CORNIFF'S ART PRINTERY, represented by DORIS CORNIFF Plaintiff-In-Error, v. **HIS HONOUR WILLIAM H. KENNEDY,** Judge, Debt Court, Montserrado County, et al., Defendants-In-Error.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE GRANTING THE PETITION FOR A WRIT OF ERROR.

Heard: March 18, 1982. Decided: July 8, 1982.

1. Where two legislative enactments are repugnant to, or in conflict with each other, the last enactment will govern, control or prevail and it supercedes and impliedly repeals the earlier act although it contains no repealing clause.

2. In writ of error proceedings, the Supreme Court has appellate jurisdiction over appeals from the Justice in Chambers, who has original jurisdiction in all proceedings arising from remedial writs.

3. An affidavit for a writ of error signed by an attorney not legally qualified is invalid and consequently the application for the writ will be denied.

4. Costs are accrued when they are accumulative, aggregate and increased progressively, have not been paid, and are still pending when the second action begins.

5. The rule of default judgment, is of common law origin and was enforced for the purpose of keeping the docket current and expediting the disposal of causes, thereby preventing procrastinating defendant from impeding the plaintiff in the establishment of his claim after expiration of the time originally allowed by law for the filing of an appearance or answer.

6. No service needs to be made on a party in default for failure to appear except service of pleadings.

7. In actions of debt, where the claim is for a sum certain and the party is in default, no further notice of assignment is required.

8. A trial judge in a non-jury case can render final judgement immediately after the case has been argued and submitted.

These error proceedings grew out of an action of debt instituted in the Debt Court for Montserrado County in which plaintiff-in-error, upon receipt of the writ of summons and

the complaint, did not file an answer nor did he appear formally as the writ of summons commanded. Consequently, a default judgment was entered against her. She signed the bill of costs, but failed to pay the judgment amount. As a consequence, she was arrested and imprisoned. While in jail, a petition for a writ of error was applied for before the Justice in Chambers alleging, among other issues, that the trial judge committed reversible error when he rendered judgment by default against her without a prior notice of assignment and when he hastily rendered judgment against her without waiting for four days as required under the statute.

In resisting the application for error, defendants-in-error questioned the power of a single Justice to hear and determine error proceedings; that plaintiff-in-error not having filed an answer and not having appeared formally during the proceedings as the writ of summons commanded, was in default and, hence, was not entitled to a notice of assignment. Defendants- in-error also alleged that the petition for error was defective in that the affidavit attached thereto was signed by Counselor Julia Gibson who was not a licensed attorney at that time. From a ruling of the Chambers Justice granting the writ, defendants-in-error appealed to the Full Bench.

The Supreme Court held that, although the filing of the petition before the Justice in Chambers was proper, it was nevertheless invalid because of improper verification, the affidavit thereto not having been signed by a licensed lawyer. The Supreme Court also held that plaintiff-in-error, not having filed an answer and not having appeared formally upon the receipt of the writ of summons, was not entitled to any further notice of assignment, the denial of which may warrant the issuance of the writ of error. Accordingly, the Supreme Court reversed the ruling of the Justice in Chambers, quashed the alternative writ, and denied the application.

J. Emmanuel R. Berry for defendants-in-error/appellant. *Julia Gibson* & *Raymond A. Hoggard* appeared for plaintiff-in-error/appellee .

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

The defendant, plaintiff-in-error herein, was sued in an action of debt, in the Debt Court for Montserrado County. The sheriff's returns indicated that she had been duly summoned and furnished with a copy of the complaint along with the supporting documents on the 5th of January 1977. The records also disclosed that the plaintiff-in-error neither filed an answer nor appeared formally as the writ commanded; consequently, a default judgment was entered against her on April 6, 1977.

Eight (8) days thereafter, an execution prayed for by the judgment creditor was granted and issued with the bill of costs already prepared and taxed by both parties; the same was served and returned served. The judgment debtor did not only fail to pay the amount of the judgment, but she also did not show any property to be levied upon. She was therefore arrested and imprisoned. The records further showed that while she was in jail, her counsel applied to the Justice in Chambers for a writ of error which was granted by Mr. Justice Azango, then presiding in Chambers. Plaintiffs, defendants-in-error, filed their returns to which plaintiffs-in-error filed an answering affidavit.

