LUC MATHELIER, Appellant, *v.*, PILAR MATHELIER, Appellee.

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

Argued April 28, May 2, 1966. Decided June 30, 1966.

1. A motion for continuance is addressed to the discretion of the court and a ruling thereon is not reviewable absent abuse of discretion.
2. Denial of a motion for continuance was not an abuse of discretion in a civil suit where the ground on which the continuance was requested was the inability of a party to testify or attend the trial by reason of illness and the party would have suffered no prejudice if the testimony had been taken provisionally by written deposition.

On appeal from a ruling in Chambers denying an application for a writ of certiorari in a wife's suit against a husband for maintenance and support, the *ruling* was *affirmed.*

Richard Diggs for appellant. *Joseph W. Garber* for appellee.

MR. JUSTICE MITCHELL delivered the opinion of the Court.

The common law writ of certiorari is a remedial process which is invoked to review an interlocutory ruling or decision of a court of record. It issues only when applied for according to law to relieve against the enforcement of an illegal or prejudicial act or acts of a judge of a subordinate court when the trial has not been brought to a point of conclusion. But where, upon examination, it appears patently clear that the writ is sought to review the ruling of a lower court in which the trial judge is authorized under the law to exercise his sound discretion, the peremptory writ will not issue unless it is legally apparent that an abuse was made of such discretion.

This certiorari proceeding grew out of the case: Pilar Mathelier, petitioner, *versus* Luc Mathelier, respondent —a maintenance and support suit, filed in the Circuit Court of the Sixth Judicial Circuit, Montserrado County. The history of the case reveals the following. In the process of the trial of the basic suit of maintenance and support in the court below with His Honor D. W. B. Morris presiding over the March 1965 term, Luc Mathelier, the respondent below, filed a motion for a continuance of the cause to the succeeding term of the court and alleged the following as his grounds.

"1. That during the trial of this case, he was taken ill by a serious nervous breakdown and is now admitted to the medical clinic of Dr. M. Gebara, and has been advised by his doctor, Dr. Maurice Klat, that his condition requires a complete rest at home or preferably in a hospital, and that it will be necessary to procure a treatment for at least 2 months, as will more fully appear from copy of medical certificate hereto attached and marked Exhibit A to form a part of this motion.

"2. And also because respondent submits that under his present condition he is unable to appear in court to continue the trial of the case even to the extent of giving evidence in his own behalf or to follow up the trial of the case in his interest."

A hearing having already begun before the filing of the motion to continue the cause, petitioner's counsel made her resistance on the record of the court, stating that:

"1. Because petitioner says that illness of a party, even though he be a witness, is not a ground for continuance; for there is an express provision in our law for the taking of a deposition in case of serious illness of a witness.

"2. And also because the motion for continuance by which the respondent seeks to interrupt the trial of the case which is already started, and to have the same

postponed until the June term of this year, is clearly an attempt on part of respondent to continue the baffling of this case as respondent has been doing since the year 1963, and thus continue the action of his support for petitioner which respondent has not provided since August of 1963.

"3. And also because petitioner says that it is only because respondent fully realized that he has neither a legal nor factual defense in this case that he has filed this motion for continuance; wherefore petitioner respectfully prays that Your Honor will deny the unmeritorious motion and proceed to continue the hearing of the case which has already begun."

On this motion and the resistance rehearsed herein *supra,* the respondent judge made a ruling which, in our opinion, does seem to be incongruous and not applicable to the motion in all of its aspects; however, because the Chambers Justice before whom the certiorari proceeding was heard has already, in a very elaborate and comprehensive ruling, explored all of the phases of the ruling of the respondent judge, the reason is not apparent to warrant further action thereon in this opinion, except to mention that the motion for continuance was denied, to which the movant excepted and prayed for certiorari to remedy this ruling in point which petitioner felt to be prejudicial to his legal interest.

The present appellant having filed his petition praying for the issuance of certiorari, the present appellee filed her returns and the case was heard by Mr. Justice Simpson, from whose ruling denying the issuance of the peremptory writ and quashing the preliminary writ this appeal came to the full bench. But before entering upon the merits of the ruling which is the subject of this appeal, we will couch herein the statement of the appellee made in the court below, which, in our opinion, is very important and should form a part of this opinion.

