S. ALFRED P. HARRIS, Petitioner-in-Certiorari, *v.* SARAH V. HARRIS and His Honor EMMANUEL W. WILLIAMS, Resident Circuit Judge of the Sixth Judicial Circuit, Montserrado County, Respondents-in-Certiorari.

PETITION FOR WRIT OF CERTIORARI.

Argued March 13, 1947. Decided May 9, 1947.

1. To remedy defects in a law is not one of the functions of a writ of certiorari.
2. The function of the courts is to interpret the law. Courts are not concerned with whether legislation is wise or unwise.
3. Where a regular appeal has been abandoned, certiorari will not issue without good cause shown.

Respondent Harris successfully sued petitioner for maintenance in the circuit court. Petitioner excepted and prayed an appeal which was granted and which petitioner failed to prosecute. Petitioner filed a petition for a writ of certiorari and Mr. Justice Reeves in Chambers, declaring himself disqualified, instructed the clerk of the Court to order respondents to file returns and to have the Court *en banc* consider the petition. Upon hearing of the petition by the Court *en banc, petition denied.*

B. G. Freeman for petitioner. *A. B. Ricks* for respondents.

MR. JUSTICE RUSSELL delivered the opinion of the Court.*

This case was filed in the clerk's office on June 13, 1946, praying for the issuance of a writ of certiorari. The respondents in said petition are His Honor Emmanuel W. Williams, who presided over the March term, 1946 of

* His Honor Mr. Justice Reeves, having been of counsel for one of the parties prior to his elevation to the Bench of this Court, recused himself in this case.

the Civil Law Court, Montserrado County, and petitioner's wife, Sarah Victoria Harris, the plaintiff in a suit for maintenance out of which these proceedings grew.

Petitioner in his petition states that on February 5, 1946 Sarah Victoria Harris, his wife, instituted a suit for maintenance against him in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, which case was assigned to be heard on March 25, 1946, but that ere said date arrived, that is to say, on March 19, 1946, petitioner's counsel, Mr. Justice Reeves, was elevated to the Bench of the Supreme Court of Liberia, and consequently could no longer represent his cause in the court below. Petitioner therefore found himself without counsel. He was subsequently successful in engaging the services of Counsellor B. G. Freeman, but because the time for hearing was too close at hand and his new counsel had not had sufficient time to thoroughly acquaint himself with the case, he filed a motion for continuance of said cause until the June term, 1946. His honor the judge, however, overruled said motion and ordered the case to trial. The case was duly heard and the trial judge ruled that petitioner pay his wife for her maintenance the sum of twenty-five dollars monthly; and allowed her the sum of seventy-five dollars for suit money, which his wife had not prayed for in her petition for maintenance. To these rulings of the trial court petitioner announced his exceptions and prayed an appeal before the Supreme Court of Liberia, which was granted by the Court. Even though his appeal had been announced and granted, petitioner in these proceedings had to comply with the judgment of the trial court, since the law provides in cases of maintenance that the decree of the court of original jurisdiction shall be enforced immediately and shall continue in force pending the decision of the appellate court. L. 1935–36, ch. XVII, § 24. This provision of the law in cases of maintenance, petitioner submits in his petition, is a gross injustice and is therefore inequitable, for which

reason he desires this Court to order the records of the lower court sent hither in order to correct such irregularities and errors as might be therein found.

Mr. Justice Reeves who was presiding in our Chambers at the time of the filing of this petition for writ of certiorari, upon being informed thereof, issued the following instructions to the clerk of this Court:

"SUPREME COURT OF LIBERIA
CHAMBERS—R.J.
FORTSVILLE, *July 13, 1946.*

"MR. J. D. LAWRENCE,
CLERK, SUPREME COURT OF LIBERIA,

"SIR:

"In acknowledging the receipt of yours of the 1st instant, advising that S. P. Alfred Harris has filed in your office a petition for a writ of certiorari, growing out of the case petition for maintenance instituted by Sarah V. Harris, his wife against him—you are hereby ordered to require the respondents to file their returns to the alternative writ not later than the 1st of September.

"After said returns shall have been filed in your office, you are further instructed to send forward and docket said issue to be considered by the Court *in banco,* at the ensuing October Term, stating the reasons that I am disqualified from presiding over said issue because of having been counsellor for the respondent in the petition for maintenance in the court below.

. . . . .

"And it is so ordered.

"[Sgd.] CHARLES B. REEVES,
Charles B. Reeves,
Associate Justice of the Supreme Court of Liberia, presiding in Chambers."

Sarah V. Harris in her returns contended that the writ should be denied petitioner, submitting *inter alia* that al-

though petitioner had announced his appeal from the judgment of the court below, nevertheless he had failed to prosecute and complete said appeal, as evidenced by a certificate from the clerk of the civil law court issued on August 22, 1946, a period of over sixty days from the date of final judgment. Therefore, she felt that petitioner was estopped from obtaining a writ of certiorari. Respondent contended that the writ ought not to issue because petitioner had complied with the judgment of the court below for the first month, but had failed to pay maintenance as well as the suit money for the two succeeding months, and when the sheriff for Montserrado County called on him for the amount due, one hundred and twenty-five dollars, petitioner gave him a deed for lands in Grand Bassa County to be sold in satisfaction of said amount, but that before said property could be sold petitioner had applied to this Court for a writ of certiorari, which action had immobilized the sheriff as far as these matters were concerned.