Subsequent thereto, the error proceedings were mysteriously taken over by Mr. Chief Justice James A. A. Pierre who heard and ruled in favor of plaintiff-in-error/appellee herein and from said ruling defendants-in-error/appellants took exceptions and appealed to this Court *en banc* for appropriate review.

There are a number of issues raised on both sides as found in the records. However, for the purpose of this opinion, we will only consider the following:

1. Whether or not only the Ful1 Bench of the People's Supreme Court has original jurisdiction in writ of error proceedings?

2. Whether or not the signing of an affidavit accompanying an application for a writ of error is a legal function?

3. What are accrued costs under the Liberian law and the common law?

4. Whether or not the party who fails to answer or appear after being duly summoned is entitled to a further notice of assignment for the hearing of the case?

5. Whether or not it is an error for the trial judge in a non-jury case to render final judgment immediately after the case has been argued and submitted?

6. Whether or not the taxing of a bill of costs is a matter of law or fact? For the sake of clarity we shall discuss these issues in the order of their presentation. When this case was called for hearing before this Bench, the defendants-in-error, having previously questioned the power of the Chambers Justice in his returns to hear and determine error proceedings, correspondingly argued and cited Civil Procedure Law, Rev. Code 1:16.24.4 and *Zormelo v. Dennis*, 20 LLR 117 (1970), to support his contention. On this issue, counsel for plaintiff-in-error contended, in the answering affidavit, that the Full Bench has no original jurisdiction over proceedings in error and therefore consistently argued, relying on the Judiciary Law,

Rev. Code 17: 2.1 and 2.2; and also the case, *Kuyete and Kuyete* v. *Wards worth and Sirleaf,* 28 LLR 163 (1979), to buttress her position. The question which immediately then comes to our mind is, whether the Civil Procedure Law, Rev. Code 1:16.24.4, which reads:

"Hearing and judgment. The assignment of error shall be dealt with in the same manner as a bill of exception, and the hearing on the writ shall be upon certified copies of the records transmitted by trial court. The Supreme Court hearing a matter on a writ of error may grant such judgment as it may warrant on an appeal, if the judgment is affirmed, the Court may, in addition to costs, award the defendants-in-error their reasonable disbursements made in connection with the hearing of the writ".
as well as the holding in the *Zormelo* v. *Dennis*, which states that:

"Under provisions of the New Civil Procedure Law, a single Justice cannot hear and determine error proceedings, although under the superseded Civil Procedure Law, he could, from which determination an appeal could be taken to the Court *en banc* "are consistent with the Judiciary Law, Rev. Code 17: 2.1 and 2.2, which read:

"The Supreme Court shall have original jurisdiction in all cases affecting ambassadors, or other public ministers and consuls, and those in which a county is a party."

The Supreme Court shall have jurisdiction of all appeals from courts of record and from rulings of Justices of the Supreme Court presiding in Chambers on applications for remedial and extraordinary writs, including refusal to issues such writs, and shall be the court of final resort in all such cases."
and the court's decision in the *Kuyete and Kuyete* v. *Wardsworth and Sirleaf*, 28 LLR 163 (1979) that: "statutes cannot repeal or annul constitutional provisions."

The obvious answer to the debated issue is categorically "NO". The statute relied upon by counsel for defendants-in-error, was published in April 1968, while *Zormelo* v. *Dennis* was decided in June 1970; the statutes cited and relied upon by counsel for plaintiff-in-error were published in hand bills on June 22, 1972, while *Kuyete and Kuyete* v. *Wardsworth and Sirleaf* was decided on December 20, 1979.
At this point, we do not only have the two statutes quoted above being inconsistent with each other, but we also have section 16.24(4) of the Civil Procedure Law which is in conflict with PRC Decree # 3, as the Constitution is now suspended.

In interpreting and construing statutes, the general rule applied by courts of common law jurisdictions is that:

"Where two legislative acts are repugnant to, or in conflict with each other, the last one enacted wil1 govern, control or prevail and supersede and impliedly repeal the earlier act although it contains no repealing clause." 82 C. J. S., *Statutes,* § 291.

