JIDSANC, INC., by and thru FORD DENNIS, and**, WILLIAM H. COOPER,** Appellant, v. **HIS HONOUR J. HENRIC PEARSON,** Assigned Circuit Judge, the Sheriff for Montserrado County, **WEST-TECH P.L.C. GROUP OF COMPANIES et al.**, Appellees.

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: December 19, 1988 Decided: December 30, 1988

1. In a motion to justify surety, a trial judge may order appellant's surety to be present at the hearing of the motion to be examined under oath.

2. Objections to the admission of evidence are properly made after the evidence has been identified and marked.

3. For a document to be received, identified and marked by the court to go to the trier of facts for consideration, the document must be relevant to the issue of fact raised in the pleading, and must have been pleaded.

4. A copy of writing is admissible into evidence only when the original is proved to have been lost or destroyed.

5. Certiorari is a corrective remedy; it does not restrain or prohibit as an injunction does; it does not compel performance as mandamus; and it is not a preventive remedy.

6. Certiorari is a writ issued from a superior court to an inferior court commanding the latter to send up its records for review to correct decisions of officials, boards or agencies acting in a judicial capacity, or to review an intermediate order or interlocutory judgment of a trial court.

7. Certiorari will not be granted to correct the action of a trial judge if he or she has not issued an interlocutory ruling that prejudiced the rights of the petitioner.

8. Certiorari will not lie to secure the release of a person from illegal detention.

9. Certiorari concerns itself only with the records; it is to review the records and correct prejudicial errors of a trial court during the pendency of a case.

10. Certiorari will not lie to perform the proper functions of other remedial processes: it will not compel the performance of an act as a mandamus would; or prohibit an act, as in prohibition; nor can it be substituted for writ of error.

11. Even after a hearing has been conducted, the writ of certiorari has no power to divert property from one party to another, and cannot compel the trial judge and the ministerial officers to undo an act that has not been done or to undo an act that has already been done.

12. If the Legislature intended to require the payment of accrued costs as a prerequisite to the issuance of a writ of certiorari, as it has done in the case of error, it would have specifically said so.

13. The rule governing the form of amendments to a pleading is applicable to motions.

14. A motion filed after the withdrawal of a first motion should be denominated "amended motion," or the paper may be stricken and dismissed.

15. A notice to reclaim replevin property in an action to recover chattel is like a motion and has all the characteristic of a motion.

16. A notice to reclaim replevin property should pray for a relief which is ancillary to the main relief sought by the defendant in the answer to the complaint.

17. A notice to reclaim replevin property must carry an affidavit as any other motion, but the contents of the affidavit must meet the statutory prescription.

Appellee West-Tech filed an action to recover chattel in the civil law court and, accordingly, obtained a writ of summons and a writ of replevin. The chattels were seized and taken into possession by the sheriff. The next day appellant filed a notice to reclaim the chattels, but failed to file an adequate bond as mandatorily required by statutes. Appellee filed an exception to appellant's sureties, and a justification of sureties hearing was set. The parties also filed their respective pleadings, as well as other pre-trial motions and pleadings. The trial judge then proceeded to dispose of the pre-trial motions and exceptions, but decided to consolidate all the motions and ordered the parties to argue said motions simultaneously. Neither side objected nor excepted to the novel procedure of simultaneous argument on the motions, as opposed to hearing each motion and exception according to the order or priority