Before proceeding to consider the matter before us, however, we deem it expedient to quote from count 3 and from the prayer of the petition in order that the remedy which petitioner seeks by the institution of these proceedings may be more clearly shown:

> "3. That the divorce law of Liberia and that portion therefor in relation to maintenance, provides that the judgment of court in maintenance proceedings should be enforced while the party prosecutes his appeal. This provision of the statute places your petitioner in a most embarrassing condition to be made to comply with the judgment of the court, based upon insufficient evidence as the records hereto attached will show; and for petitioner to comply with this provision of the statute, is both an injustice and inequitable.
>
> "Wherefore your petitioner most respectfully prays that in view of the foregoing, Your Honour will cause

the Clerk of this Honourable Court to issue a writ of certiorari upon His Honour Emmanuel W. Williams, Resident Judge, presiding by assignment over the March Term of the Circuit Court of the sixth judicial circuit, Montserrado County, commanding him to transmit to this Honourable Court a full and complete copy of records of the proceedings in the matter hereinabove complained of, with his certificate and seal of court, in order that the same should be reviewed by this Honourable Court; errors and irregularities in the proceedings corrected, if same is found to exist; and that This Honourable Court will summon Sarah Victoria Harris, one of the respondents aforesaid, to show, if she can, why the judgment of the court in the aforesaid case should not be reversed, and to perform and do such other and further acts in the premises as in justice, equity and right will thereto appertain."

In plain words, what petitioner is asking us to do is to reverse the judgment of the lower court from which he had prayed an appeal, which appeal he had failed to prosecute because, in his opinion, not only is the law in maintenance proceedings which provides that the decree of the court of original jurisdiction shall be enforced pending the decision of the appellate court inequitable and unjust, but also because the motion for continuance above referred to was denied.

Now as to the nature of certiorari, the law writers are unanimous that:

"Certiorari is an extraordinary remedy offering a limited form of review of a cause of proceeding below, its purpose being to bring the record of such cause or proceeding up to the court issuing the writ for consideration by it. . . .

"It is not the function of the writ to supply defects in the action of an inferior tribunal or to *remedy a defect in the law.*" 14 C.J.S. *Certiorari* § 2(a), at 122 (1939). (Emphasis added.)

It may therefore be clearly seen that to remedy defects in a law is not one of the functions of the writ of certiorari. On that score this Court has ever and anon enunciated the principle that courts are not concerned with whether or not legislation is wise or unwise, oppressive or democratic; it is the especial function of the courts to interpret the law. Any legislation considered pernicious, unwise, or oppressive may be remedied only by the people who, where the legislators refuse to change the law, may change their representatives in the legislature from time to time until such repugnant legislation is repealed.

We are therefore of the opinion that the ground given, the injustice and inequity of the law of maintenance extant on our statute books, is not within the province of the Court to pass upon, however the individual minds of its personnel may feel about it.

Now with regard to the motion for continuance which the court below denied, we are of the opinion that a regular appeal would have provided an adequate means for a review of the error complained of, for at the time petitioner filed these proceedings he had announced his appeal to this Court and he had to a certain extent complied with the judgment of the court below, though not as fully as the law requires; but he had failed to prosecute his appeal before this Court, which appeal would bring any and all matters attending the trial before the scrutiny of the appellate court. Petitioner having prayed an appeal from the rulings of the court below and failing to complete said appeal, we are of the opinion that he should in his petition have stated clearly and certainly the cause of said failure, showing that it was due to no negligence on his part, but that same was due to circumstances beyond his control. These things petitioner failed to do.

In support of our position, we quote the following:

"If the party aggrieved has elected another remedy

under which he can obtain full redress he cannot resort to certiorari also; although it would seem that the rule is otherwise where the remedy is inadequate to afford the relief sought. Similarly, since the writ will, as a rule, lie only to a final determination . . . where the case is still pending in the court below where the error complained of, if any, may be corrected on the final hearing, the writ will not lie. It has also been held that the writ will not lie where a proceeding in equity for the same relief is pending between the identical parties, or where a proceeding is pending in chancery which may dispose of the questions sought to be determined by the writ. . . .

"The writ will not be granted when an appeal is pending from the same determination and the questions sought to be reviewed thereon are the same, even where the remedies are concurrent." *Id.* § 41, at 191.

In consideration of the above, we are of the opinion that the petition should be denied with costs against petitioner; and it is hereby so ordered.

Petition denied.

MR. JUSTICE SHANNON, concurring.

I am in agreement with the opinion just read and even more with the conclusions denying the writ of certiorari, and because of the strongly worded dissent which is to follow I have deemed it necessary and expedient that I write this concurring opinion to more fully show the reasons and grounds for my concurrence.

