W. H. BRYANT, Appellant, *v.* THE AFRICAN PRODUCE COMPANY, U.S.A., through their Attorney THOMAS J. R. FAULKNER, Appellee.

APPEAL FROM THE CIRCUIT COURT.

Argued April 19, 20, 21, 1937. Decided May 14, 1937.

1. Before any person can hold himself out as the agent or attorney of another, he should have received a power of attorney, and same should have been probated and registered.
2. Hence should a suit be instituted based upon a power of attorney that had not been admitted to probate, the subsequent probation and registration of an admittedly valid power of attorney will not be sufficient to prevent the abatement of the former action.

In action of debt in the court below, judgment was rendered for plaintiff. On appeal to the Court, *reversed.*

A. B. Ricks and *P. Gbe Wolo* for the appellant. *Doughba Carmo Caranda* and *L. Garwo Freeman* for the appellee.

MR. JUSTICE RUSSELL delivered the opinion of the Court.

On the 23rd day of October, 1934, Mr. Thomas J. R. Faulkner, acting as attorney for the African Produce Company, U.S.A., instituted an action of debt against appellant for the recovery of the sum of $550.76, being the balance due them for sundry matters properly chargeable in account. Exhibit "A" filed with the complaint shows that defendant Bryant, by his own account of November 15, 1927, rendered to plaintiff corporation, admitted that he had on hand for said Company the said amount thus complained of, $550.76, but which, through the years following, he had failed to transmit or for which he failed to ship produce to plaintiff's firm in keeping with an agreement existing between them.

Defendant appeared, and demurred, to the effect that: (1) Mr. Faulkner, the attorney for the Company, had "no legal right and authority to institute this suit on behalf of the African Produce Company, U.S.A., as against the defendant in that said Company although it had executed unto the said Thomas J. R. Faulkner a Power of Attorney, did on its part cancel and revoke said appointment by issuing unto one David N. Sharp, his substitute, another power of attorney as the Company's agent and representative in Liberia to treat with the defendant on the subject of the business relationship which previously existed between them . . ."; (2) "That Thomas J. R. Faulkner is privy to the cancellation of his Power of Attorney and the appointment of his substitute David N. Sharp (dated) May 18, 1933, and as such, he fully knew that until his revoked and cancelled authority had been renewed by the company he now pretends to represent, he had no authority whatever to institute this suit on behalf of the company . . ."; and (3) "Because the defendant says that granting that the suit at bar is legally instituted, and he denies it to be so, yet he maintains and respectfully submits that the transaction, the subject of this suit, is barred under the statute of limitations. . . ."

The plaintiff, Mr. Faulkner, for this Company replied in substance as follows: (1) That the one-year authority, subject to renewal, of the instrument given David N. Sharp by the African Produce Company, U.S.A., made profert of by defendant in his said answer, in no wise whatever abrogated his general power of attorney issued by said Company under date November 4, 1929, and remaining unrevoked to date; (2) That the Company having by letter and otherwise given their agent, Thomas J. R. Faulkner, general and full authority to collect the balance of the Company's money due them by the defendant, they deny the formalities defendant contended should be met as set out in count three of defendant's answer.

The pleadings having been rested, defendant filed a

motion to the jurisdiction of the court setting out in substance the same points as summarized above in the answer. Defendant added in said motion that plaintiff attempted to have his power of attorney probated during the latter part of the year 1934 in order to be able to institute and carry on the case at bar, notwithstanding that said purported power of attorney had long since been revoked, cancelled and rendered null and void and of no effect, and that same was denied him after the facts had been brought to the knowledge of the court, which caused the said Thomas J. R. Faulkner to appeal to the Honorable Supreme Court of Liberia at its November term, 1934, and which appeal he afterwards withdrew, thereby leaving him up to the present powerless to act upon said power of attorney. His Honor Judge Summerville, after hearing the motion, dismissed same and proceeded with the hearing of the law pleadings. His Honor also overruled counts one, two and three on the same principle enunciated in the motion to the jurisdiction of the court. He said:

> "With reference to count three of the Answer the court says that it has inspected the Power of Attorney and is satisfied, 1) that the law of probation and registration in Liberia does not refer to Powers of Attorney of this nature. 2) Documents of this kind take their validity according to the law of the place in which they were made, and the defendant not showing that the document would be invalid in the place where it was made due to its not being registered and probated the Court overruled count three of the Answer! Defendant subsequently filed a Motion for a rehearing setting out the same points of law, but same was overruled and the case ruled to trial upon its merits by a jury."