prescribed by law and practice. While the trial judge was hearing the pre-trial motions, appellant petitioned for two writs of certiorari. The Chambers Justice before whom the first writ was filed called the parties to a conference, which was not held. Subsequently, Petitioner withdrew their first writ of certiorari and the trial judge resumed jurisdiction. Appellant then filed another writ of certiorari and prayed that a clause be inserted in the mandate commanding the sheriff to deliver the seized chattel to appellant. The writ was issued and appellees filed their returns as well as a bill of information. The Chambers Justice consolidated the pleadings and after hearing, ruled that the trial judge did not commit any error to justify the granting of the writ of certiorari. Accordingly, the writ was dismissed. The appellant thereupon appealed to the full bench of the Supreme Court. In reviewing the appeal, the Court held that the trial judge had the power to order the appearance of appellant's sureties for a justification of surety hearing. The Court then proceeded to examine the office of certiorari at great length and concluded that certiorari will not lie to perform the proper functions of other remedial processes; it will not compel the performance of an act as a mandamus would; or prohibit an act as in prohibition; nor can it be substituted for writ of error. The Court determined that it was prejudicial to include in the pray of the writ an order to return seized chattel. Finally the Court held that payment of accrued costs was not a prerequisite to the issuance of a writ of certiorari. The Court affirmed the ruling of the Chambers Justice and ordered the lower court to resume jurisdiction and dispose of the case on a priority basis. Affirmed

Cyril Jones for appellant. H Varney G. Sherman and M Wilkins Wright for appellees.

MR. JUSTICE KPOMAKPOR, delivered the opinion of Court.

According to the record in this case, West-Tech P.L.C. Group of Companies, et. al., appellees in these certiorari proceedings, filed an action on August 7,1988 in the Civil Law Court for the Sixth Judicial Circuit to recover chattels. In pursuance thereof they obtained a writ of summons and a writ of replevin in keeping with statutory requirement. In support of the writ of replevin, the appellees filed the corresponding bond with an affidavit of surety.

The sheriffs returns shows that the writ of summons and the writ of replevin were served on the appellant and the chattels seized on August 25 and August 26, 1988 respectively. In support of these returns of the sheriff, appellant filed with the clerk of the court on August 26, 1988, a notice to reclaim the chattels, and stated therein that all the chattels had been delivered to the sheriff. Unfortunately, however, at the time of filing the notice to reclaim, appellant did not file and serve an approved bond

of not less than twice the value of the chattels reclaimed, with sureties acceptable to the court as mandatorily required by the relevant statute. Appellant filed and served on September 7, 1988 in response to the appellees' exception to their sureties, a justification of sureties. Appellant filed an answer to the complaint and the appellees filed a reply to the answer.

After the filing of the above initial pleadings, the parties engaged in the following procedural battle:

On August 30, 1988, appellant filed with the clerk of court a notice to withdraw its notice to reclaim the chattels filed on August 26, 1988 with reservation to re-file. On September 2, 1988, appellants again filed and served a new notice to reclaim and, this time, had same accompanied by an approved bond and affidavit of sureties. On September 5, 1988, appellant then filed and served an exception to the appellees' surety to their replevin bond.

In response to appellant's new notice to reclaim, appellees, on September 5, 1988, filed and served a motion to strike said notice to reclaim on the ground that the new notice to reclaim should have been prefixed "amended," considering that this new notice to reclaim was a substitution for the August 26, 1988 notice, which was withdrawn on August 30, 1988 with reservation to refile. In response to appellant's exceptions to the appellees' surety, the appellees filed and served a motion to strike said exceptions on the grounds that the failure of appellant to except to sureties within three (3) days after the service of the writs of summons and replevin and the seizure of the chattel on August 26, 1988, constitute a bar to the exceptions and the appellees' replevin bond was allowed by operation of law. The appellees also filed and served on September 5, 1988, exceptions to appellants' surety on the bond filed with the new notice to reclaim.

When the parties ceased trading their procedural punches, the trial judge proceeded to dispose of the pre-trial motions and exceptions first; This is the practice that obtains in this jurisdiction. However in doing so, the trial judge *sua sponte* consolidated all the pre-trial motions and exceptions, and ordered that they all be argued simultaneously. Neither side objected nor excepted to this novel procedure. Clearly had the trial judge heard each motion and exception according to the order of priority prescribed by law and the practice, the need for filing these certiorari proceedings might not have arisen. What is important, though, is the fact that while the trial judge was hearing the pre-trial motions and exceptions, appellant sued out two writs of certiorari; the first on September 23, 1988 and the second on October 18, 1988.

