ALEXANDER KAROUT, Petitioner, v. ALFRED B. FLOMO, Assigned Circuit Judge, Sixth Judicial Circuit, Montserrado County, and S. EDWARD PEAL, Respondents.

APPEAL FROM RULING OF JUSTICE IN CHAMBERS DENYING ISSUANCE OF WRIT OF CERTIORARI TO THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued April 6, 1978. Decided April 28, 1978.

1 A writ of certiorari will not be granted to correct the action of a lower court judge if he has not issued an interlocutory ruling which prejudiced the rights of petitioner.

2 A writ of attachment may be issued by a Circuit Court judge out of term under circumstances amounting to an emergency.

3 Certiorari concerns itself mainly with the record of a case, and where a judge issues a writ of attachment on application of a party to an action of damages, there is no opportunity for a hearing and issuance of the writ is not warranted.

4 Certiorari will not lie to perform the proper functions of other remedial processes, and cannot be used to secure release of a person from illegal detention, which is the office of habeas corpus.

5 A counselor guilty of applying for any of the remedial and extraordinary processes for the mere purpose of delay will be held in contempt of court and fined.

A writ of attachment was issued and served on the defendant in an action of damages for breach of contract. He alleged that he was later illegally arrested and taken before the judge of the Circuit Court, who ordered him to tender additional security or be imprisoned, and that he was in fact imprisoned in accordance with that order. He then petitioned for certiorari, contending that the action of the judge, taken outside term time and with regard to a case venue in a term over which he had no jurisdiction, was unlawful. The Justice in chambers, on considering the petition, denied issuance of the writ for the reason that certiorari was not the proper remedy since the petitioner brought up for review no interlocutory order. The Supreme Court, considering the case on appeal, agreed with the reasoning of the Justice in chambers and *affirmed the ruling.*

Emmanuel Berry for petitioner. *Joseph Findley* and *S. Edward Peal* for respondents.

MR. CHIEF JUSTICE PIERRE delivered the opinion of the Court.

Our distinguished colleague Mr. Justice Henries heard this matter in chambers, and ruled denying the petition and quashing the alternative writ. He also ordered the lower court to resume jurisdiction over the action of damages for breach of contract, and to determine it according to law. From this ruling petitioner herein appealed.

We have reviewed the petition and the return of the parties, and we have examined the documents in the Civil Law Court in the case out of which these proceedings have grown, and we find ourselves in complete agreement with the ruling in chambers. We are therefore quoting the ruling and adopting it as the opinion of the bench en banc.

The ruling reads : "The petitioner alleges that a writ of attachment was issued and served on him which necessitated his surrendering the ground floor of his hotel as security; that counsel for co-respondent Peal and a bailiff, without warrant of court, illegally arrested the petitioner on Saturday, May **21,** 1977, and took him to the respondent judge's residence, and although the judge was assigned to preside over the March 1977 Term of Court, he proceeded to assume jurisdiction over the cause venue in the June 1977 Term of Court in the absence of petitioner's counsel and despite the fact that pleadings had not rested; that the co-respondent judge conducted an investigation and ordered the petitioner to tender additional security or be imprisoned. The petitioner contends that the ruling of the respondent judge ordering his imprisonment is a miscarriage of justice and an abuse of judicial discretion because he did not have authority to interfere with cases venue in a term of court over which he had no jurisdiction. He prayed among other things for the release of the petitioner who allegedly is now in prison.

"The respondents countered these allegations by contending that the irregularities regarding service of process should have been raised in the lower court; that the matter of jurisdiction should have been raised either in the answer in the damage action or in a motion to vacate the attachment, in which case the respondent judge would have determined the issues in a ruling reviewable by this Court; that the petition does not state or proffer any interlocutory ruling made by the judge in the proceedings out of which these proceedings grew; that accrued costs have not been paid ; that if the judge did not have jurisdiction to grant attachment and proceeded contrary to rules that should be observed at all times, petitioner should have sought a writ of prohibition and not certiorari ; and that habeas corpus proceedings, and not certiorari, are the proper remedy for the release of one who is illegally detained.

"At the outset it might be necessary to state the purpose of the writ of certiorari. Its purpose is 'to review and correct decisions of officials, boards, or agencies acting in a judicial capacity, or to review an intermediate order or interlocutory judgment of a court.' Rev. Code 1:16.21 (1). There must be an interlocutory ruling to be reviewed and corrected. Neither the petition nor the certified record shows any interlocutory order or ruling made by the respondent judge; consequently the petition is unmeritorious in this respect. *Bestman v. Findley,* 19 LLR 57 (1968).

"We are also in agreement with the respondent that the alleged irregularities of counsel and the bailiff, as well as the question of jurisdiction of the judge, should

have been brought to the attention of the judge in order for him to decide on them, and then we would be better able to review his acts. If the trial judge had exceeded his jurisdiction or proceeded contrary to established rule, petitioner should have come by prohibition. *Union National Bank v. Hodge,* **20** LLR 635 (1971) *Eitner v. Sawyer* decided October Term, 1971. The conduct of the judge with respect to investigating a matter and giving orders concerning a matter pending in court, if true, is reprehensible and would have been effectively stopped by prohibition, but in the absence of any evidence of a ruling given by him, certiorari will not lie.

