NAIF A. HALABY, Appellant, *v.* MAHMOUND FARHART, Appellee.

MOTION FOR REARGUMENT.

Argued January 8, 1941. Decided January 17, 1941.

Where the service of an affidavit in an attachment proceeding has been omitted, the court has no jurisdiction and the suit will be dismissed. But where a bond is given and there is no demurrer to dissolve the writ of attachment, it will be considered a waiver of any effects in the attachment up to the point of giving said bond.

On motion to the Supreme Court for reargument of a decision to dismiss appeal, wherein the Court denied the motion and affirmed the judgment on the merits (7 L.L.R. 124), *motion denied.*

E. A. Morgan for appellant. *D. A. B. Worrell* for appellee.

MR. JUSTICE TUBMAN delivered the opinion of the Court.

It is alleged in a motion for reargument that for several legal reasons there should be a reargument of the dismissal of the appeal, which dismissal had been sustained by this Court in an opinion and final judgment entered on December 20, 1940, and I, Mr. Justice Tubman, one of the concurring Justices, having expressed a desire to have said motion reargued, granted the present motion under Rule of Court so that, if any point of law had been overruled, it might be considered in this reargument in the furtherance of justice.

This done, the cause was redocketed and arguments were heard from counsel for both parties.

The only new question brought out by appellant which

we consider worthy of legal comment by this Court is that which raises the question of whether omission to serve a copy of the affidavit for a writ of attachment is sufficient ground for dismissing an action or is sufficient ground merely for dissolution of the attachment.

The statute requires copies of the complaint and affidavit to be served on a defendant. L. 1879–80, 9, § 1. As this is a peculiar and specific procedure, great care should be taken in every stage of its preparation and proceedings.

Attachment is considered by the law writers to be a harsh proceeding and often arouses resentment in the one on whom the writ is served.

In Foster, *First Book of Practice,* it is stated that:

> "Attachment is looked upon by many of the Courts as a harsh envy remedy, to be resorted to only in cases where other remedies would be insufficient. In States where this doctrine obtains, the courts construe the statutes creating this remedy with great strictness, and he who invokes the remedy must see to it that every statutory requirement is literally complied with. This requires great care and a thorough knowledge of the statutes as well as the rulings of the courts in relation thereto. It often occurs that an attorney is called upon in an emergency requiring prompt action, but no matter how urgent the necessity, he should not allow himself to be hurried into taking steps which do not appear to be fully justified by the facts of the case. If the attorney has made himself thoroughly familiar with the statutes and decisions of his state, he can very quickly determine by an examination of the facts presented whether there exist any of the statutory grounds of attachments; but he should not proceed to sue out of the writ until he has situated or satisfied himself that the affidavit sets forth a sufficient statutory ground for attachment, and that he can produce sufficient evidence to prove the allegations therein contained. Great care must be taken or ob-

served in taking the successive steps in the order, at the time, and in the manner prescribed by the statutes, as a failure in any important particular may result in undoing all that has preceded it."

The affidavit in an attachment proceeding is so important that the jurisdiction of the court is based wholly upon it. It is a jurisdictional question and of the very foundation of the suit. Again in Foster, *First Book of Practice,* the author states that "the jurisdiction of the court in attachment proceedings is based wholly upon the affidavit."

The question, then, whether or not an affidavit is one of the pleadings, a question which the trial judge confessed to have labored in vain to try to solve, is one which to our minds is not the principal point demanding solution at the moment. That which is more pertinent is, as has been seen, that in an application for an attachment the affidavit is the very cornerstone or foundation of the court's jurisdiction. That being so, the service of the affidavit upon the party whose goods are to be levied upon becomes at the incipiency of the suit of far greater importance and of more urgency than the service of the complaint itself, as was pointed out in the opinion of His Honor the Chief Justice filed in this case on the twentieth of December, 1940. *Halaby* v. *Farhart,* 7 L.L.R. 124 (1940).

Foster, *First Book of Practice,* states that provision is made whereby giving a bond, without demurrer to dissolve the writ of attachment, will be considered a waiver of any defects in the attachment up to the point of the giving of said bond. But if no copy of the affidavit was served and defendant appeared to contest the legality of the proceedings without such service, how can any such provision logically or legally be invoked against him?

It follows then, in our opinion, that the motion for reargument should be denied, with costs against the moving party. And it is hereby so ordered.

Motion denied.