It is to be first observed, and this with particular emphasis, that the denial of the granting of a writ of certiorari does not carry with it the necessary implication of the affirmance of the lower court's position or judgment. Invariably, it is based upon some irregularity in procedure which shows a lack of jurisdiction which would enable the superior court to open up the record for review of the error complained of. As shown in the opinion just

read, petitioner commenced an action of divorce for desertion against his wife, one of the respondents, and during the pendency of this action before the lower court the wife also commenced a suit for maintenance against him. For obvious reasons, the suit of maintenance was first heard which resulted in a decree against petitioner ordering him to pay his wife the monthly sum of twenty-five dollars as well as the sum of seventy-five dollars for counsel fees, and the petitioner, having duly excepted to this decree of said court, was granted an appeal upon his application.

However, since the law of maintenance as found in the Matrimonial Causes Act of 1935–36, ch. XVII, § 24 expressly provides that an exception to, and a taking of an appeal from, a decree ordering the husband to pay the wife suitable money for maintenance does not act as a suspension of such payments whilst the appeal is pending, petitioner was called upon and made to satisfy the decree as to the payment of the monthly sum of twenty-five dollars allowed his wife, which was subject to enforcement, especially upon application of the wife.

Despite the above and the payment by petitioner of an initial sum in satisfaction of the terms of the decree, he, instead of prosecuting the appeal regularly and according to his notice of record, deserted this course and elected the procedure by certiorari without a sufficient legal reason for such a position, since the reason he assigned was that to have proceeded by the regular way would have worked a hardship on him since in such a case he would have been required to satisfactorily comply with the decree in the payment of the monthly allowances to his wife. It is not clear how under the law of maintenance just quoted the change of tactics, in bringing the matter before us, from a regular appeal to a supersedeas in the enforcement of the decree, especially in face of the pointed, though strange, provisions of the statute of 1935–36 just referred to, came about. Accordingly, recourse was

taken to the order of the Justice presiding in Chambers to ascertain whether or not it was upon his directions that such a stay was effected; but there was no such order found except the usual notice that is given by the clerk of this Court to the respondents informing them of the filing of the petition in certiorari and directing them to stay further proceedings until such time as the order of the Justice presiding in Chambers will have been indicated. This notice of the clerk of this Court was accepted by the lower court as an inhibition to its carrying out the special provisions of the statutes with respect to such judgments or decrees when appealed from. For petitioner to have decided to proceed by certiorari instead of by the regular and ordinary appeal announced could not legally affect the requirement of compliance with the decree in face of this special statute regulating the procedure in maintenance cases; and that it did so in this special case was irregular and unauthorized.

The statute of 1928, chapter XIV, regulating the law of alimony is not to be read in connection with, or confused with, that of the Matrimonial Causes Act of 1935–36 since the provisions, principles, and procedure are altogether different, and it cannot be gathered from the maintenance law, which was enacted after the alimony law, that it was intended to supplement, amend, repeal, or even counteract said alimony law. Presumption of guilt on the part of the wife is not a bar to her procuring a decree against her husband in a maintenance suit as it is in a suit for alimony.

Possibly if we had found our way clear to enter into the merits of the case we might have been persuaded, as is our distinguished colleague who dissents from us, to pronounce upon the irregularity of certain of the rulings of His Honor Judge Williams before whom the maintenance cause was heard or perhaps have differed with him in his decree for the wife; but we found ourselves unable to do so in face of the rather strong objections

initially interposed by the said wife, as one of the respondents in these proceedings, in her returns, to the legal propriety of the procedure by certiorari when there is no apparent good reason shown for not coming up on a regular appeal or abandoning same. This brings us to the consideration of the main reason assigned for adopting this course.

Petitioner submits that to have brought the case up on an ordinary appeal would have left him at the mercy of the lower court which would have compelled him to comply with the decree against him whilst he was prosecuting his appeal, and hence he decided to adopt this procedure in order to avoid meeting a condition of a statute which petitioner considers hazardous, unfair, unjust, unwise, and unconstitutional. In other words, petitioner wants this Court to grant him a writ of certiorari to enable him to evade compliance with the express provision of a statute.

We have reserved our personal opinion on this particular provision in the Matrimonial Causes Act which requires a husband to comply with the decree of the trial court in a suit for maintenance even whilst he is appealing and pending the appeal to the Supreme Court, and where even if there is an eventual reversal of the decree the sum the husband may have paid in compliance with said decree is not recoverable, because it is neither within the province of the courts to be concerned with whether a law enacted by the Legislature is good or bad, useful or not, nor to pass upon the necessity, utility, and expediency of a statute. This has been stressed by this Court in *Delaney* v. *Republic,* decided February 4, 1944. [Case missing.] The principle of law relied upon therein is found in *Ruling Case Law:*

> "While the courts may, and, when the question arises and is properly presented, must, determine the constitutional power of the legislature to enact a particular statute, where a law does not transcend the

> limits of legislative power it cannot be held invalid by the courts because they may question the wisdom of the enactment. Within constitutional limits, the necessity, utility and expediency of legislation are for the determination of the legislature alone. The remedy for unwise legislation is not in the courts but remains in the people, who, by making the necessary changes in the legislative body, may have the unwise, improvident or pernicious legislation of one legislature corrected by another. . . ." 25 *Id. Statutes* § 60, at 808 (1919).