Courts of common law jurisdictions also generally hold that a statutory enactment is always inferior to a constitutional pro-vision relating to the same subject matter. Hence, a statutory enactment which is contrary to, or in conflict with the constitution is null and void *ab initio. Ibid.,* §§ 278, 303, 311, and 328.

Now applying these rules of law to the problem at hand, the following observations could be made:
PRC Decree # 3 and Civil Procedure Law, Rev. Code 1: 16.24.4 are both legislative enactments, but PRC Decree # 3, being a latter act (1980) than the Civil Procedure Law (1968), will prevail and thereby repeal the former.

The 1968 statute being a 1egislative enactment, will *a fortiori* give way as it conflicts with the Constitution. LIB. CONST. (1847), Art. IV, § 2. The fact that the Constitution has been suspended does not mean that the Constitution is void; suspension simply means that the provisions are kept in abeyance as opposed to a repeal which puts an end to such provisions. Since PRC Decree #3 and the Judiciary Law (1972) are latter acts and are in harmony with the Constitution, they will thus prevail over the statute of 1968, which conflicts with the Constitution, besides being a former act.

The holding in *Zormelo* v. *Dennis*, 20 LLR 117 (1970), which is based on the 1968 statute, is thus null and void as it conflicts with the Constitution. Accordingly, the case *Kuyete and Kieta* v. *Wardsworth and Sirleaf*, 28 LLR 163 (1979), decided during the October Term 1979, prevails and repeals the earlier case as it is in harmony with the Judiciary Law, PRC Decree # 3 and, above all, the Constitution.

In writ of error proceedings, as in other remedial writ proceedings, the Supreme Court has appellate jurisdiction over appeals from the Justice in Chambers who has original jurisdiction in all proceedings arising from remedial writs. Original jurisdiction is therefore exercised by a Justice of the Supreme Court sitting in Chambers in all remedial writ proceedings under the authority of the Judiciary Law, Rev. Code 12: 2.1 and 2.2, PRC Decree #3 (1980), and above all, the Constitution of Liberia (1847), (now suspended), Art. IV, sec. 2. Any contrary view is unconstitutional and also in conflict with the PRC Decree and the Judiciary Law. Therefore, the contention of plaintiff-in-error, being sound and supported by the current statutes, is hereby sustained as against defendants-in-error's contention.
With regard to the affidavit annexed to the application for the writ of error, we observe that

it is attacked for defectiveness on the ground that it was signed by a Counselor (Julia Gibson) as one of counsel for plaintiff in-error/deponent, who was not a licensed lawyer at the time. The counsel for defendants-in-error, one the one hand, argued that the verification requirement to an application for a writ of error was a legal function and that only a lawyer should be the deponent. Plaintiff-in-error, on the other hand, maintained that the signing of an affidavit, which is attached to an application for a writ of error, was not a legal exercise; and that even though Counselor Julia Gibson did not possess a license at the time, yet, she signed same only as a mere witness and not as a lawyer.

However, we observe that one of the legal prerequisites listed in the Civil Procedure Law (Sec. 62.4) in perfecting a writ of error application is the assignment of error, similar in form and content to a bill of exceptions, which shall be verified by affidavit stating that the application has not been made for the mere purpose of harassment or delay. We also observe that an affidavit differs from many legal forms such as depositions, pleadings, testimonies, and the like, in that it is *ex parte* and voluntary without notice or cross examination. An affidavit is thus held conclusive on its face value. 2 C.J.S., *Affidavits,* §§ 1 & 2.