On the 14th day of July, 1936, the case came on for trial. The counsel for both parties filed stipulations asking the court to assent to the waiver of a jury and requested

that the facts be decided by the court, which request was granted. From the evidence adduced, the court below found that the claim was legitimate and ought to be paid by defendant Bryant, the more so because defendant admitted having in hand for the plaintiff firm the money which he had converted into coffee but which coffee he had resold. We regret that from the decision reached by the court below we are not in a position to pass upon the entire case, but must confine ourselves mainly to the point of representation as raised in the pleadings of the defendant.

The question for consideration, to our mind, is whether Mr. Faulkner, at the time he instituted the action, was so properly clothed with legal authority as to warrant his instituting and prosecuting said action to the end.

An exhibit filed in the records on appeal shows a notice in which Mr. Faulkner, the agent, withdrew his appeal in a proceeding before Judge Brownell, drawing into question his (Mr. Faulkner's) authority for the prosecuting of the cause. Judge Brownell ruled that although the power of attorney to Mr. Faulkner dated November 4, 1929, could not be held to be cancelled by the power of attorney to David N. Sharp dated May 18, 1933, since "When an instrument seeks to revoke, cancel, or annul another, it must specifically refer to it, or it must be inconsistent for the two to stand together," yet the said Company informed Mr. Bryant, the defendant, that Mr. David N. Sharp had been authorized as its agent to collect from him the balance due the Company in money or in produce and that Mr. Sharp was fully authorized to give receipts and discharges in the Company's name for the merchandise received from Mr. Bryant for the Company. It would seem that Mr. Faulkner did not deny the existence of a subsequent authority to Mr. Sharp, but contended that his authority was general in nature and it was not abrogated by the one year's authority issued to

Mr. Sharp, but that his right to institute legal proceedings was still intact. Judge Brownell held:

> "The letter of May 18, 1933 (directed to David N. Sharpe) supported by the Power of Attorney to the said David N. Sharpe under the same date, supersedes and nullifies the Power of Attorney granted to Thomas J. R. Faulkner four (4) years previous. I take it that Mr. Faulkner not having acted for four years, the Company changed its intention as to Mr. Faulkner's continuing to represent them in Liberia and delegated that power to David N. Sharpe, and which act the company had the right to do."

The power of attorney to Faulkner was thereupon denied probate. From this ruling an appeal was taken but, as above indicated, was withdrawn by Faulkner.

During the pendency of the appeal, a new power of attorney was issued to Mr. Faulkner by the same Company negativing the implication or conclusion of Judge Brownell and empowering Mr. Faulkner "to institute in any court or courts and where suit has already been instituted, to prosecute same to its or their conclusion." This power of attorney was duly registered and probated without any objection. This means that the case at bar was instituted in October, 1934, based upon the authority of the Company given to Mr. Faulkner in 1929 but which was denied probate. But Mr. Faulkner's authority was renewed in 1935 empowering him to institute suit against defendant Bryant, and where suit had already been commenced, to prosecute same to its conclusion.

At the time Mr. Faulkner instituted the suit at bar, did he have the authority, probated and registered according to the practice in this jurisdiction, to entitle him to maintain the action at bar for and on behalf of his clients, The African Produce Company, of the U.S.A.? We are of opinion that he did not. According to the law and practice of this jurisdiction, before an agent or

attorney can hold himself out to be the lawful agent of his principal, he must have previously been vested with that authority, and said authority ought to be probated and registered. Upon this point we have decided not to affirm, but rather to reverse, the judgment of the court below as to the proper authority of Mr. Faulkner to maintain the suit begun before his power of attorney of 1935 had been probated and registered.