In view of the above, and despite what might be my personal opinion of the alleged injustice and unfairness of the law requiring the husband to pay the wife the amount allowed for maintenance by the decree of a court in face of an appeal duly announced and in the process of prosecution, I am impressed that it is without the province of the courts to so pronounce it, since the sole responsibility for the correction of said unwise and unjust legislation is reserved for the legislature; and to grant the writ of certiorari prayed for would have the effect of being a pronouncement against the wisdom, necessity, utility, and expediency of the statute which is unjust and unfair to the petitioner.

Because of this position, I have joined in signing the judgment denying the writ of certiorari.

MR. JUSTICE BARCLAY, dissenting.

Because of my disagreement with the opinion of my distinguished and esteemed colleagues just read, I am filing this dissenting opinion.

My colleagues have taken the position that the petitioner is simply asking the Court to reverse the judgment of the lower court, from which he prayed an appeal and did not prosecute, because the maintenance law is inequitable and unjust since it provides that pending an

appeal the judgment of the court should be enforced, and also because his motion for continuance was overruled.

With reference to the motion for continuance, my colleagues have taken the position that a regular appeal would have provided adequate means for a review of the errors complained of; that because petitioner had announced an appeal and had partially complied with the judgment but had failed to prosecute his appeal to this Court, which appeal would bring any and all matters attending the trial before the scrutiny of the appellate court, he should have in his petition stated clearly and certainly the cause of said failure, showing that it was due to no negligence on his part but that same was due to circumstances beyond his control.

I have understood the petition to mean that he did not come by regular appeal because of the harshness of the law which placed him in an embarrassing position, and that to do so would be detrimental to his interests since he would be, under the law, in complying with the judgment, paying out money, twenty-five dollars per month and seventy-five dollars suit money, pending the appeal, which under the same law could not be recovered even if he succeeded in getting a reversal of the judgment. There is no request in the petition for the Court to repeal or change the law, since that could not be done by any court.

The relevant part of the Matrimonial Causes Act reads as follows:

> "A husband shall be responsible for the maintenance and support of his family, and for the education of his children and wards. . . .
>
> "Where he neglects or refuses to maintain or support his dependents, upon complaint made by any member of his family or by any public authority, he shall be compelled by any court having jurisdiction over matrimonial causes to provide such maintenance and support; in case of his failure or refusal to comply

with the judgment of court, execution shall be issued against any of his property or credits to be applied for the support and maintenance of such dependents.

. . . . . .

"The defendant may appear and file an answer confessing judgment or to excuse or justify his conduct, and the plaintiff may thereafter reply to the answer of the defendant.

"Upon filing the reply, the Judge of the Circuit Court sitting in equity shall proceed to try the issue in keeping with the principles and rules of equity.

"An appeal shall lie from every such final decree to the Supreme Court, but the decree of the court of original jurisdiction shall be enforced immediately and shall continue in force pending the decision of the appellate court.

"A decision of the appelate [*sic*] court reversing the decree of the court of original jurisdiction shall extend only to preventing the further enforcement of the lower court's decree and no reimbursement of cost or other amounts paid by appellant under the decree of the lower court shall be required to be made to appellant." L. 1935–36, ch. XVII, §§ 20, 23, 24.

It has to be remembered that the law of maintenance contained in the statute just quoted above is in derogation of the regular statute on appeals since it provides that pending the appeal the judgment must be complied with, and in case of a reversal no refund shall be made. Is such a law not unjust, is it not unfair, is it not inequitable?

Under these circumstances the Court should and must in all fairness in dispensing justice exercise its full equitable powers in scrutinizing carefully the records and evidence adduced in support of the petition, upon which the decree of the Court is based, for the maintenance law gives the court the power to try the issue in keeping with the principles and rules of equity. For example, to make plain the danger of such a law, suppose a judge had a

personal grudge against a litigant defendant, or corruptly acted in collusion with a petitioner, who under the law can only be one of the fair sex, and planned to harass and fleece money or property out of a respondent, and without sufficient proof in the petition awarded the wife one-half of the alleged income, say one hundred dollars per month. Following the regular appeal with its usual delays, in a year the husband would have paid out twelve hundred dollars plus costs of court without even, in case of a reversal of the decree by the appellate court, the possibility of a reimbursement. Hence it is that I have taken the position that an application for a remedial writ was the only remedy available to petitioner to save himself embarrassment and an unjust expenditure of money and probable imprisonment in case of his inability to each month obtain the sum required. As it is, this case was heard in the lower court over a year ago, and but for the supersedeas caused by the application for this writ of certiorari one can readily see what expense respondent, now petitioner, would have been put to. So then, the application was not for the mere purpose of delay but was for the purpose of protecting a substantial right brought about by circumstances beyond his control.