Even though an authorized agent or attorney having know-ledge of the facts, especially when it is impossible for his principal to do so, may make an affidavit, yet when an attorney makes an affidavit on behalf of his principal by virtue of the lawyer/client relationship, the attorney must be legally qualified. *Ibid.,* §§ 1 & 2. The signing or making of an affidavit by an attorney, unlike an ordinary agent, for his client is a legal function surrounded with legal professionalism and thus presupposes that the attorney is legally and morally qualified at the time to carry out such functions. Otherwise, the functions will not be valid and as we know, what is not legally done is not done at all. Judiciary Law, Rev. Code 17:17.9

Therefore an affidavit, which is executed by a counsellor-at-law who is not legally qualified at that material time is not valid and consequently, the application for the writ of error will also be adversely affected. This Court has held that an application for a writ of error will be denied where the petition and affidavit fail to conform to the statutory requirements. *Goodridge* v. *Kennedy,* 17 LLR 584 (1966); and *Holmen* v. *Montgomery*, 23 LLR 19 (1974).

With reference to the question of accrued costs, counsel for the plaintiff-in-error, on the one hand, argued that payment of the filing fees and Marshal's service fees made by her constituted payment of the accrued costs as contemplated by the statute. Defendants-in-error, on the other hand, argued and maintained that what the plaintiff-in-error allegedly paid was not accrued costs as intended by the statute but fees for services to be rendered in the filing of the application serving of the writ.

Accrued costs under the common law have two meanings:

(1) Costs are said to be accrued when they are due, payable, and vested in favor of the party litigant who has received final judgment. In this sense, payment cannot be enforced until final judgment has been rendered; and,

(2) costs are said to be accrued in the second sense when they are accumulative, aggregate and increased progressively. In other words, for costs to be accrued in this second sense, the costs incurred in the first action will not have been paid and are still pending when the second action begins. The general rule of law is that the party will not be allowed to proceed with another action until all outstanding costs ruled against him in the prior action are paid. 20 C.J.S., *Costs,* §§ 411 and 429.

Approaching it from a different angle, costs are said to be accrued in this second sense when the cost incurred in the prior action will not have been paid by the party who lost the case when a new set of costs are incurred in the second action; thereby increasing the volume of costs (expenses) of the party litigant who received judgment in the lower court in a similar cause of action. Hence, the general rule of law is that the party litigant who received judgment in the lower court should be recompensed and indemnified by the party who lost the case and now wants to take an appeal the higher court. In such circumstances, the costs are correctly described as "accrued costs" because of their increasing and accumulative effects. Therefore, under the Civil Procedure Law, Rev. Code 1:16.24, accrued costs are best construed in the second sense. In *Dennis v. Republic*, this Court held:

"When money is paid by a party to the clerk of a court for his services, it is fees; when moneys which have been expended by a successful party are repaid him by the losing party, it is costs." *Dennis v. Republic,* 2 LLR 534 (1925), text at 535; and *Dayrell v. Thomas,* 11 LLR 98 (1952).

Counsel for plaintiff-in-error argued that the trial judge committed a reversible error by rendering judgment on the 6th of April, A. D. 1977 without further notice to her besides the writ of summons issued and served on her in January 1977. The counsel argued further that the failure of the trial court to issue a notice of assignment denied her of her day in court, and that therefore, the trial judgment should be set aside.

Counsel for defendants-in-error argued that a further notice of assignment was not required where the writ of summons, with the complaint, was served on the party to appear and file an answer within ten days but neither appeared nor filed an answer. He argued further that

the writ of summons constituted sufficient notice to plaintiff-in-error of the complaint made against her.

The rule of default judgment is of common law origin and was enforced for the purpose of keeping the docket current and expediting the disposal of causes, thereby preventing procrastinating defendant from impeding the plaintiff in the establishment of his claim after expiration of the time originally allowed by law for the filing of an appearance or answer. 47 AM. JUR 2d, *Judgement*, § 1152. The term also applies to judgments entered under our statute for lack of affidavit of defense or to take some required step in the case. BLACKS LAW DICTIONARY 104 (5th ed.). The Civil Procedure Law clearly postulates that no service need be made on a party in default for failure to appear except service of pleadings. Civil Procedure Law, Rev. Code, 1:8.3. Additionally, where the claim is for a sum certain no notice is further required as in the instant case. *Ibid.,* 1:42.7.