When the first petition was filed as aforesaid, our colleague, Mr. Justice Junius, invited the parties to a conference on September 29, 1988 and also ordered the matter placed in *quo ante bellum,* evidenced by the letter of the Clerk of this Court dated September 23, 1988. The conference was not held on September 29, 1988 due to the illness of Mr. Justice Junius. However, on October 3, 1988, the appellant withdrew the petition for the writ of certiorari with reservation to re-file, and on October 4, 1988, upon order of Associate Justice Junius, the Clerk of this Court ordered the trial judge to resume jurisdiction and proceed with the matter. After the trial judge complied with this mandate and resumed jurisdiction over the matter, appellant filed in the Chambers of our other colleague, Mr. Justice Robert G.W. Azango, presiding in Chambers by assignment, a second petition for the writ of certiorari and prayed that a clause be inserted in the writ and order, commanding and compelling the trial judge and the ministerial officers of the trial court to deliver the seized chattel to appellant. The writ of certiorari was issued in keeping with said prayer.

The appellees, for their part, filed their returns to the petition and also filed a bill of information in which the Chambers Justice was requested to give an interim order to the court to release to the appellees two vehicles a Range Rover and a Land Rover, as well as household goods and furniture, which appellant gave no notice to reclaim and which appellant acknowledged were belongings of appellees. Appellant resisted the bill of information on the ground that the appellees should state the value of said properties so that appellant could have its bond accordingly reduced thereby.

During the hearing, our colleague consolidated the bill of information and the petition for the writ of certiorari and these responsive papers, heard argument *pro et con* and delivered his ruling. From this ruling appellant appealed to this court *en bane.* In his ruling, Mr. Justice Azango identified the following five basic issues, which we shall pass upon *seriatim:*

1. Whether the trial judge committed an error that would justify the granting of the writ of certiorari?

2. May a writ of certiorari compel, or command an inferior tribunal to undo that which has already been done, or do that which has not been done?

3. Whether the payment of the accrued costs by the petitioner in the trial court was a prerequisite to issuance of the writ of certiorari?

4. Did the respondents, now appellees, blunder when they filed their motion to strike in response to petitioner's notice to reclaim, or are they required by law to file a motion for justification and a motion to strike?

5. Was the filing by the petitioner on September 2, 1988 of the notice to reclaim done in keeping with law?

In his ruling, dated December 1, 1988, our distinguished colleague held that the trial judge did not .commit any error to justify the granting of the writ of certiorari. According to the petition for the writ of certiorari, the trial judge ordered the appellant and the appellees to procure their sureties to be justified. Another error shown is contained in count 13 of the petition wherein it is stated that the trial judge overruled objections from appellant for court's marks to be placed on photocopies of certain documents testified to by the appellees' witness during the justification of sureties; but said documents were never pleaded and the whereabouts of the original never established.

We observe from the records in the case that appellant did file a paper for the justification of sureties after the appellees filed exceptions to their sureties. The Civil Procedure Law provides that "within three days after service of notice of exceptions, the surety excepted to or the person on whose behalf the bond was given shall move to justify, upon notice to the adverse party. The surety shall be present upon the hearing of said motion to be examined under oath. If the Court finds the surety sufficient, it shall make an appropriate endorsement on the bond." (Our emphasis). Civil Procedure Law 1: 63.6 (1).

Now appellant, having moved the trial court to justify its surety by filing and serving the justification papers, the trial judge acted consistent with law when he ordered appellant's surety to be present upon the hearing of the motion to be examined under oath or, in other words, to justify. Appellant cannot, under any parity of reasoning, assign error warranting the granting of the writ of certiorari the trial judge's compliance with appellant's own motion to justify. This is indeed ironic, to say the least.

