INTERNATIONAL TRUST COMPANY, HENRY CONWAY, JR., and MALOUF BROTHERS, represented by ABRAHAM MALOUF, Appellants, *v.* J. J. MENDS-COLE, by and through his Son, JEROME MENDS-COLE, Appellees.

APPEAL FROM RULING IN CHAMBERS ON APPLICATION FOR WRIT OF CERTIORARI.

Argued October 13, 17, 1966. Decided December 16, 1966.

1. Omission of the statutorily required revenue stamp from returns submitted to the Justice presiding in Chambers on an application for certiorari precludes only judicial consideration of the returns.
2. A hearing on the granting of a preliminary injunction may be *ex parte*. 1956 Code 6:1084.
3. An injunction action is commenced by issuance of the writ upon the filing of an application and submission of supporting evidence.
4. The granting of a preliminary injunction is discretionary and dependent on the court's finding that immediate and irreparable injury, loss, or damage would otherwise result to the plaintiff from the prospective actions of the defendant. 1956 Code 6:1084.
5. A writ of certiorari is issuable only where an action is pending.

On appeal to the full Court from a ruling in Chambers quashing an alternative writ of certiorari and denying the application for the peremptory writ in an injunction action, the *ruling* was *affirmed*.

Joseph J. F. Chesson, Moses K. Yangbe, and *James Doe Gibson* for appellants. *Morgan, Grimes and Harmon Law Firm* (*J. Dossen Richards* and *John W. Stewart* of Counsel) for appellees.

MR. JUSTICE SIMPSON delivered the opinion of the Court.

The facts relevant to a determination of the present case are few, but their legal effects on the procedural steps to be taken in the prosecution of an action of injunction may be far reaching.

In the court below, J. J. Mends-Cole filed an action of injunction against the International Trust Company and one Abraham Malouf, a Lebanese national, for the purpose of restraining the aforesaid defendants, subsequently petitioners in certiorari proceedings and now appellants, from carrying on certain acts. After the filing of this complaint in the March 1966 term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, sitting in its equity division, the assigned judge, His Honor Robert G. W. Azango, ordered to be issued a writ of summons commanding the petitioners herein to appear in court on the 29th day of March, 1966 at the hour of 9 o'clock A.M. "to show cause why the writ of injunction as applied for should not be granted."

The record further shows that on the appointed date and at the prescribed hour, the petitioners herein, in obedience to the writ of summons, appeared in court. They then requested the court's permission to spread upon the records their resistance to the issuance of the writ. This request was resisted by the plaintiffs in the injunction suit predicated upon the fact that the proceedings being conducted by the judge at that stage of the case were *ex parte* and that in the premises it was only the plaintiff that was possessed of the right to make any statement before the court in respect of the same at that particular time. The court concurred with the contention of the plaintiff in the court below, now one of the respondents in these proceedings, and disallowed any endeavors on the part of the petitioners to give either factual or legal reason why the writ as sought by respondent Mends-Cole should not be granted.

Immediately upon the court's ruling on this particular point, the petitioners herein, in an endeavor to invoke the provisions of statute allowing for the issuance of the writ of certiorari, made application to the Chambers of Mr. Justice Wardsworth for the issuance of an alternative writ of certiorari. This application was granted

and these certiorari proceedings commenced with the issuance of the interlocutory writ wherein respondents herein were required to file returns. These returns were duly filed and, after the same were served upon the petitioners, an answering affidavit was filed by petitioners.

The petition alleged substantially what had transpired in the court below; thereafter the returns alleged primarily that there was no act or ruling of the respondent judge that was materially prejudicial to the rights and interests of the petitioners. In other words, respondents contended that the legal averments required by Section 1201(b) of the Civil Procedure Law had been omitted by the petitioners, said omission constituting a material defect which in law necessitated the dismissal of the petition.