"Q. You have filed against your husband, the re-

spondent, a case of maintenance and support. Please state as briefly as possible all of the facts and circumstances in the case.

"A. On March 3, 1962, we were married in Monrovia, Liberia. My husband had leased a house at Sinkor, Monrovia, Liberia, where we lived in happiness over 2 months after the wedding. Suddenly one day, my husband fell ill and he was transferred to the hospital. After recovery, instead of coming home to Sinkor, he went to his brother's house on New Port Street, Monrovia, and never came back to our house at Sinkor even though he had promised me to come back to Sinkor after getting well. To my surprise I learned that he was working again and feeling well and never came back to the house. The owner of the house, Mr. Padmore, told me that my husband told him that he would never come back to the house again and he was requesting that I leave this house since I have no job and my husband was not coming back to Sinkor. Then after a month and 20 days, before the lease was finished, I left the house and went to stay where I am now, since my husband would not come to me and he never came back to look for me. He was working and living in his brother's house. I reported the situation to the Garber Law Firm and they called my husband and he went to the meeting with his lawyer, Counsellor Jacob Willis. My lawyer asked my husband if he was working and was all right, and why he did not come to the house at Sinkor. He said that he would never come back. Then Mr. Garber asked him what he had in mind; he said that he would never come back. Then my lawyer told him that no foreigner can remain in Liberia without supporting his wife and he said

that he agreed to support me in the amount of $200 every month but no law could force him to come back to me; then Counsellor Willis said that he did not agree that his client should give me the sum of $200 a month and the meeting finished. . . .

"The first meeting was in 1962; after this there was another meeting and my lawyer contacted the immigration authority informing them that I was without support. Then the immigration officer called my husband and he agreed to pay me the sum of $125 monthly and he paid from November 1962 to August 1963. In August, 1963, he filed an action of divorce against me and since that day he stopped payment and has been trying always to get his divorce from me. He has sent to my counsellor lots of times to ask for a divorce since he filed it in 1963."

That was the testimony of Pilar Mathelier, petitioner in the court below, and that testimony remains on the record uncontradicted because, before another witness could testify either for or against, the present appellant claimed illness and requested continuance. However, since this is a matter of certiorari and not the suit of maintenance and support, we shall refrain from making any comment of this testimony *pro et con.*

Now, for a moment let us take a recourse to the motion for continuance which stands as the backlog to the application to this Court for certiorari and ascertain if legal grounds were sufficiently laid therein to warrant a favorable consideration thereof by the court below. As for Count 1 thereof, the physician, Dr. Maurice Klat, who tendered the medical certificate declaring that the appellant should have complete rest for at least 2 months, was brought before the court by the respondent judge; and he testified to the fact that the appellant, his patient, had been under medical care for a period of almost 3 calen-

dar years for a mental disease, that this condition had gotten worse and warranted hospitalization; that appellant's sickness is cyclic, that is to say it is periodical and comes in circles; and that therefore the physician could not say with any certainty when appellant's condition would be improved sufficiently for him to be engaged in any mental performance. Notwithstanding the doctor gave such testimony of and concerning the mental condition of his patient, yet when asked if he was a psychiatrist, he replied in the negative; hence his preconceived opinion about the absolute condition of his patent remains a vacuum yet to be closed.

In Count 2, the appellant alleged that his condition was sufficient ground to permit the case to be carried forward to the June term of the court, 1965, because he was unable to attend even to the end of giving evidence in his own behalf or to follow up the trial.

Before going further, we feel it worthy of note to say that here is an instance of a purported mental derangement. The medical doctor who performed at the call of the patient and who tendered a medical certificate certifying his condition to be unfit, is a medical doctor and not a psychiatrist. On the other hand, in civil matters, our statutes are vocal on the point of representation and make it imperative under the dictates of the Constitution, and we quote:

> "Every person injured shall have remedy therefor, by due course of law; justice shall be done without sale, denial or delay; and in all cases not arising under martial law, or upon impeachment, the parties shall have a right to trial by jury, and to be heard in person or by counsel or both." CONST. Art. I § 6.