As to whether the trial judge erred when he ordered the marking of photocopies of documents not pleaded, we held in the case, *Levin vs. Juvico Supermarket,* 24 LLR 187, 192 (1975), that "...objections to admission of evidence are allowed after the evidence has been identified and marked..." Of course, we agree in part with the appellant's

contention that documents, once identified, received and marked by the court, must go to the trier of the facts. We say "in part" because we have held that in order for such document that has been received, identified and marked by court to go to the trier of the facts, the document must have been pleaded and it must be relevant to issue of fact raised in the pleading. *Walker v. Morris,* 15 LLR 424 (1963); *African Mercantile Agencies v. Bonnah,* 26 LLR 80 (1977). Then we held in the case, *Monrovia Construction Company v. Wazami,* 23 LLR 58 (1974), that "[a] copy of a writing is admissible in evidence when the original is proved to have been lost. "It is therefore clear that appellant's objection to the document was premature as said objection should have been made when the document was offered into evidence since, according to appellant, the document was never pleaded and it was a copy. We say that the objection was premature because the appellees could have, at any time before it rested evidence, proved that the original of the document already marked was lost or destroyed. To sustain objections to its marking preempts the appellees' presenting evidence as to the whereabouts of the original; so the trial judge did not err when he overruled the objection.

We therefore confirm the holding of our colleague that the trial judge did not commit any error that would justify the granting of the writ of certiorari.

Our colleague further ruled that the writ of certiorari cannot compel, force or command an inferior tribunal or court to undo that which has already been done or do that which has not been done. The writ of certiorari is originally a common law writ, whose office and function is now statutory in Liberia and forms a part of many of the opinions of this Court. Certiorari is a writ issued from a superior court to an inferior court commanding the latter to send up the records of a particular case." 14 C.J.S., *Writs, § 1.* Certiorari does not restrain or prohibit as injunction would do. *Id.,* §4(c); neither does certiorari compel performance as mandamus *Id.,* §4(c). Put another way, certiorari is not a preventive remedy as prohibition, but a corrective remedy instead. *Id., §1(e).*

It is an elementary principle and has been provided in our statute that certiorari is a special proceeding to review and correct decisions of officials, boards or agencies acting in judicial capacity or to review an intermediate order or interlocutory judgment of a court. Civil Procedure Law, Rev. Code 1: 16.21 (1). In the case, *Karout v. Flomo,* 27 LLR 60 (1978), we held that certiorari will not be granted to correct the action of a [trial] court judge if he has not issued an interlocutory ruling which prejudiced the rights of the petitioner, nor would certiorari lie to perform the functions of other remedial processes such as securing the release of a person from

illegal detention..." We further held that certiorari concerns itself only with the records.

Our colleague properly expounded on the office and functions of certiorari when he cited the case *Vanderoode v. Morris,* 12 LLR 323 (1956), which holds that "the definite and specific function of a writ of certiorari is to review the records and correct prejudicial errors of a [trial] court during the pendency of a case." A writ of certiorari will not lie to perform the proper functions of other remedial processes. It cannot compel the performance of an act, as a mandamus would, or prohibit an act, as in prohibition; nor can it be used as a substitute for a writ of error." It was therefore highly misleading for the appellant to pray this Court to order the trial judge to deliver the seized chattels to it. What is most astonishing and annoying is the fact that the appellant prayed and caused our colleague to insert a clause in the writ of certiorari to deliver the chattels to appellant even before a hearing was conducted. This Court frowns very seriously on this conduct of the appellant and admonishes party litigants to desist from deliberately and intentionally misleading the court and thereby exposing the judiciary to ridicule and the scorn of the public. It is elementary procedure that before one decides, one must first hear. Therefore, it is out of question that a chattel would be delivered in certiorari proceedings even before the petition is heard.

The writ of certiorari, even after a hearing had been conducted, has no power to divert property from one party and rest it in the other, and it cannot command or compel the trial judge and the ministerial officers to undo an act that has not been done or to undo an act that has already been done. It was not only prejudicial but it was also a travesty of justice when appellant prayed for, and the Chambers Justice granted the prayer that a clause be inserted in the writ of certiorari ordering the trial judge and the ministerial officers of the civil law court to deliver the seized chattels to appellant before the hearing of the petition.

Our colleague found and held that appellant did not pay the accrued costs as required by the Civil Procedure Law, Rev. Code 1: 16.23(3), before applying for the writ and that this was a violation of the statutory requirements for the granting of the writ.

