JOSEPH F. DENNIS, Relator, *v.* REPUBLIC OF LIBERIA, EDWARD J. SUMMERVILLE, Circuit Judge of the Circuit Court of the First Judicial Circuit, Montserrado County, and M. DUKULY, County Attorney for Montserrado County, Respondents.

APPEAL FROM THE CHAMBERS OF MR. JUSTICE TUBMAN.

Argued February 3, 1941. Decided February 21, 1941.

1. A writ of prohibition will lie only in cases of manifest necessity.
2. It is the present policy of the Supreme Court to discourage removal of cases to the Supreme Court other than by regular appeals.
3. A writ of prohibition to prevent enforcement of a final judgment in the lower court will be denied where the lower court has not yet acted upon a contested motion to enforce the final judgment.
4. It would be inconsistent to deny a writ of prohibition and to enforce a lower court order since the former confirms the jurisdiction of the lower court whereas the latter implies that the lower court, having jurisdiction, has neglected to perform its duty and this Court will perform it in its stead.

Defendant, now relator, was convicted of embezzlement. Relator contested a motion by the county attorney for enforcement of the final judgment. Prior to a decision on the motion by the trial judge relator sued out of the chambers of Mr. Justice Tubman a writ of prohibition. After a hearing in chambers the writ was denied. On appeal for an argument before this Court *en banc, order affirmed.*

Joseph F. Dennis for himself. *The Attorney General* for appellee.

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

This is a matter in which the relator, Joseph F. Dennis, has prayed for an argument before the full Bench on an order given by Mr. Justice Tubman on the seventeenth

day of November, 1939, then as now presiding in our chambers as the agent of this Court.

The facts before us for consideration and upon which said order was predicated may be stated briefly as follows:

The said relator was indicted by a grand jury of Montserrado County for embezzlement, and, after a trial had during the August term, 1939, of the circuit court of said county, a verdict was rendered against the said relator as defendant in the criminal trial on September 22, 1939, and he was sentenced according to law.

Three days thereafter, including a Sunday that was sandwiched in between the date of the sentence and the date of filing a motion we are now about to advert to, the county attorney for Montserrado County filed a motion in the said court praying for enforcement of the final judgment upon the ground that the criminal statute of appeals, then recently enacted, required a notice of appeal to be filed within forty-eight hours, instead of sixty days as before, and a copy thereof to be served upon the prosecution within the same period, which notice under said statute relator had neglected to file in writing as the law prescribed. [See the petition of relator and the opinion of Mr. Justice Tubman.]

A "resistance," i.e., set of objections, to the said motion was interposed, a copy of which is contained in a letter from His Honor Judge Summerville, the trial judge, to His Honor the Chief Justice and included in the record of the proceedings now before us. Before the judge could express any opinion whatever upon the issue so joined, defendant, now relator, sued out of the chambers of His Honor Justice Tubman this remedial writ of prohibition.

The Chief Justice in the opening address read from this Bench on the twenty-seventh of November, 1939, in the following language deprecated the growing practice of applying for extraordinary writs:

"My colleagues, who during the year have been presiding in Chambers by rotation, . . . have, by a written memorandum filed with the Chief Justice, urged that a further warning be given. In more than one instance, as they point out, applications for remedial writs have been filed, and the machinery of this Court set in motion to the extent of having a stay of proceedings issued by the Clerk of this Court until the decision of the Justice presiding in Chambers could be obtained. Too often, they aver, after all these preliminary steps have been taken the application has been withdrawn before the Justice could even act, leaving an impression that this court has been used as a mere tool to effect a postponement of trial, or obtain some other temporary relief, upon an application wholly without merit. As the attempt to invoke the extraordinary powers of this court upon petitions of that kind is clearly a contempt of court my colleagues have urged that this warning note be sounded at this time, so as to give due and timely notice of what may likely follow should any such spurious petitions be again filed."

The expression is in full harmony with the present policy of this Court of discouraging the removal of cases to this Court other than by regular appeals, as is more fully explained in the opening address from this Bench delivered on the twenty-seventh of November, 1936.

Petitioner has, however, prosecuted his application in this case in chambers, as well as before the full Bench, with an amount of energy and zeal that has impressed us as having sprung from a conviction so sincere as to exempt him from the category of persons condemned by the Chief Justice hereinabove; and so we proceed to a consideration of said motion upon its merits.