Additionally, respondents contended that the ruling of the trial judge was legally sound and correct because petitioners, in accordance with procedure extant, could only record their objections to the writ of injunction after the same had been ordered issued and an answer had been filed to the complaint with or without the additional filing of a motion to dissolve. These returns were vehemently attacked by the petitioners on the ground that respondents had omitted, in contravention of existing statute, to have affixed to their returns a 25¢ revenue stamp; therefore the returns were legally invalid and this fact precluded the court from taking legal cognizance of the same.

This case was finally called for hearing before the Chambers Justice. After entertaining arguments *pro et con,* he determined that although the position of petitoners in respect of the invalidity of the returns was legally sound, the interlocutory writ could not be made absolute because the writ of summons that issued in the court below upon the judge's orders was for a preliminary investigation by the judge to satisfy himself as to whether or not an order should be granted for the issuance of a writ of injunction.

The assigned Justice also noted that no regularly instituted action was pending before a court or judge involving any allegation of error or prejudicial action by the court against a party to the proceedings so as to give rise to the use of the remedial writ of certiorari under Rule IV, Part 9 of the Revised Rules of the Supreme Court of Liberia (13 L.L.R. 693, 699). Predicated upon the above, the alternative writ was quashed and the peremptory writ denied. An appeal from the ruling of the Chambers Justice was taken to this Court. This is the matter that has now been brought before us. In order to effect a proper review of the ultimate issue raised, we must first resolve the several secondary issues that lead to a determination of whether or not certiorari will lie in the present circumstances.

In the first instance, we must affirm the position taken by the Chambers Justice in respect of whether or not the returns were to be given legal cognizance in virtue of respondents' omission to have affixed thereon the requisite stamp in accordance with our Revenue and Finance Law. This Court has on innumerable occasions held that where a document does not possess the statutorily required revenue stamp, the same shall constitute a legal nullity and no cognizance in law can be given thereunto. In the premises, the returns filed by the respondent cannot be given legal cognizance by the Court. Irrespective of this fact it is the considered opinion of this Court that even in the absence of returns being properly before us as a matter of law, it is within the province of the Chambers Justice to determine whether or not the writ should issue. By this is meant that the Chambers Justice cannot summarily sustain the position of the petitioners predicated solely upon the absence of proper returns being before the Court where the grounds as laid in the application for the issuance of the writ are legally unfounded.

Was the trial judge correct in summoning the defendants to appear in court to show cause why the writ as ap-

plied for should not be granted and the same ordered issued? Petitioners are strenuously contending that they had a legal right to be heard and that the trial judge's denial of this right, especially when they had been called into court to give reasons why the writ of injunction should not issue, constituted prejudicial error. Recourse to the judge's order in the court below for the issuance of the writ of summons shows that the same was in harmony with the case of *Cooper* v. *Cooper,* 12 L.L.R. 412 (1957).

In respect of the procedure to be followed for the commencement of an action of injunction, we now quote *in toto* Sections 1084 and 1085 of our Civil Procedure Law.

> "A writ of injunction shall issue only when it appears from the evidence presented by the plaintiff that immediate and irreparable injury, loss, or damage will result to him from the prospective actions of the defendant. Every writ shall be endorsed with the date and hour of issuance; shall be entered immediately as of record; and shall define the injury and state why it was irreparable and justify issuance of the writ. It shall expire by its own terms within such time after entry as the court shall therein fix. The writ may be extended for another period for good cause shown, but the reasons for the extension shall be entered as of record. The hearing on the show cause order as set forth in the writ shall be held at the earliest possible time and shall have preference over all matters except prior preferred actions and proceedings; if at the hearing the plaintiff fails to proceed with his application for a permanent injunction, the court shall dissolve the writ.
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> "Upon reasonable notice to the plaintiff, the defendant may file a motion to dissolve or modify the writ; and the court shall hear the motion as expeditiously as the ends of justice permit. The court may dissolve the writ outright at such hearing or may condition dissolution of the writ pending final hearing of the issues on the giving of a bond by the defendant for any dam-

age caused the plaintiff by the defendant's actions after dissolution of the writ if on final hearing a permanent injunction is granted; provided, however, that the court shall not dissolve a writ upon motion unless the defendant files a sufficient answer, and it shall not be a sufficient answer merely to deny knowledge of the facts alleged by the plaintiff and put the plaintiff upon proof thereof." 1956 CODE 6:1084.

