of the Justice herein, since it is clear by the record that a writ of summons was issued in the action of debt and served by the ministerial officer of the court.

This Court, incidentally, is not ignoring its holdings that a motion is not a pleading, which consists of complaint, answer, and reply. *Davis* v. *Crow,* 2 LLR 309 (1918).

It was entirely proper for the Justice to grant the writ of prohibition petitioned, for it is the proper remedy to restrain a court from proceeding by rules different from those it should observe at all times. *Parker* v. *Worrell,* 2 LLR 525 (1925).

In view of the foregoing, the ruling of the Justice should be and is hereby affirmed by this Court. And it is so ordered.

Affirmed.