An order to show cause was issued and, the returns of the trial judge and prosecuting attorney having been

filed, the issues joined were argued on the eighth and ninth of November, 1939, after which the Justice aforesaid denied the writ because, as said the Justice:

> "It was brought out during the hearing on this petition, that the trial Judge, since the filing of the petition for prohibition, approved the Bill of Exceptions and Appeal Bond, thereby taking the case out of the jurisdiction of the trial court, and allowing petitioner to perfect his appeal, which fact prevents enforcement of the judgment as petitioner contemplated. . . . It seems obvious then, that we could reasonably conjecture that had petitioner awaited the decision of the Judge on the application for enforcement of the judgment against him, the petition would not have been filed here; and this circumstance is a practical manifestation of the wisdom of the law writers in this respect, that the objection must be first interposed in the trial court and an adverse ruling obtained before the writ will issue."

We may here add parenthetically that it was discovered during the hearing before the full bench that: (1) The trial judge did not indeed approve the appeal bond, and (2) He did, in fact, contemplate giving a ruling adverse to defendant. But said points are not yet ripe for our consideration. However, inasmuch as the said opinion appears to us to have been in all respects supported by the principles of law therein cited, particularly those from *Cyclopedia of Law and Procedure,* quoted below, this Court is in full accord with the opinion so rendered and upholds the same.

> "A writ of prohibition will lie only in cases of manifest necessity, and after a fruitless application for relief to the inferior tribunals. It is properly issued only in cases of extreme necessity. It will not be granted where a greater injustice would be done by its issue than would be prevented by its operation, or

where the legal right is doubtful and the remedy would involve public inconvenience." 32 Cyc. of Law & Proc. *Prohibition* 602–03 (1906).

"An application for a writ of prohibition will not be considered unless a plea to the jurisdiction has been first filed and overruled in the lower court. Until the inferior court has been asked in some form, and without avail, to refrain from proceeding with the trial of a cause, or to dismiss the same, a superior court will not entertain an application for a writ of prohibition. This rule has, however, been held to be inapplicable to *ex parte* proceedings, or to proceedings in which the applicant for the writ had no opportunity to object. And in some jurisdictions an exception to the rule is recognized where a want of jurisdiction is apparent on the face of the record." *Id.* at 624.

In the fourth count of the brief filed by the Honorable Attorney General during his arguments before this Court *en banc,* he submitted that we should not only "deny the petition," but should also "order the judgment of the lower court enforced." Let us now examine said contention of his. The object of the petition was to prevent an enforcement of the final judgment, the sentence, pending a review of the record by this Court. Mr. Justice Tubman, as has been seen, denied the writ on two grounds, one of which was that the said petition had been prematurely filed and the second that, since the filing of the petition, the trial judge had approved the bill of exceptions and appellant had been allowed to perfect his appeal, whereby the trial court had lost jurisdiction.

For every act of commission or of omission contrary to law there is an appropriate remedy provided, and it is fundamental that the remedy for one injury cannot legally be applied to another. If, as the Honorable Attorney General contended here, there has been some irregularity or omission in any of the jurisdictional steps necessary to

transfer the case from the trial court to this Court, the statutes of this country provide the appropriate remedy to be followed when the cause shall have been placed upon the docket of this Court for any given term and thereby becomes ripe for our consideration; and numerous decisions of this Court show how such matters have heretofore been disposed of. To proceed otherwise would be, in our opinion, not only contrary to precedent but also contrary to law, as the only issue now before us is whether or not the judgment of the Justice presiding in our chambers should be upheld.

The two requests contained in the brief of the Honorable Attorney General, therefore, appear to us to be inconsistent with each other and incompatible with the nature of the proceedings now pending. The function of a writ of prohibition is to cause the court below to cease all further proceedings for want of jurisdiction; denying the writ commands said court to proceed. On the other hand, an order to enforce a judgment both implies that said court has jurisdiction and, the court having neglected to perform said duty, this Court will perform the duty in its stead; thus the one is the very antithesis of the other. We therefore feel that we should dispose of the two antagonistic issues one by one and in due order. The Court therefore is of the opinion that the second request of the Honorable Attorney General, namely, to order an enforcement of the judgment now appealed from, should, at this stage and upon these proceedings, be denied; that the judgment given by His Honor Mr. Justice Tubman should be upheld; and it is hereby so ordered.

Order affirmed.