KHALID KONTAR, Appellant, *v.* AMEEN MOUWAFFAK and His Honor, RODERICK N. LEWIS, Assigned Judge of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, Appellees.

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

Argued November 10, 1965. Decided January 21, 1966.

1. The function of an affidavit being to set forth facts, not contentions concerning issues of law, argumentative counts in an answering affidavit will not be cognized by the Supreme Court.
2. A defendant in a preliminary hearing in an injunction action is not barred from subsequently applying for a writ of certiorari solely by failure to file a formal appearance at such a preliminary hearing.
3. Certiorari, as a proper remedy for review of an interlocutory ruling or determination, will lie to review of issuance of a preliminary injunction.
4. The posting of a legally sufficient bond is a jurisdictional requisite of an injunction action.
5. Vacation of an injunction bond for insufficiency divests the court of jurisdiction and requires dissolution of the injunction.
6. An action is not barred by a plea of *res judicata* unless the prior adjudication was on the merits.
7. Dismissal of an action for lack of jurisdiction is not an adjudication on the merits.
8. Where an injunction has been dissolved on purely jurisdictional grounds, such as vacation of the bond for insufficiency, *res judicata* cannot be successfully asserted as defense to a renewal of the injunction action.

Appellee Mouwaffak instituted actions of replevin and injunction against appellant in the Circuit Court of the Sixth Judicial Circuit, Montserrado County. The injunction action was dismissed for insufficiency of bond. Appellee excepted to the dismissal but, instead of perfecting the appeal, applied to the Justice presiding in Chambers for an alternative writ of error. The application was denied in a ruling holding that the appeal should have been perfected as the proper remedy. Appellant appealed this ruling to the full Court and meanwhile instituted a second injunction action on the same subject

matter in the circuit court which subsequently dissolved the second injunction on the ground of the pendency in Supreme Court of the appeal from the ruling in Chambers on the application for a writ of error. That appeal was then withdrawn and a third injunction action instituted. Appellant applied to the Justice presiding in Chambers for a writ of certiorari against issuance of the injunction. An alternative writ of certiorari was granted, but, on hearing, the peremptory writ was denied and the alternative writ dismissed. On appeal to the full Court from the ruling in Chambers denying the peremptory writ of certiorari and dismissing the alternative writ of certiorari, the full Court held that although certiorari would lie, the third injunction action had been properly instituted and was not barred by *res judicata;* consequently the *ruling* thereon in Chambers was *affirmed.*

P. Amos George and *McDonald G. Acolatse* for appellant. *Joseph W. Garber* for appellees.

MR. JUSTICE SIMPSON delivered the opinion of the Court.

On August 5, 1964, an action of replevin was filed by Ameen Mouwaffak, a Lebanese national residing in Monrovia, against Khalid Kontar, likewise a Lebanese resident of Monrovia. This action of replevin as filed was for the recovery of certain merchandise which Mouwaffak allegedly left with his compatriot under extreme circumstances. Having been advised by his physician to go to foreign parts to seek additional medical attention, Mouwaffak needed someone to care for his business and thereupon executed a document allegedly believed to have been a power of attorney but later discovered to have been an assignment of subleasehold rights.

Mouwaffak further alleged that upon his return to Liberia, he endeavored to continue the operation of his

business but was refused entry by Kontar. During the pendency of the replevin action of injunction Mouwaffak filed an injunction action (hereinafter called Action No. 1) to restrain Kontar pending disposition of the action of replevin from operating a tailor shop and store which Mouwaffak had left in Kontar's possession.

Action No. 1 was filed in the Circuit Court of the Sixth Judicial Circuit, Montserrado County, sitting in its equity division and presided over by Judge Roderick Lewis. Kontar filed a verified answer together with a motion to dissolve the injunction in keeping with the statutory requirement. Subsequently there was a review of the petition and accompanying papers, filed in Action No. 1, involving an application for verification of bail. A ruling was rendered on Wednesday, August 12, 1964, the same being the 26th day's session of that term of court, wherein the Judge dissolved the injunction. The ruling held that:

> "Since the issuance of the writ of injunction is based upon the filing of a bond by plaintiff and if said bond is vacated because of its insufficiency, it necessarily follows from a legal sequence that there is no action under the circumstances; therefore, the bond being insufficient, which is the very foundation of the action, the court has no alternative but to dissolve the injunction with costs against plaintiff."