In count 28 of the appellees' returns to the petition for the writ of certiorari, the appellees alleged that appellant did not pay accrued costs as a pre-condition for the issuance of the writ of certiorari. Appellees therefore prayed that the writ of certiorari be quashed, citing *Dixon v. Kandakai,* 25 LLR 562 (1976). Although the petitioner did

not deny this averment anywhere in the record certified to this Court, we will take recourse to the recent case, *American Life Insurance Company (ALICO) v. Sarsih and Pearson,*34 LLR 64 (1986). In *ALICO,* there were several issues raised in the court below and before the Chambers Justice, but on appeal to the bench *en banc,* the parties agreed that the only issue they wanted the Court to decide was whether or not the failure of the petitioner, in a certiorari proceedings, to pay the accrued costs prior to applying for the writ is ground to dismiss the alternative writ.

Mr. Justice Jangaba, speaking for the Court, observed first of all that although the issue of "accrued costs" has been raised in the past in several actions, but up to that time the Court has not spoken decisively, or as he put it, "no clear cut ruling" has been made on the issue. "Consequently," he continued, "we want to take this opportunity in this (sic) proceeding where it has been raised to attempt a final resolution of said issue once and for all."

Apparently, the Court did not succeed in its attempt to lay this issue to rest. Incidentally, the problem of one issue keeps creeping up time and time again after the Court has dealt with it, is a common phenomenon. Trial judges keep making the same mistakes, if one can really refer to them as such, and unfortunately, the trial lawyers, without any exceptions, keep bringing up for our determination issues which have been adequately resolved either by statute or by our opinions. However, after having said this, we are reminded of the old but true saying, when you point one finger at somebody, three point back to you. In other words, until the bench is consistent in its opinions, this problem will not only remain with us, but will get worse as has been the general trend. This problem is common knowledge and authorities or examples need not be cited. Until the Justice in Chambers strives for greater consistency in the future, the battle against issues that has been decided in the last term of the court coming up in the next will be lost.

Now, reverting to our subject of accrued costs, Justice Jangaba answered the question posed in the negative, relying on the civil procedure law: "The petitioner shall pay all the accrued costs, and he may be required to give a bond, conditioned on paying the respondent such damages as he may sustain if the writ is dismissed." Civil Procedure Law, Rev. Code 1: 16.23 (3). In making his point Justice Jangaba went to the next section of the statute: "As a prerequisite to the issuance of the writ, the person applying for the writ of error, to be known as the plaintiff-in-error, shall be required to pay all accrued costs,. . ." Civil Procedure Law, Rev. Code 1: 16.24 (1)(d).

The court noted that there is a clear distinction between the two writs of certiorari and the writ error. In the former the condition of prior payment of accrued costs is not imposed before the writ can be issue; in the latter, it is a condition precedent. In reversing the Chambers Justice for dismissing the petition for certiorari for failure to pay accrued costs as a mandatory prerequisite, the Court emphasized that had the Legislature intended to require the payment of accrued costs as a prerequisite to the issuance of the writ of certiorari, as it had clearly done in the case of error, it would have specifically said so. We believe that this interpretation of §§16.23 (3) and 16.24 (1) (d) by the Court is sound. We are not in agreement, therefore, with our colleague, Mr. Justice Azango, for quashing the writ of certiorari on the ground that appellant neglected and failed to pay to respondents/appellees' accrued costs. Since the said accrued costs have been paid, we need not belabor the point.

Mr. Justice Azango, our colleague, also held that the appellees were not required by law to file justification of sureties in addition to filing a motion to strike exceptions to surety.

Appellant claim that the time for them to file exceptions to surety commenced to run on September 2, 1988, the date that the sheriff made his returns to the writ of summons and the writ of replevin, and not August 26, 1988 the last day on which the sheriff seized all the chattels from appellant. This contention of the appellant is untenable in law and reasoning, and their reliance on Civil Procedure Law, Rev. Code 1:61.6, is therefore misplaced. They also contend that even if the time to file exceptions to surety commenced on August 26, 1988, they had ten (10) days under §61.6 of the statute; this section gives the sheriff ten (10) days within which to retain custody of a replevin chattel. This provision does not state the time for the defendant to file exceptions to the plaintiffs sureties; instead, it merely says that when the sheriff makes his returns after the lapse of the ten (10) days, and in said returns he says that no notice of exception to plaintiffs sureties had been served on him, the replevin chattel would then be delivered to the plaintiff.