Now, let us see whether petitioner had any precedent for his actions. In the case *Daniel* v. *Compania Trasmediterranea,* 4 L.L.R. 97, 1 New Ann. Ser. 99, decided April 20, 1934, Mr. Justice Grigsby, speaking for this Court, in defining the functions of a remedial writ, said:

> "A remedial writ is an extraordinary remedy, usually applied for in order to prevent an injury to a party that may be irreparable, or at all events may not give an adequate remedy if the ordinary methods of bringing up a case for review are pursued. It follows, then, that an application for such a writ should be heard and disposed of as expeditiously as possible, without awaiting the time for the convening of a regular term." *Id.* at 99.

The purpose of this application was to prevent an irreparable injury to a party. Furthermore, the principle is laid down as follows in *Corpus Juris Secundum:*

> "Ordinarily, the writ will not lie merely because the remedy by appeal is less prompt than by certiorari, and this is true even under a statute providing that the writ will lie only where there is no plain, adequate, or speedy remedy. Thus, a delay caused by following the regular course of review by appeal will not alone warrant the allowance of the writ. Such delay, however, when added to other reasons may bear considerable weight. Thus, the courts have allowed the writ where the delay incident to an appeal would deprive appellant of a substantial right." 14 *Id. Certiorari* § 39(b), at 188 (1939).

In my opinion because of the enunciation made by the Court through Mr. Justice Grigsby, *supra,* and because of the authority quoted above, petitioner was warranted in applying for the writ instead of following the regular course of appeal, because of the delay incident to an appeal, especially under this special law of maintenance, enacted apparently for some questionable reason in derogation of the law controlling appeals. This statute provides that appellant, notwithstanding his notice of appeal, must *immediately* comply with the judgment pending the appeal, and, worse still, that even where a reversal of the erroneous decree is made by the appellate court, there shall be no reimbursement to appellant of costs or other money paid out.

Petitioner therefore naturally expected that by applying for a remedial writ his case would have been heard and disposed of as expeditiously as possible by the appellate court without awaiting the regular term. In fact, it could and should have been heard during our October term, but because of circumstances over which petitioner had no control it was not assigned. Yet under the majority opinion just read petitioner must pay the

penalty since each month that passes increases the amount to be paid. And further, he felt that there was no evidence upon which to base the decree made by the judge in the court below, and that a review of the records in the case would have disclosed that the misconduct and the erroneous and illegal actions of the judge were sufficient to bring about a reversal of the said decree. In count 3 of the petition in these proceedings it is stated that, "This provision of the statute places your petitioner in a most embarrassing condition to be made to comply with the judgement of the court, based upon insufficient evidence as the records hereto attached will show. . . ."

In this case, as distinguished from *Dennis* v. *Reffell,* 9 L.L.R. 310 (1947), the application for the writ acted as a supersedeas and stopped the monthly payments of the twenty-five dollars and of the suit money, whereas in the other case, as therein pointed out in my dissent, there was nothing to be stopped, and consequently adequate remedy could be obtained by regular appeal. And furthermore, in the *Dennis* case the errors and injustices complained of in the bill of costs were never brought to the notice of the judge in the court below and a ruling adverse to the petitioner obtained.

I shall now review the records sent up from the court below to see whether or not petitioner's contention that the judgment was based on insufficient evidence can be supported and justified. The petition for maintenance shows that Sarah V. Harris, respondent in these proceedings, on February 5, 1946 filed an action for maintenance in the equity division of the Circuit Court for the Sixth Judicial Circuit, Montserrado County, alleging in her petition that she was lawfully married to her husband on January 29, 1939, but that from the month of October, 1945 her husband, becoming unmindful of his marital vows and covenants and duties, indulged in hateful habits of maltreatment and wilful neglect of his marital duties and functions towards her, his wife, and made life be-

tween him and her unbearable and practically intolerable, particularly by his having cruelly separated himself from her and by his wilful neglect to contribute towards her support, maintenance, and well-being since the month of October, 1945; and that he did leave his wife and from that time up to the filing of said petition refused and neglected to give her food, clothing, or any of the ordinary necessities of life, which as his lawful wife she is entitled to whereby her domestic happiness and well-being might be assured and secured. She also alleged that her husband was in a position to provide adequate support and food and was capable of contributing to her maintenance and well-being, since he was employed by the Raymond Concrete Pile Company at a salary of fifty dollars a month, as well as by the Firestone Plantations Company as a machinist at a salary of forty dollars a month. Since the total amount is ninety dollars per month, she felt that her husband could give her at least thirty dollars per month for her support and maintenance.

Sarah V. Harris prayed that the court sitting in equity order and decree that her husband, petitioner herein, contribute to her support and domestic well-being as his wife by giving her protection, maintenance, and support, financial and otherwise, and by doing such other and further acts, and performing such other duties and functions which, as his wife, she is entitled to receive.