Mouwaffak proceeded to except to the above ruling. However, instead of perfecting the appeal to the Supreme Court, he applied to Mr. Justice Pierre, then presiding in Chambers, for an alternative writ of error. This application was denied on the ground that since Mouwaffak could have perfected an appeal from the ruling, error would not lie. Mouwaffak thereupon appealed from the ruling in Chambers to the full Court.

While this appeal was pending before the Supreme Court, on September 17th, 1964, Mouwaffak instituted a second injunction suit (hereinafter called Action No. 2).

Upon being apprised of the filing of Action No. 2, Kontar, by and through his counsel, proceeded to apprise the presiding judge of the appeal pending before the Supreme Court *en banc* from the ruling in Chambers on the application for a writ of error in Action No. 1. The judge immediately thereafter ordered the sheriff to undo that which he had done in virtue of the pendency of the appeal; whereupon Mouwaffak hastened to the Supreme Court and withdrew his appeal in Action No. 1.

Mouwaffak spared no time in refiling the injunction suit that had been hastily withdrawn. This refiled action we shall hereinafter call Action No. 3. On the filing of the petition in Action No. 3, McDonald G. Acolatse, of counsel for Kontar, was present in court and requested the assigned judge to institute a preliminary hearing, which the judge did. At this hearing it was strenuously argued that the writ should not issue in view of the fact that Action No. 3 was identical with Action No. 1, both involving the same parties and subject matter and that since there had been a dissolution of the injunction previously issued in Action No. 1, the matter had been litigated and was therefore *res judicata* and could not be brought into court for a second time. There were strong arguments on both sides, and at the culmination thereof, the trial judge entered a ruling which held, among other things, and we quote.

> "With reference to that portion of defendant's submission which asserts the defence of *res judicata,* we quote from *Phelps* v. *Williams*, 3 L.L.R. 54, 57 (1928): '[W]here a matter has been decided by this Court it becomes *res judicata*, if there is a concurrence of the following conditions, viz.: Identity in the sued for; identity of the cause of action; and identity of persons and of parties to the action. Such judgments are conclusive upon the parties and no party can recover in a subsequent suit.' The doctrine of *res judicata* amounts simply to this, that the cause of action once

finally determined, between the party on the merits by a competent tribunal cannot afterwards be litigated by a new proceedings either before the same or any other tribunal.

"In view of the foregoing and with respect to Counsellor Davis's persuasive argument on this score, recourse to the records in the former action must be taken. In doing so, this court observes that the former action of injunction was dissolved upon an issue not affecting the merits of the case and that the action which is now about to be instituted is the same with respect to: (1) identity of the thing sued for; (2) identity of the cause of action; and (3) identity of the person and of the party to the action. But does this go to show that the action was finally determined without appeal between the parties on the merits? If the injunction had been dissolved the court would not have even staged a preliminary investigation because it is quite elementary that under such circumstances the doctrine of *res judicata* would apply.

"Wherefore, for the foregoing legal and factual reasons, which in our opinion are sound in chancery, this court has no alternative but to order the clerk to issue the writ of injunction on the defendant upon receipt of the accompanying complaint, affidavit and other relevant documents. And it is hereby so ordered."

Kontar excepted to the above ruling of the trial judge in Action No. 3 and immediately thereafter, on the same 17th day of September, 1964, applied to this Court for the issuance of a writ of certiorari, contending that the ruling of the trial judge in allowing the writ of injunction to issue was erroneously prejudicial and therefore subject to review of the same by the Chambers Justice.

The alternative writ was subsequently ordered issued and did issue on the 24th day of September, 1964. Upon hearing of the alternative writ, the same was ordered

quashed and the peremptory writ was denied. An appeal to this Court of last resort was prayed for and granted.

After giving most of the background material heretofore recounted in this opinion, Kontar's petition alleged in Count 5 that on the 17th day of September, 1964, His Honor Roderick Lewis, then presiding by assignment over the Circuit Court of the Sixth Judicial Circuit, Montserrado County, had ordered the sheriff to serve the writ of injunction against the said petitioner although respondent Mouwaffak had an adequate remedy at law and had in fact been indemnified by Kontar in the replevin case, which ought to have precluded and served as a bar to any intervention by a court of equity.

Kontar further contended in Count 6 of his petition that final judgment had been rendered in Action No. 1 and had been subsequently "confirmed" by Mr. Justice Pierre, then presiding in Chambers, and had been "acquiesced in" by respondent Mouwaffak; that therefore the doctrine of *res judicata* should have been applied by the trial judge; and that not having done so, but instead permitting respondent to re-enter said injunction suit by way of Action No. 3, constituted encouraging multiple suits, which equity frowns upon.