The question that comes to mind is, if §61.6, *supra,* gave appellants ten (10) days to file exception to the appellees' surety, then how many days did the appellees have to file a justification? Chapter 61, *Action To Recover A Chattel,* is silent on the question posed. However, all through our civil procedure law, we find that equal time is always given to party litigants on each side within which to perform an act or duty; for example, where a plaintiff has "X" number of days to respond or react. This is the equity inherent in the code.

We therefore take recourse to chapter 63, *Bond And Security.,* and note that the civil procedure law provides that a party must file exceptions to surety within three days after notice of filing of the bond and where exceptions are not taken within three days, the bond is allowed. Civil Procedure Law, Rev. Code 1: 63.5(1)(2). Where exceptions are however taken within the statutory three-day period, the surety excepted to or the person on whose behalf the bond is given must within three days after receipt of the exceptions move to justify. Civil Procedure Law, Rev. Code 1: 63.6 (1).

Appellant filed exceptions on September 5, 1988, ten (10) days after they, according to their notice to reclaim of August 26, 1988, and the sheriffs returns, had delivered the chattels to the sheriff. The exceptions were tardy, since the appellees' bond had been allowed as of August 29, 1988. Consequently, the appellees were not obliged to file justification, as what is not legally done is not done at all. The appellees' motion to have the appellant's exceptions stricken and set aside was proper and in keeping with the practice. The trial judge should have therefore granted the motion to strike appellants' exceptions.

Finally, our colleague, Mr. Justice Azango, held that the September 2, 1988 notice to reclaim as filed by appellant was not valid in keeping with law. Of course, appellant had earlier filed a notice to reclaim on August 26, 1988, which was patently defective as it did not carry a bond with it. The contention of appellant is that the August 26 notice to reclaim was not served on the appellees, but whether or not it was served is immaterial. What is important is the fact that said August 26 notice to reclaim formed a part of the records of the trial court once it had been filed, regardless of the fact that it was subsequently withdrawn with reservation to re-file. While appellant did re-file a notice to reclaim on September 2, 1988, they, however, made it appear as though this September 2nd notice was the first notice to reclaim when, essentially, this notice should have been an amended one.

We held in the case *Lamco J. V. Operating Company v. Verdier,* 25 LLR 394 (1977), that "the rule governing the form of amendments to a pleading is applicable to motions and any subsequent motion to dismiss an appeal filed after withdrawal of a first motion should be denominated 'amended motion', or the paper will be regarded as improperly before the court and will not be considered. We also confirmed this position in the case, *King Peter's Heirs v. Gigger,* 27 LLR 287 (1978).

It is our holding, then, that a notice to reclaim replevin property in an action to recover chattel is like a motion, as it has all the characteristics of a motion. To elaborate on this point, a notice to reclaim prays for a relief which is ancillary to the

main relief sought by the defendant in the answer to the complaint. This is what any other motion does, and said notice to reclaim must be filed and served on the adversary as any other motion. The notice to reclaim must carry an affidavit as any other motion, except that the statute prescribes what the contents of the affidavit should be contain. Civil Procedure Law, Rev. Code 1: 61.7. The September 2, 1988 notice to reclaim should have therefore been dismissed by the trial court and the replevied properties turned over to the appellees on the strength of their replevin bond, pending the disposition of the main action to recover chattel.

In view of the foregoing, the ruling of our colleague, Mr. Justice Azango, quashing and dismissing the writ of certiorari and ordering the trial court to repossess the replevied chattels from the appellant and proceed to dispose of the case is hereby affirmed and confirmed.

The Clerk of this Court is ordered to send a mandate to the trial court to resume jurisdiction and dispose of this case on a priority basis, consistent with this opinion. Costs are ruled against the appellants. And it is hereby so ordered.

Ruling affirmed; petition denied.