In this case, the petitioner was represented in court by counsel and there was no urgent necessity, in our opinion, for him to have been present for a continuation of the cause. Moreover, he did not claim that he intended to depose as a witness; and even if that was his intention, his

deposition may have been possible for the purpose of meting out transparent justice. His lawyer of record was charged with the responsibility of following up the trial in his interest; so such grounds for continuance, in our opinion, were insufficient in law. Besides that, a motion for the continuance of a cause is addressed to the sole discretion of the court and a ruling thereon according to law may not be disturbed unless it is made positive that the court abused that right. It was shown on the record that the case was instituted in the year 1963; that a continuance had been granted from then until the March term of the court, 1965, upon the application of appellant whose disease was supposed to be cyclic; and therefore it was not conclusive that he would be restored to normal condition at the meeting of the June term, which means that the possibility prevailed that there could have been a perpetual continuation of the trial of the case altogether against the basic requirements of a speedy trial, especially in a suit of maintenance and support of spouse.

Taking recourse to common law, we have this citation of law which is positive in our understanding:

> "The presence of a party to an action to aid and assist his counsel in the trial of the cause is not ordinarily considered essential; and the absence of a party, not as a witness, but simply as an aid to counsel, is rarely regarded as a ground for continuance." 13 C.J. 140 *Continuance* § 36.

And here is still another citation of law:

> "The illness of a party is not ipso facto a cause for continuance of the cause, but where a party's presence at the trial is indispensable, and the character of his illness is such as to render his presence at the trial impossible, a continuance should be granted if it appears that he has been guilty of no negligence and the sickness is not the result of an act voluntarily done for the purpose of affecting the trial. . . . It should further appear that, if the continuance is granted, there is rea-

sonable probability that the party will be able to attend the trial within a reasonable time. From the very nature of the relief asked, the decision of the question must necessarily rest within the sound discretion of the trial court, and such discretion will not be interfered with unless the same has been abused to the extent of prejudicing the applicant's right to a fair trial of the cause. A continuance is properly refused where it appears that the party is not too ill to attend the trial. . . ." 13 C.J. 141–142 *Continuances* § 39.

The motion for continuance did not aver that petitioner's presence at the trial was indispensable. Nor did it allege that there was a reasonable probability of his presence at the June term to which he sought a continuance because his doctor testified to the fact that his illness was cyclic and it could not be reasonably determined when he would be restored to normal condition even if the physicians were the proper type to do so. Under such circumstances, the court was left with no alternative than to use its sound discretion, which in our opinion was done without prejudice or abuse, it not appearing at all that, as a party, he was a material witness whose evidence was quite necessary to a final determination of the cause.

This case was heard by the Chambers Justice and a very elaborate ruling made denying the issuance of the peremptory writ. In finalizing this ruling, the Justice said the following:

"On the other hand, where it does not appear that the accused would be better able to go to trial at a subsequent term, and the evidence indicates that he might actually be less able, a continuance may very properly be refused. The exercise of such discretion will not be abused where the court determines his alleged physical disability, or illness by a personal inspection or examination. The illness of an accused defendant which may prevent him from properly presenting his defense or rendering the assistance to coun-

sel that he otherwise would do is generally held a reasonable ground for a continuance. However, a motion for continuance because of the illness of a party is addressed to the sound discretion of the trial court, a discretion with which the appellate court will not interfere unless it appears that it was abused to such an extent that prejudice or injury results. See *Note, Continuance because of illness of a party,* 42 L.R.A. (N.S.) 660.

"There is one further point in the judge's ruling which we find necessary to pass upon. He had this to say, and I quote: 'If and when the defendant finds it necessary to counter the evidence of the plaintiff and is then disabled to attend upon this trial, the deposition of the defendant may be taken as the law directs.' On the matter of the taking of the deposition of the defendant as witness, this Court has but to say that the trial judge should probe into the matter from every factual and legal aspect in making a determination as to the suitability of taking a deposition *de bene esse* where an allegation has been laid as to the mental instability of the proposed deponent.

"Predicated upon the above, the alternative writ is hereby ordered quashed and the peremptory writ of certiorari is hereby denied."

Scrutinizing this ruling in all of its aspects and perusing the records before us in their entirety, we are of the sound opinion that the ruling of Chambers Justice should not be disturbed; therefore the said ruling is hereby affirmed with costs against the petitioner. The clerk of this Court is hereby ordered to send a mandate to the court below informing it of this judgment. And it is hereby so ordered.

Ruling affirmed.