In the year 1896, the Legislature of Liberia passed a statute respecting the representation of foreign enterprises in this Republic, the relevant portion of which reads:

> "Any person or persons acting as the agent or agents of foreign firms, or companies, must in every case register their powers of Attorney in the office of the Registrar of each County in which said firms or Companies may have offices or business establishments." Acts of the Legislature of Liberia, 1896, p. 16, § 32.

It is proper, we think, to make the following observations in reversing the judgment of the court below: that because of the fundamental character of the issue of representation which, as may be observed, has almost exclusively claimed our attention, we have refrained from passing upon the evidence in the case, said evidence being available to the plaintiff firm in a subsequent action if they elect to institute it. Nor is it to be understood that we have in any way considered the question of the statute of limitations raised by defendant in these proceedings; and said plea of defense shall not be available to the defendant in any further suit growing out of this controversy provided any such suit shall have been commenced within three years from the date of this opinion —especially so since, indeed, the appellant in his statement of account rendered to the plaintiff company under date of November 15, 1927, as also by his letter to said company dated November 12, 1927 (both documents marked by the court "A" and "B" respectively), unequivocally admitted having on hand in favor of the Afri-

can Produce Company, U.S.A., the amount of $550.76. And particularly may he not seek refuge under the plea of the statute of limitations because at the present session of this Honorable Court, in *Henrichsen* v. *Logan,* an action of debt, this Court, through His Honor the Chief Justice, handed down an opinion stating *inter alia* that letters like those quoted therein might be considered tantamount to an acknowledgement of a continuing indebtedness and to a new promise to pay. Thus we are only passing upon the right of maintaining suit in the absence of a power of attorney duly probated and registered antecedently to the institution of such suit. We are, however, of opinion that under the circumstances above explained the judgment of the court below should be reversed with costs against appellee; and it is so ordered.

Reversed.

MR. CHIEF JUSTICE GRIMES, dissenting.

We have all agreed that the facts upon the record filed here establish that appellant is indebted to appellees, and that he should be compelled to pay his just debt, the more so as said appellant has himself acknowledged his indebtedness in a statement of account which he, on the 15th of November, 1927, sent by mail to his creditors, the African Produce Company of the United States of America, appellees in this case. Nor is there any doubt in the minds of any of us that appellant's plea of the statute of limitations should not be allowed, since indeed the statutes of limitations are statutes of repose, and not intended to serve as a means behind which defaulting debtors may screen themselves if there has either been a new item added to the statement of account, a new demand made upon the debtor, or a new promise to pay either express or implied. See in this connection the opinion of this Court in *Henrichsen* v. *Logan,* decided at this term.

But the point upon which we have fundamentally dif-

fered, and with respect to which we have been unable to find any point of agreement, is the view my learned colleagues have taken about the fact that at the time of the institution of said action, the power of attorney of T. J. R. Faulkner, given him by his principals, the appellees in this case, had not been registered.

I find myself of substantially the same opinion as His Honor Judge Summerville, the Circuit Judge who disposing of the issues of law decided substantially, "that the law of probation and registration in Liberia does not refer to powers of attorney of this nature. Documents of this kind take the validity according to the law of the place in which they were made and the defendant not showing that the document would be invalid in the place where it was made, due to its not being registered and probated the court overrules count three of the Answer. . . ."

I propose dealing with this question from the following angles: First, the law on this subject within this Republic seems to have been unchanged since first enacted by a statute passed and approved by our Legislature at its session of 1895–96, which reads:

> "Any person or persons acting as the agent or agents of foreign firms, or companies, must in every case register their powers of Attorney in the office of the Registrar of each County in which said firms or Companies may have offices or business establishments." Acts of 1895–96, p. 16, § 32.