"The hearing to determine whether an injunction shall issue shall be held on the date set therefor in the writ of injunction or on such other date as may be set by the court upon motions for an extension or dissolution of the writ, as set forth in section 1084 above. The decision to grant or deny an injunction at such hearing shall be made on the basis of the evidence and points of law raised in the complaint and the answer and in such accompanying affidavits and exhibits as the parties then submit. If the court determines that a final decision cannot be made without serving additional pleadings or the production of additional evidence due to the complexity or number of the issues involved, it may extend or dissolve the writ in the manner and under the circumstances provided in section 1084 above; but such decision shall not prejudice any final judgment on subsequent full hearing of the issues.

"Whenever an action of injunction is commenced during the regular session of court or less than fifteen days previous to the first day of the session, the final trial of the action to grant a permanent injunction may be postponed until the following session if this is necessary to allow adequate pleadings to be filed and substantial justice to be done between the parties; but if the pleadings are filed and the issue joined within the session, the action may be heard at such session." 1956 CODE 6:1085.

The above-quoted provisions and in particular the first sentence of Section 1084 clearly demonstrate that the Legislature intended that prior to the issuance of the writ of

injunction any hearing should be primarily *ex parte* and for the purpose of the court's satisfying itself that the allegation of facts sworn to by the plaintiff and such additional information as the court upon its own initiative may solicit and receive from the plaintiff shall either singly or conjointly serve as a basis for the exercise of discretion on the part of the court in either granting or disallowing the temporary injunction.

The above clearly shows that the opinion of this Court in the *Cooper* case, cited *supra,* in so far as same relates to having the defendant brought before court prior to the issuance of the writ of injunction, is not in harmony with existing statutory provision and, in the premises, this Court finds itself bound to recall that particular portion of the *Cooper* opinion. Irrespective of this fact, we should like to lose no time and spare no effort in reiterating our belief in the mandatory requirement of Section 1084 of the Civil Procedure Law quoted *supra,* to the effect that injunctions do not generally issue as a matter of right. Grounds that will in ordinary circumstances justify the issuance of the writ may be so clearly present as to exclude the possibility of its denial by the trial judge. Yet we must emphasize that the writ will only issue in the exercise of sound judicial discretion within the framework of basic principles of equity. By this is meant that the scope of the exercise of discretion by the trial judge is not limited to previously determined grounds for the issuance of the writ, although in the periodic expansion of this scope he should at all times permit his acts to be motivated by legally accepted principles of equity.

Turning now to the next issue with which we find ourselves confronted, we must have recourse to the Chambers Justice's ruling, paying particular attention to that part thereof which has been quoted *supra.* Initially, we should like to state that although we concur with the proposition that a preliminary investigation is generally necessary for the determination of whether the writ should issue, yet the

provisions of statute must be complied with where the terms thereof are clear and unequivocal. With the exception of actions of injunction and replevin, actions are generally commenced by the filing with the clerk of the court a complaint accompanied by an application called a written directions (1956 CODE 6:167). In view of the exception to the general rule prescribed in Section 167 of the Civil Procedure Law, we must turn to Section 1080 of the same statute for guidance as to how injunction proceedings are commenced:

> "An action of injunction shall be commenced by a writ of injunction issued in duplicate by the clerk of the court on the order of the judge thereof. The plaintiff shall obtain a writ of injunction by filing his complaint, verified by oath, which sets forth the grounds therefor, and by submitting such other evidence as the court or judge may require. An action of injunction may be commenced and a defendant summoned to appear in court in such action at any time when the cause of action occurs or becomes known to the plaintiff, whether the court is in session or not." 1956 CODE 6:1080.

From the above, it is seen that there is no action commenced in injunction proceedings until such time as the writ of injunction shall have issued. Additionally, a precondition to the issuance of the writ is the filing of the complaint by the plaintiff and submission by the plaintiff of such other evidence as the court or judge thereof may require.

