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

MOTION TO DISMISS APPEAL.

Argued December 18, 1940. Decided December 20, 1940.

1. The payment of costs is one of the essential jurisdictional steps in bringing a case on appeal to this Court.
2. The law does not favor the arrest of defendants in civil actions; hence, all statutes which permit a defendant to be arrested in civil suits should be strictly construed.
3. Therefore, where a case is commenced by attachment and arrest, the affidavit is the very foundation of the suit and a copy thereof should be served promptly upon defendant.

Appellant, plaintiff in the court below, appealed from the trial judge's decision dismissing the case because plaintiff failed to serve on defendant a copy of an affidavit to the complaint in which he prayed for writs of attachment. Appellee moved the Supreme Court to dismiss the appeal. On appeal to the Supreme Court, appellee's *motion denied and judgment affirmed.*

Edwin A. Morgan for appellant. *David A. B. Worrell* for appellee.

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

The appellee has moved for the dismissal of the appeal prosecuted by appellant to this Court and has based that application on the following two grounds: (1) Because appellant neglected to pay costs as is required by law, and (2) Because, contrary to law, the appeal was taken from a judgment that was interlocutory rather than final.

The logical sequence of events necessitates our considering the points raised in said motion in reverse order.

Point two, therefore, becomes the first of these to claim our attention.

Referring to the decision of the trial judge who dismissed the case because plaintiff had neglected to serve on defendant a copy of the affidavit to the complaint upon which he prayed for writs of attachment and arrest, the pith of his honor's decision reads as follows:

> "Therefore, for the failure of the plaintiff to accompany a copy of his affidavit for a writ of attachment with his complaint in order that same may have been served on the defendant at the time his property was sought to be attached and he was arrested thereafter, the action is abated.
>
> "Since it is presumed that the action will be recommenced the court under these conditions will disallow cost."

Confining ourselves first of all to the points advanced in the motion to dismiss:

The difference between an interlocutory and a final judgment has been very clearly set out in all the textbooks on the subject and, as taken from *Cyclopedia of Law and Procedure,* may be defined as follows:

> "A final judgment is one which disposes of the case, either by dismissing it before a hearing is had upon its merits, or after trial, by rendering judgment either in favor of plaintiff or defendant. An interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of a cause, but does not adjudicate the ultimate rights of the parties." 23 Cyc. of Law & Proc. *Judgments* § 9, at 672 (1906).

We are of the opinion that with a judgment worded as was that of the trial judge in this case before us, plaintiff's case as filed, if dismissed and not recommenced, was as dead as a man who, buried alive, found himself in due course interred with six solid feet of earth resting upon

his body. Hence obviously there was such an element of finality in that decision as to warrant the appeal, and the motion on this ground ought to be denied.

The payment of costs is one of the essential jurisdictional steps in bringing a case on appeal to this Court; but the payment of said costs when properly analyzed implies the following:

(1) The bill of costs, i.e., an itemized statement of the amounts to be refunded the winning party and paid to the officers of the court, should be placed in the hands of the ministerial officer of the court for collection;

(2) That itemized statement should be prepared by the clerk of the trial court; and

(3) The bill of costs should be prepared upon the mandate of the trial judge who, actually or impliedly, signs his approval thereon.

But if, as in the case at bar, such approval is not impliedly withheld but actually forbidden, as will appear from the partial extract of the judge's ruling above quoted, the clerk would have no authority whatever to prepare any such bill of costs,—rather he would be inviting a proceeding for contempt against himself did he dare, in face of such a decision, to prepare a bill mulcting a party of costs when expressly disallowed by the trial judge. The sheriff would, as a result of the foregoing, have no warrant upon which to collect any costs, and the appellant no direction to pay. By such a method of elimination appellant would obtain an exemption ordered by the trial judge from complying with the provisions of a general statute, and whether right or wrong, the *actus curiae neminem gravabit,* which means the acts of the court shall prejudice no man, a maxim going back to the foundations of our judicial system. The second count of said motion is, therefore, without merit.

Dealing now with the merits of the judge's ruling, as that was argued here simultaneously with the arguments

on the motion to dismiss, we have reached the following conclusions:

In ordinary cases if a plaintiff files a complaint with an affidavit attached and, when serving notice upon his adversary of the filing thereof, omits to set out *in extenso* a copy of said affidavit, the notation "affidavit attached" would seem to us to be notice to the party that said complaint had been filed with an affidavit, and thereby would put the opposite party on inquiry to ascertain from the clerk's office an inspection of same. But a complaint, and, *a fortiori,* one praying for an attachment and for an arrest, is a special proceeding of an extraordinary character, permitted by special statutes in derogation of the principles adverse to arrests in civil proceedings, and every step in such procedure should follow closely the provisions of the statute or the suit is bound to fail. So far the Legislature has specified but three instances in which an attachment may be issued: (1) Upon a return of a writ of summons or resummons where the defendant has not, within four days after the date fixed for his appearance, made such formal appearance. Stat. of Liberia (Old Blue Book) ch. II, § 7, 2 Hub. 1528; (2) Where plaintiff makes an affidavit that he fears defendant cannot be found to be summoned or will not appear if summoned. Stat. of Liberia (Old Blue Book) ch. II, § 12, 2 Hub. 1529; (3) Where the affiant swears that he fears that without an attachment or without an attachment and an accompanying writ of arrest he will be unable to obtain security for his debt or his damages. L. 1879–80, 9, § 1; Stat. of Liberia (Old Blue Book) ch. II, §§ 29, 33, 2 Hub. 1532. The above being the case, the affidavit becomes of primary importance. This fact is emphasized by our colleague, Mr. Justice Russell, in his opinion of this Court in the case *Thomas* v. *Dennis,* 5 L.L.R. 92 (1936), in which the learned Justice said, at p. 104, "The law does not favor the arrest of defendants in civil actions, and hence all statutes which permit a de-

fendant in a civil case to be arrested must be construed strictly. For, a man's liberty is too sacred to be wantonly restrained."

Hence, in a case commenced by this extraordinary mode of procedure the affidavit is the very foundation of the suit, and, therefore, although an intended defendant is given ten days within which to prepare in relative leisure and file an answer, the inconvenience he suffers by having his goods levied upon or the humiliation of an arrest is immediate, and notice of the averments contained in the affidavit are of more immediate urgency to him than the allegations in the complaint itself. A copy of the affidavit should, therefore, be promptly served upon him.

From the foregoing reasoning it appears to us that, no copy of the affidavit having been served upon the defendant, it was a fatal blunder and that, in addition to the other authorities cited by the trial judge himself in his decision in the matter, the neglect was, in our opinion, ample authority to support his dismissal of the case.

In view of the foregoing, the motion should be denied. The judgment of the court below should be affirmed with costs against appellant; and it is hereby so ordered.

Motion denied and judgment affirmed.