Respondent Mouwaffak in his return, comprising, in all, nine counts, contended that the petition was not properly before this Court and must be regarded as nugatory and without any legal effect whatsoever because Kontar, as defendant in Action No. 3 in the court below, failed to file a formal appearance as required by law. Mouwaffak further asserted that an appeal was available to Kontar from the ruling of the trial judge and that therefore it was illegal for Kontar to abandon the regular process of appeal and to resort to certiorari proceedings.

The next argument advanced in Mouwaffak's returns was to the effect that Justice Pierre did not affirm the dissolution of the injunction in Action No. 1 but instead held that his ruling denying the application for the issuance of

the writ of error was rendered in view of the existence of an appeal from Judge Lewis's dissolution of the injunction. The last issue of any substance raised in the returns dealt with what Mouwaffak termed "a pathetic lack of understanding on the part of petitioner of the doctrine of *res judicata*." Mouwaffak contended that the dissolution of the injunction in Action No. 1 was based not on the merits but on the alleged insufficiency of the bond filed in support of the application for an injunction.

In the answering affidavit filed by Kontar, all the counts with the exception of Count 1 relate to legal issues and constitute a traversal of the returns. It is settled law that the function and scope of an answering affidavit are limited by law to the refutation of factual allegations in the returns and that a petitioner may not use an answering affidavit for traversal of issues of law raised in the returns. The word "affidavit" itself signifies that its use is restricted to the judicial introduction of matters of fact and not questions of law.

Reverting to Count 1 of the answering affidavit, it is therein contended that the writ of injunction had not issued and therefore no formal appearance was necessary. This Count sustains that contention, since a formal appearance is entered upon the record only after service of process has been effected. In the case at bar, there had been but a preliminary hearing by the judge for determination of whether or not the writ should issue. It was with respect to this determination or ruling of the trial judge that the writ of certiorari was sought. Furthermore, as was above mentioned, the writ was applied for on September 17, 1964, the very day on which the said ruling was made.

Turning next to the argument advanced by Mouwaffak to the effect that a writ of error was not the proper relief for petitioner in view of the fact that he had excepted to the ruling of the trial judge and made record of the effect that he would avail himself of the statutes in

such cases made and provided, this Court calls attention to the following statutory provisions:

> "Certiorari is a special proceeding to review and correct the proceedings of any court of record other than the Supreme Court. . . ." 1956 CODE (1957–58 CUM. SUPP.) 6:1200.
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> "An applicant for a writ of certiorari shall submit to the Supreme Court or to the assigned Justice thereof a verified application 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. . . ." 1956 CODE (1957–58 CUM. SUPP.) 6:1201.

It is therefore clear that the function of the writ of certiorari is to review an interlocutory ruling or determination. Since certiorari would not lie from a final judgment, the proper remedial writ for the petitioner to have availed himself of was a writ of certiorari.

Let us now center our attention upon the main issue that has been presented to us for our determination. Did the trial judge err in ordering issued the writ of injunction in Action No. 3 after having dissolved the injunction in Action No. 1, predicated upon the insufficiency of bond?

It is written in our Civil Procedure Law relating to injunctions:

> "The judge shall require the plaintiff to give a bond with two or more legally qualified sureties before granting a writ of injunction. The bond shall be in the amount set by the judge and shall be to the effect that the plaintiff will pay the defendant such damages, not to exceed the amount named in the bond, as he may sustain by reason of the injunction if the court finally decides that the plaintiff is not entitled to the relief demanded in the complaint." 1956 CODE 6:1081.

It follows that the posting of a bond with two or more qualified sureties in an amount set by the judge constitutes

a jurisdictional prerequisite to the entertaining of an injunction action by the court. And where this jurisdictional step is defectively taken, then the action of injunction must be abated and a motion to dissolve will be properly entertained and granted.

Our Civil Procedure Law is vocal on the point of involuntary dismissal of actions:

> "For failure of the plaintiff to prosecute or comply with this title or with any order of court, a defendant may move for dismissal of the action or of any claim against him. A defendant may also move for dismissal in accordance with the provisions of section 623 below at the conclusion of the plaintiff's case.
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> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this section or any other dismissal not provided for in section 596 above, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication on the merits." 1956 CODE 6:597.

From the quoted statute it is readily seen that where a dismissal of an action is had for lack of jurisdiction, there is no adjudication on the merits.

In the premises, it is the determination of this Court that the ruling of the Chambers Justice is sound and in consonance with law extant; and therefore the same is hereby affirmed with costs against the appellant. And is hereby so ordered.

Ruling affirmed.