The husband in his answer set up:

(1) That the court sitting in equity is without jurisdiction over the subject matter of his wife's petition under the Liberian Criminal Code and statute of divorce in that the Criminal Code makes it a misdemeanor for a husband to abandon or desert his wife and leave her in destitute circumstances and the divorce statute makes desertion one of the causes for divorce. Sarah V. Harris, not having pursued either, committed a legal blunder.

(2) That counts 1 and 2 of the petition are false and

misleading in that on October 6, 1945 he provided his wife with her usual monthly allowance of food for maintenance and additional allowances plus payment for a medical bill, aggregating in all $42.25.

(3) That said counts 1 and 2 are also false and misleading since he has never deserted his wife, but, on the contrary, she deserted him and her home in Bensonville where they formerly lived, and since that time has resided in Monrovia against his will and consent.

(4) That count 3 of the petition is false in that he is receiving no permanent salary from the Firestone Plantations Company or from Raymond Concrete Pile Company, not being a monthly employee of either of them. On the contrary, he works for the Firestone Plantations Company by the day and receives a daily wage whenever he works, and he works for Raymond as a jobber when he can make it and they have work to be done.

(5) That having endeavored to induce, persuade, and advise his wife to return to her home in Bensonville or to him at Firestone and she having defiantly refused to obey, he informed her that he would withhold her support and maintenance until she complied with one or the other of his demands. Nevertheless, she being his wife, whenever she appealed to his sympathy he gave her at intervals the following amounts: November, 1945, ten dollars; December, 1945, fifteen dollars; and January, 1946, seventeen dollars.

The reply attacked count 2 of said answer by stating substantially:

(1) That in count 2 of said answer her husband admits having supplied her, which is a denial of the petition, and in count 5 he sets up that because of her refusal to obey his request to return either to

her home at Bensonville or to him at Firestone he informed her that he was withholding her support and maintenance until she obeyed either one or the other of his demands, which is an admission that he is withholding her maintenance and support which he in count 2 says he has given. She submits that since the answer is therefore evasive and contradictory and also discloses an attempt at justification, said answer is a proper subject to be ruled out of court.

(2) That under the Constitution of Liberia, Article V, section 11, even in an insolvent estate the widow is entitled to support and maintenance. It is therefore obvious that it is obligatory for a husband to support and maintain his wife. Under the divorce statute a divorce for desertion cannot be granted unless the desertion has been for the space of one year, and since that period has not expired she could not successfully maintain a divorce for desertion.

(3) That the allegations of facts stated in count 2 of the answer are untrue.

(4) That the allegations of facts stated in count 3 are untrue; she came to Monrovia for medical treatment, but since her husband came down he has not taken up residence with her where she is, but deserted her without means of support and medical treatment and took himself to another place of abode, to which he did not invite her.

(5) That the allegations contained in count 4 are untrue.

(6) That it is untrue that there was any effort on the part of her husband to get her home to Bensonville, which she had never deserted, or that he had named any place at Firestone where he had provided living quarters for himself where she could go.

On March 21, 1946 S. Alfred P. Harris was suddenly notified that the case was assigned for hearing, and being then without counsel, his former counsel having been a few days before elevated to the position of Associate Justice of the Supreme Court of Liberia, he filed a motion for the continuance of the case till the June term, stating said fact and pointing out that because of the shortness of time he was unable to retain counsel who could acquaint himself with the case to meet the assignment that day. His Honor E. W. Williams, the trial judge, granted the motion in these unmistakable and memorable words:

> "Counsel for defendant says that he would like to look over the records, and mentions a case in the Supreme Court of Liberia. The Court gives his request some [consideration]. Yet it is indeed surprising to the Court to see Mr. Harris not ready this morning when he seemed to have been ready all last week. Yet in fairness to both sides the Court gives the defendant until 2 o'clock today certain, and then at that hour there will be no power on earth, Heaven, or Hell to prevent the trial. And it is so ordered."

This in my opinion indicated the attitude of the judge, which is confirmed and emphasized by his ruling on the legal pleadings that afternoon: "The Judge says that Answer of Respondent is dismissed. The Reply of Petitioner is sustained, and the case ruled to trial." No reasons are given for the dismissal of the answer or for sustaining the reply. Of course her husband excepted thereto.

Now follows the evidence of the wife upon which the judgment is based. There is not a scintilla of evidence to prove her petition and to support the judgment.

Mrs. Harris testified that one day in October, 1946 she was in Bensonville at her home working. About 5 o'clock she saw her husband come up in a pick-up. He said to her, "I have come for you. There is a writ out for you and I don't want you to be arrested up here."