It will be seen that the aforesaid law prescribes no penalty for the neglect of a party to probate and register his power of attorney. See in this connection *West* v. *Republic,* 1 L.L.R. 410, 412 (1903), where it is pointed out that "the main strength and force of the law consists in the penalty annexed to it"; and hence that if there be no penalty, the breach thereof is not punishable. See also *Jantzen* v. *Williams,* 4 L.L.R. 280, 2 New Ann. Ser. 118 *et seq.,* esp. p. 120 (1935) where this Court held:

"When it comes to the effort of Mr. Karnga to read into the law governing conveyances, that in prescribing that 'the Registrar shall record . . . such other agreements between two or more parties as they may desire to have recorded,' we have to say that, that provision is not only not compulsory, but is permissive; and unlike the previous section requiring conveyances of real estate to be recorded, has no vindicatory clause such as in section 1302 of the Revised Statutes hereinbefore quoted, and the Act of 1861. *West* v. *Republic,* 1 L.L.R. 410, 412 (1903)."

My second reason is that Faulkner did make an effort to have his first power of attorney probated and registered, by offering same for probation on the 22nd of October, 1934. But it was then objected to by appellant on the ground that it had been revoked by the grant of a subsequent power of attorney to one David N. Sharp. Upon this objection the court below refused to admit said power of attorney to probate and Faulkner thereupon appealed to this Court. Before said appeal was reached upon our docket, however, Faulkner received a second power of attorney from his principals, and thereupon on the 16th day of May, 1935, withdrew said appeal, stating in his notice of withdrawal his reasons therefor as follows:

"Because the relief sought for through the appeal, has been cured by the issuance of a new Power of Attorney by the company, which he claims to represent."

The transcript of record sent up for our review contains both the second power of attorney to Faulkner, and the one to Sharp upon which the objection of the former power of attorney to Faulkner was based.

The second power of attorney to Faulkner states:

"It is further expressly understood that the power of attorney given to the said David Sharp, deceased, and the letter to the said H. Bryant, advising him of the power of attorney given the said David Sharp,

never was intended to be a revocation of the power of attorney given the said Thomas J. R. Faulkner heretofore but rather intended as a supplement to aid in the collection of said debt from the said W. H. Bryant, inferred and evidenced by the letter to the said W. H. Bryant. The power of attorney to the said David Sharp is hereby expressly revoked."

The power of attorney to Sharp was word for word as follows:

"KNOW ALL MEN BY THESE PRESENTS:

"That the African Produce Company, a corporation of the State of New Jersey, having its principal office in the City of Newark County of Essex and the State of New Jersey, United States of America, acting by and through its Secretary has made, constituted, and appointed David N. Sharp its agent and representative to buy, sell and exchange merchandise for the company for a period of year from the date hereof, subject to renewal.

"In witness whereof, We have hereunto subscribed the corporation name and placed its seals this the Eighteenth day of May, One thousand nine hundred and Thirty-three.

"The African Produce Company

[Sgd.] W. P. ALLEN,

Secretary.

"Certified true and correct
copy of the original

[Sgd.] W. H. BRYANT."

Company's Seal attached.

Any person who shall have carefully read said power of attorney to the said David N. Sharp cannot but arrive at the conclusion that the power of attorney to Sharp did not revoke the one to Faulkner as was subsequently decided by the trial court in its decision on the motion in arrest of judgment given on July 21st, 1936.

This brings me to my last thought, which is: When

then, as in this case, the power of attorney originally granted to Faulkner was for the specific purpose of collecting a debt from Bryant, the existence of which he had admitted, and the said Bryant was aware of the existence of said power and the scope thereof, and he, the said agent, had been defeated in his endeavor to have said power of attorney probated and registered by the objections of the debtor, was it not the duty of the court, under such circumstances, to prevent the debtor from taking advantage of his own wrong, and screening himself behind such a technicality as to evade the payment of a debt admitted by said debtor? I think so, for *Nemo ex proprio dolo consequitur actionem.* "No one acquires a right of action from his own wrong." *Nemo ex suo delicto meliorem suam conditionem facere potest.* "No one can improve his condition by his own wrong." 2 B.L.D. "Maxims," p. 2147.

And because of the reasons hereinbefore given I have found it necessary to withhold my signature from the judgment of the majority of my colleagues who have decided to reverse the judgment and to place upon record these my reasons therefor.