In view of the above, let us now turn to Section 1201 of the Civil Procedure Law with emphasis on subsection (a) thereof, and we quote:

> "An applicant for a writ of certiorari shall submit to the Supreme Court or any Justice thereof a verified application or petition which shall contain the following:
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> "(a) a statement that the applicant or petitioner is

a party to an action or proceeding pending before a court or judge thereof or an administrative board or agency. . . ." 1956 CODE 6:1201.

The key here, therefore, is in the words "action or proceeding pending," or by proper utilization of the disjunctive, "action pending." Predicated upon this, it is now clear that a precondition to the granting of a peremptory writ of certiorari is the existence of an "action pending." What then therefore does the word "pending" legally connote? BALLENTINE'S LAW DICTIONARY (1948 ed.) gives this definition:

"Remaining undecided. An action is said to be 'pending' from its commencement, as long as it remains undecided."

And BLACK'S LAW DICTIONARY (3rd ed., 1938) contains this definition:

"Began but not yet completed; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is 'pending' from its inception until the rendition of final judgment [citation]."

These definitions are instinct with the proposition that a suit is not pending until it is instituted or commenced. Using these definitions of the word "pending" and relating them to this word as found in section 1201(a) of the Civil Procedure Law and interrelating them with Section 1080 of the same title, it is evident that the issuance of the writ commences the action; the action is not commenced until the court has issued orders predicated upon a verified complaint and such other evidence as the court may require from the plaintiff. *A fortiori,* certiorari cannot lie in the absence of a "pending" action within the meaning of the above-cited laws.

At early common law, there were two modes of approach in respect of the commencement of proceedings for the obtention of injunctive relief. In some early cases in England and in the United States, preliminary relief by injunction was granted before the filing of the bill,

especially for the staying of waste or the restraining of actions at law. Nowadays, statutes generally require the action to be filed before the issuance of an injunction or may allow the granting of a temporary injunction to follow the summons.

Courts of equity exercise discretionary powers in the granting or withholding of extraordinary remedies. See 19 AM. JUR. 49 *Equity* § 19. Although this discretionary power is neither limited nor restricted to a particular remedy, it is particularly applicable to injunction, since it is the strong arm of equity and calls for great caution and deliberation on the part of courts and the judges thereof. See *Virginia Ry. Co.* v. *Federation,* 300 U.S. 515, 549–551 (1936).

The relief, especially since mandatorily required by statute, is not granted by the trial judge as a matter of course for every purported injury; its granting rests in the sound discretion of the court, to be exercised in accordance with settled equitable principles and in the light of all the facts and circumstances in the case.

The propriety of granting an injunction depends upon the facts and circumstances in the case.

> "The propriety of granting an injunction depends upon the facts of each particular case and the general principles of equity as related to injunctions, and the right to exercise common sense in the granting or refusing of injunctions is one of the fundamental prerogatives of a court of chancery." 43 C.J.S. 419 *Injunctions* § 12.

Again at this juncture, we would like to reiterate, reemphasize, and reaffirm our position as heretofore taken on innumerable occasions from this bench to the effect that discretion is the greater part of wisdom and wisdom is demonstrative of virtue which constitutes a *sine qua non* to the admeasurement of justice in accordance with settled legal principles; and judges should therefore continuously give cognizance to the rights of parties as

regards their freedom of action and movement. To this end, we again in the most vocal manner reassert that trial judges in the administration of their offices in respect of granting injunctions should permit sound discretion to precede a desire to stop an alleged or purported wrong. At any and all times, the guiding principles of equity must be strictly adhered to in determining whether or not the interlocutory writ as prayed for in the complaint should be granted in the light of all facts presented by the plaintiff and the law controlling.

In view of all the facts that have been presented and legal issues that we have been called upon to determine, it is our considered opinion that in accordance with the records certified to this Court from the court below, the ruling of the assigned Justice presiding in Chambers was legally sound and therefore the same is hereby affirmed with costs against appellants. And it is hereby so ordered.

Ruling affirmed.