THOMAS JOHNSON, Appellant, *v.* MATTAR BROTHERS, by and through HALIM MATTAR, Appellee.

MOTION TO DISMISS AN APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, MARYLAND COUNTY.

Argued April 20, 1970. Decided June 11, 1970.

1. Upon the failure of movent to appear on his motion to dismiss an appeal, should the appellant insist that the motion be heard on its merits and not be dismissed for failure of moving party to appear, rather than permit argument by appellant only, for the sake of fairness to all, the Supreme Court will restore the motion to its calendar so that both sides may be heard.

The appellant's complaint for a proper accounting was dismissed by the trial court. He appealed from the judgment. During the pendency of the appeal, appellee moved to dismiss. At the call of the calendar on the motion, appellee failed to answer or appear. The Supreme Court thereupon dismissed the motion by default. The appellant, however, thereafter urged the Court to consider the appeal on the merits and allow him to argue the motion. The application of appellant was granted. However, at the time the Court was considering its decision on the merits of the motion, it *reconsidered* its position *and redocketed* the motion for argument, so that both parties would be assured an opportunity to be heard.

Wellington K. Neufville for appellant. No appearance for appellee.

MR. JUSTICE SIMPSON delivered the opinion of the Court.

During the February Term, 1969, of the Fourth Judicial Circuit Court, Maryland County, an action entitled "Bill in equity for correct accounting" was filed by appel-

lee. The bill alleged that on April 5, 1967, Thomas Johnson gave to Mattar Brothers, by and through Halim Mattar, a limited power of attorney, authorizing the latter to receive his salary checks for the months of June through December, 1967, to the value of $210.00.

The gravamen of the complaint consists of a charge by petitioner in the court below to the effect that, after having received cash and goods to the value of $110.00, he returned to his post of duty in an area remote from Harper and thereat remained for a few additional months. Whereupon, being in further need of cash and supplies, he returned to Mattar Brothers at Harper to receive the additional $100.00 that remained at the store. However, to his great surprise he was informed that his account had been exhausted in that, instead of $85 as he alleged, he had already received $185, thereby exhausting the account.

He proceeded to the Stipendiary Magistrate for Harper City and charged Halim Mattar with forgery. This case was, however, dismissed by the Magistrate. It was after this dismissal that the present proceedings were commenced for the purpose of ascertaining a true statement of account between the parties. Count seven of the bill at the lower court stated that the suit for a correct accounting, then filed, was "an ancillary" to a basic suit sounding in damages which petitioner would bring against respondent in the Law Division of that court to recover damages for the inconvenience that he sustained by reason of the fraudulent, prejudicial and mischievous acts of the respondent. Further complaining, he continued: "and for the suit of damages he herein gives notice to respondent as required by law."

To this bill in equity as filed, respondent filed an answer in which it said that no action existed known as a bill in equity for correct accounting, but, instead, should have been labeled a bill in equity for proper accounting. Additionally, it was contended that petitioner should have

been nonsuited for having chosen the wrong form of the future action intended, the facts recounted by the petitioner indicating the basis of a suit under the Penal Law for defrauding and cheating.

Thirdly, in further answering, the respondent in the lower court held that a bill in equity for correct accounting will not lie in the absence of a basic suit having been filed. The respondent contended that the intention to file a basic suit in and of itself is insufficient to serve as a basis for the maintenance of a bill in equity for proper (correct) accounting. Respondent insists that the suit must already have been commenced prior to the institution of the ancillary action.

The reply of appellant, then petitioner, at the lower court, held that the averment of an intention to file a basic suit at law fulfills the legal requirement by giving notice thereof in the ancillary suit.

The trial judge after entertaining argument of counsel, proceeded to hand down a ruling, in which he dismissed the entire proceedings. Exceptions were taken to this ruling and an appeal taken to this Court. Upon the call of the case for hearing of a motion filed by appellee for dismissal of the suit, no one appeared for appellee-movent, whereupon, by invocation of our Civil Procedure Law, L. 1963–64, ch. III, § 1007, providing for default on motion, the motion was dismissed for failure of movent to appear.

Immediately following the Court's determination that the motion be dismissed by default, appellant, a counsellor from one of the leeward counties who had been here at the capital for a protracted period of time to attend upon this Court, importuned the Court to consider the case, since he was desirous of returning to Harper City at the earliest possible time. In a moment of compassion the Court granted the request of counsel and permitted him, as appellant, to argue and submit his case.

At the time of our deliberation thereon, we observed

that we were at the threshold of committing a grave injustice in an endeavor to give assistance to homesick counsel. We were about to determine a case without affording appellee an opportunity to be present to be heard. This would have been wrong.

In the circumstance, to insure transparent justice, we are ordering the redocketing of the appeal so that both parties may be afforded an opportunity to present argument to the Court. Costs to abide final determination of the case. And it is hereby so ordered.

Argument rescheduled.