"With respect to the issuance of the writ of attachment out of term, this Court has held that Circuit Judges may do so under circumstances amounting to an emergency. *Gamayel v. Almassian,* 16 LLR 290 (1965) . One of the grounds laid in the applicatory affidavit was that defendant with intent to defraud plaintiff and to avoid service of the summons was about to depart from the Republic. This, it appears to us, was an emergency situation. More than this the Civil Procedure Law states that 'an order of attachment may be granted without notice in any court before or after service of summons and at any time prior to judgment.' Rev. Code :7.16. It appears to us, reading this

sentence literally, that an attachment may be granted at any time. Furthermore to grant the writ of certiorari merely because attachment was issued out of term time would be to no avail since the June Term in which the case was venue has already passed." As to the question of releasing the petitioner from custody, the certified record shows a release from the clerk of the Civil Law Court, dated May 25, 1977, issued by order of Mr. Justice Azango, Justice presiding in chambers. Therefore this question is now moot and needs no further comment.

There are two points we would like to emphasize before concluding this opinion, and the two points refer to requests made in the prayer of the petition : (1) that the court order the "release of petitioner who is being illegally detained," and (2) that the "records be reviewed and the illegal and erroneous ruling of the respondent judge be corrected." Taking the second of the two points first, we would like to again restate a position of this Court taken in several such cases in the past that the office of the writ of certiorari is to review prejudicial rulings in proceedings being heard by an inferior tribunal, which rulings adversely affect the interest of the petitioning party. The point we would like to emphasize here is that there must be proceedings during the progress of which the judge made an interlocutory ruling or rulings which prejudiced the party's rights, in order that the writ may issue. The record referred to in certiorari hearings must be a record made during the progress of the proceeding or hearing in court; so that unless there was a hearing in court, certiorari may not be granted.

"The function of a writ of certiorari is to correct substantial errors of law committed by a judicial or quasi-judicial tribunal which are not otherwise reviewable by a court. . . . The judgment of the court in certiorari affects only the validity of the record. That is, its judgment determines whether the record is valid or invalid. . . . Under the modern practice prevailing in many jurisdictions, the writ issues in a proper case not only to review the proceedings of an inferior or subordinate court, but also to review the proceedings of an inferior board, commission, or officer exercising judicial or quasi-judicial functions, and it is in this latter area that the most significant development of the law has taken place." 14 AM. JUR. 2d, *Certiorari, §* 2 (1964).

In *Massaquoi* v. *Flomo,* decided August 9, 1977, unpublished, the Court said that "certiorari can only be issued to review and correct material and prejudicial errors appearing in the record of a case pending in an inferior tribunal; the writ concerns itself mainly with the records of the case (Supreme Court Revised Rule IV, part 9); and the records of the hearing must accompany the petition." In this case all that was done before petition for issuance of the writ was that the judge upon application of a party to an action of damages issued a writ of attachment against the other party to the suit, a right given under our law, as has already been shown hereinabove. Therefore, there was never an opportunity for a hearing to be held where any interlocutory ruling might have been made to warrant issuance of the writ. Let us repeat that if the petitioner felt that the procedure of the judge in handling the issuance of the writ of attachment in the manner that he did was irregular and contrary to rule, he had an adequate remedy available to him, but not in certiorari.

With regard to the other point we would like to emphasize, to wit: that the Court should order the release of the petitioner illegally detained, we must again restate our position taken so many times in the past, that certiorari will not, and cannot, perform the functions of other processes. The writ will not issue to compel the performance of an act that is the office of mandamus; nor will it issue to forbid anything from being done or continuance of proceedings contrary to rule—that is the function of prohibition; nor will it perform the functions of the writ of error. *Vandevoorde v. Morris,* 12 LLR, 323, 325 (1956) *Massaquoi v. Flomo, supra.* As has been stated hereinabove, release from illegal detention is the

office of the writ of habeas corpus, and certiorari cannot be used to release anyone illegally detained. The ruling of the Justice in chambers is therefore affirmed with costs against the petitioner.

Because we have so often in the past unsuccessfully discouraged unmeritorious applications for remedial writs, we will hereafter resume the imposition of penalties in each and every case where the demerits of the petition are glaringly apparent, as in this case. In *Compagnie Francaise de L'ilfrique Occidentale v. Cole,* 13 LLR 180 (1958), we quoted on 182, 183, from a statute which provided " 'that where an appeal is taken from the ruling of the justice in chambers in proceedings on an alternative or peremptory writ, any three Justices of the Supreme Court may meet in banc and dispose of the cause immediately in or out of term time; and should any counselor be found guilty of applying for any of the ... remedial and extraordinary processes where it appears patent that the application is for the mere purpose of delaying justice, [he] may for the first offense be held in contempt of court and fined a sum of not more than fifty dollars ; and for the second and all subsequent offenses shall be fined in the sum of not more than one hundred dollars.' L. 1955-56, ch. XVII, § 4.." In accordance with this precedent set by us in 1958, 25 years ago, and confirmed by a provision of the new Judiciary Law, Rev. Code 17:17.10, we hereby impose a fine of fifty dollars on Counselor Emmanuel Berry, to be paid into the Bureau of Revenues and an official receipt exhibited to the Marshal not later than Monday morning ensuing, the 1st of May, 1978. And it is so ordered.

Ruling *afflrmed.*