She asked how she is to get to Monrovia that evening. He replied that he would go to Honorable Tolbert and get his pick-up. That was done, and they went down to Monrovia and spent the night at Counsellor Rick's residence. Next morning, because of the inconvenience, they moved over to Counsellor Coleman's. Seeing the embarrassment she put it up to her husband to rent a place for them. He said to her later, "You told me to find a place and I have found one." On her offer to remove there he replied, "No." Nevertheless, one afternoon she took a walk and met her husband sitting on the piazza of the house where he was residing. She then upbraided him by saying, "Look here, Harris, I am not a street woman. You have taken me from my home and brought me to Monrovia and I am suffering." Whilst there, one Miss Knowleden came up and said to Mr. Harris, "Here is my key. I am going out." Upon that Mrs. Harris accused her husband of living in lewdness. On another evening she again visited the house and charged her husband with living in lewdness. This time the owner of the house was present and became annoyed and said to Mr. Harris, "Give this woman something to eat and let her go." She asked for ten dollars and, Mr. Harris making no move, the owner went to his box and took out five dollars and gave it to her and told Mr. Harris to ask his wife to leave his house. From that time she never visited. She then said that her husband, after he had filed a case against her, gave her twenty dollars and at another time, when he spent the night, gave her twenty dollars.

Nothing was said about her husband's income during her whole statement in her direct evidence, or about the ill-treatment and other charges enumerated in the petition. On the cross-examination counsel for Mr. Harris questioned her about her husband's income, but to each question she replied substantially that her husband was the evidence.

In the middle of the cross-examination the record here abruptly states:

> "Counsellor Freeman at this stage wishes to observe that just as he commenced cross-examination [of] the witness and asked a few questions the Court interposed and said that as far as it was concerned he was satisfied with the witness's statement which was uttered in open court and before the witness had proved her complaint as laid. The respondent felt that he was by such a statement coming from the court placed at a disadvantage and asked leave of court to enter his exceptions. The Court in reply said that it considers that after a witness had gone before the court and made a statement in accordance with the complaint, she [*sic*] filed such a statement, if they [*sic*] are cogent to the complaint and satisfy the court and jury. That doesn't say the witness is telling the truth, that doesn't say the case is proven, but all that a witness says in court is taken for the truth and is credited until the contrary appears."

There were only two other witnesses for Mrs. Harris.

Joshua Harris, a child of about ten years of age, spoke as if reciting a lesson:

> "Q. Sarah Harris has sued her husband Mr. Harris for not supporting her. Please tell the court what you know about this matter.
>
> "A. My pa don't feed my ma. He doesn't give her any money. My pa goes there in the night and sleeps there, but in the day we do not see him. My mother had to pawn her deeds to Mr. Frank Tolbert. My pa goes there every night and sleeps there. In the morning we can't see him."

Counsel for Mrs. Harris did not question the witness further.

The next and last witness was Frank Tolbert, who simply stated that Mrs. Harris went to his office one day and said she was distressed and asked him to loan her

twenty dollars, which he did. She gave him a promissory note for payment and her original deed to hold as collateral security.

The record continues:

> "At this stage petitioner's counsel announced that he rests evidence with the right of bringing rebuttal evidence if necessary. Respondent's counsel observed that since the Court ruled out his Answer and left him on the bare denial of the facts to which ruling he has already excepted, there is nothing left but to call the court's attention to the fact that the petitioner has not yet established in evidence and in support of her petition what is the monthly income of respondent to enable the court to award her any sum of money for maintenance, and his denial of the complaint stands in support of his contention, and in the absence of petitioner's proof that she is entitled to maintenance. Petitioner objects to the announcement of respondent as regards proof of his monthly income since such an announcement partakes of the nature of raising of an affirmative plea, which he is legally estopped from doing in this case, his Answer having been ruled out and he resting in defense on a bare denial. Petitioner avers that respondent if he wanted to bring in the question of proof of his income should have safeguarded himself legally so that the matter may be properly raised by the adducing of evidence. Petitioner cannot therefore be held responsible for the legal blunder made by respondent. The Court says that the objection of petitioner is sustained. To which respondent excepts."

Here followed the final decree which awarded to petitioner seventy-five dollars suit money, nowhere prayed for in the petition, and twenty-five dollars per month for maintenance.

I refrain from commenting on the evidence except to

say that from such a judge, Good Lord, deliver us, for those who read may form their own conclusions.

I have taken pains to review the case heard in the court below out of which these proceedings grew in order to give the history and background so that my position will be the better understood. In *Corpus Juris Secundum* the law is thus stated:

> "In accordance with the general rule, the reviewing court cannot review and correct a mistake of fact, or an erroneous conclusion from the facts, made by the inferior court, unless palpable error has been committed, as where an erroneous rule of law was observed in making the finding, or there was serious misconduct involved in the finding, and material injury resulted to the petitioner therefrom. *Findings of fact may be considered, however, so far as they concern fundamental questions, such as whether they were sufficient to sustain the lower court's action.*" 14 *Id. Certiorari* § 172(a), at 313 (1939). (Emphasis added.)

In my humble opinion, therefore, these circumstances appearing in the record, which plainly show lack of evidence to support the judgment, added to what has been before pointed out and the law, *supra,* are sufficient to warrant this Court unhesitatingly to grant the writ and review the case and correct the errors.