The case *Massaquoi* v. *Swaray*, 23 LLR 406 (Chambers, 1974), cited and relied on by plaintiff-in-error, appellee, is not applicable because the facts are significantly different from those of the case at bar. In this case, plaintiff-in-error neither appeared nor filed an answer, whilst in *Massaquoi v. Swaray*, even though the petitioner did not answer the complaint or file a notice of appearance, yet before the trial, he made requests as a layman, which the court construed as being a motion and thus considered the requests as having an 'appearance'.

The object of notice in a given case before a court of record is to enable one to file a written pleading and to reasonably allow such party sufficient time to appear at the trial. According to the records certified to us, the plaintiff-in-error/appellee was given every opportunity to appear, plead and proceed with the trial. Civil Procedure Law, Rev. Code 1: 42.1. We therefore hold that the procedure adopted by the trial court was in keeping with the law.

Referring to issue number five (5), the plaintiff-in-error contends that the trial judge hastily rendered judgment against her without giving any grace period. According to her, the law provides for a grace period of preferably four (4) days within which a trial judge should render a final judgment. The defendants-in-error refuted said contention and claimed that only in jury trials should judgments be rendered four days after a verdict and that the trial having been fairly conducted and in conformity with the existing law, this rule did not thus apply.

Under our statute, all judgments are announced in open court and entered immediately after the case has been argued and submitted, except for judgments in a jury trial, which cannot be announced before four days from the day of verdict. *Ibid.,* 1: 41.2. Therefore, it is no error for the trial court in a non-jury case to render final judgment immediately after the case has

been argued and submitted. *Vianini Limited* v. *McBourough,* 19 LLR 39 (1968).

Appellee, on the one hand, submitted and maintained that whilst it is true she signed the bill of costs; it is also equally true that she was deluded into signing it as she was not acquainted with court procedure. Appellants, on the other hand, insisted that the taxing of a bill of costs is a legal requirement and that the ignorance of which is no excuse.

Courts of common law and equity have generally held that the purpose of taxing a bill of costs by party litigants is to ascertain and examine the item for making any proper modifications and deductions, if any. In other words, for parties to examine and to arrive at a correct figure which a party in whose favor judgment has been rendered is legally entitled. BLACKS LAW DICTIONARY 1309 (4th ed.)

At this juncture, it should also be noted that the taxing of costs requires the filing of a bill of costs which must be verified as provided by statute. The taxation of a bill of costs is a condition subsequent and as to such it is a legal function that must be carried out by the court immediately after rendition of judgment. In other words, where a final judgment has been rendered, and a bill of costs submitted by the party in whose favor judgment has been rendered, the court must assess the bill of costs against the party who has lost the case. This is a legal requirement in which the court (clerk) has no discretion and the correctness of such exercise is normally presumed by the court as a matter of evidence in favor of the party in whose interest final judgment was rendered. 20 C.J.S., *Costs,* §§ 279-285. The taxing of a bill of costs is, therefore, a legal question as opposed to a question of fact.

The appellee finally contended that her arrest and detention were illegal in that they were predicated upon the payment of a debt. Conversely, appellants argued that a writ of error could not take a defendant from prison. We do hold that a writ of error is not a regular appeal in that the writ issues only when the applicant was not given an opportunity to announce a regular appeal in the court below, such as where the judgment was rendered in the absence of the applicant. Civil Procedure Law, Rev. Code 1:16.21.4. Hence, a writ of error will not be issued to perform the functions of other remedial writs such as mandamus, prohibition, certiorari or habeas corpus. The writ cannot release a defendant from prison.

From a careful reading of the records of this case, we are convinced that the petitioner has not established cogent grounds to entitle her to the issuance of a writ of error which reviews, scrutinizes, and corrects errors of law committed during judicial proceedings in the trial of a case before an inferior tribunal. *Logan* v. *James*, 3 LLR 360 (undated).

In view of the facts stated and the laws cited herein, we have no other choice but to reverse

the ruling of the Chambers Justice and thereby deny the application. Consequently, the alternative writ is hereby quashed. The Clerk of this Court is instructed accordingly to send a mandate to the trial court, ordering the judge presiding therein to resume jurisdiction and enforce the judgment with costs against the appellee, plaintiff-in-error. And it is hereby so ordered.

Ruling reversed.