> "While courts of equity, in the exercise of their power to render extraordinary relief, are restrained by fixed rules and settled principles, a want of jurisdiction is not to be inferred from the novelty of the question alone. In other words, it is no objection to the exercise of jurisdiction that in the ever-changing phases of social relations a new case is presented and new features of wrong are involved where merely novelty in incident, not in principle, appears. Otherwise gross injustice, under the guise of forms of law,

might be perpetrated. So, while courts of equity may not assume a jurisdiction which is non-existent, they may amplify remedies or avail themselves of new remedies and unprecedented orders to meet an emergency, when such are based on sound principles and calculated to afford necessary relief without imposing illegal burdens. And it is in this sense that the words of Chancellor Cottenham to the effect that it is the duty of a court of equity to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and enforce rights for which there is no other remedy, are so often quoted with approval. Also it is in this sense, namely, in the adaptation of its old and well recognized rules to new cases, and in the application of its highly elastic and more flexible processes and procedure to the changing emergencies of increasingly complex business relations as contradistinguished from the fixed and settled principles of equity themselves, that the jurisdiction of equity may be said to be constantly growing and expanding." 10 R.C.L. *Equity* § 9, at 263 (1916).

I am also not in accord with the view expressed in the opinion and stressed by respondents herein that because petitioner announced an appeal and partially complied with the judgment by paying the first twenty-five dollars, he is estopped from coming up by remedial process and that therefore the writ should be denied. In this instance the compliance with the judgment was not voluntary, but *forced* under the existing law, and hence an estoppel would not lie. It cannot therefore be fairly said that petitioner complied with the judgment and is barred from a review of his case.

In support of my position I cite *Cyclopedia of Law and Procedure:*

"The writ will not be dismissed on the ground that the determination or order sought to be reversed has been complied with, where some measures of relief may be afforded by a reversal, or such compliance was involuntary." 6 *Id. Certiorari* 814 (1903).

I also quote from *Corpus Juris Secundum:*

"The writ will not be dismissed on the ground of the relator's acquiescence in the determination below, where that fact is disputed; nor will it be dismissed on the ground that the determination or order sought to be reversed has been complied with, where some measures of relief may be afforded by a reversal, or such compliance was involuntary. . . ." 14 *Id. Certiorari* § 135(a), at 263 (1939).

Under the law above and in view of the peculiar circumstances of the case and of the statutory law of maintenance, had Mr. Harris been given a fair and impartial hearing he might have had the opportunity of invoking the Alimony Statute of 1928 which, according to its preamble, was passed particularly to meet suits of this kind, since in count 3 of the answer he denied deserting his wife and charged her with deserting him.

I quote the statute:

"Whereas there is no statute referring to Alimony, but that the Courts of this Republic has [*sic*] heretofore acted upon the Common Law Procedure; and

"Whereas the Common Law Procedure has been in many instances detrimental to the interest of the male citizens of the Republic, when they are compelled to institute Actions of Divorce against their wives for the breach of their matrimonial covenants and vows; and

"Whereas, various decisions rendered against those husbands in such cases are not just equitable when the surrounding circumstances are taken in consideration, Therefore

"It is enacted by the Senate and House of Representatives of the Republic of Liberia in Legislature assembled:

. . . . .

"In no case shall the wife abandoning her husband's home be entitled to an Alimony except for the reasons which shall be considered good causes:– habitual and continuous drunkeness [*sic*] which results into perpetual annoyance and an unhappy home; incompatibility of temper creating a regular nuisance to the community and endangering the life of the wife; open and outrageous immorality against the good morals of the community and for which the wife would be entitled to a divorce. In all such cases as above enumerated it shall be the duty of the Court or Judge to see that the cause or omission is actually traced to the conduct of the husband, and the wife absolutely exonerated from guilt.

"That where an action of divorce is instituted by the husband against the wife, and where the presumption of guilt on [the] part of the wife is great, she shall not be entitled to receive an Alimony upon a suit brought by her." L. 1928, ch. XIV, preamble, §§ 3, 4.

Anderson v. *Anderson,* 9 L.L.R. 301, decided today, cites *Corpus Juris* for the definition of alimony:

"'"Alimony" . . . [is] the allowance required by law to be made to a wife out of her husband's estate for her support or maintenance, either during a matrimonial suit or at its termination, where the fact of marriage is established and she proves herself entitled to a separate maintenance. . . .' 27A C.J.S. *Divorce* § 202, at 868." *Id.* at 308.

A court "will take judicial notice of its own records in a former case between the same parties." 2 Bouvier, Law Dictionary 1737 (Rawle's 3d rev. 1914). This Court must therefore take judicial notice of mandamus proceedings between the same parties wherein this

Court today upheld the order of a Justice in Chambers, re-docketing a divorce case filed by petitioner herein against his wife for desertion, in which she neglected to appear and answer, which case was illegally dismissed by the same trial judge upon the application of the wife. *Harris* v. *Harris,* 9 L.L.R. 338. Therefore the presumption of guilt on the part of the wife was great, and under the law would have barred her right to alimony or maintenance.

It is my opinion, therefore, that under the law and under the peculiar circumstances appearing in this case the correct course would have been either to grant the writ, review the case, and correct the errors, or to remand the case to be properly and legally disposed of.

In view of what I have written and read, I have refused to attach my signature to the judgment which appears to me to be an approval of the actions of the judge of the court below.