WILLIAM HENRY BRYANT, Appellant, *v.* AFRICAN PRODUCE COMPANY, through its Attorney, THOMAS J. R. FAULKNER, Appellee.

MOTION TO DISMISS APPEAL AND REMAND CAUSE.

Argued December 13, 1939. Decided December 29, 1939.

An application to dismiss an appeal pending before the Supreme Court postulates the neglect of taking some step necessary to bring the case within the Court's jurisdiction. If no such ground is shown, the appeal will not be dismissed but will be heard.

Appellant filed an appeal to the Supreme Court from an adverse judgment in an action of debt rendered in the lower court. However, before the appeal was heard by the Supreme Court, appellant moved the Court to dismiss the appeal and remand the cause on the ground of newly discovered evidence. *Motion denied.*

A. B. Ricks and *P. Gbe Wolo* for appellant. *William E. Dennis* for appellee.

MR. JUSTICE DOSSEN delivered the opinion of the Court.

This cause is a second time before us for review, having originally been heard at the April term, 1937, 6 L.L.R. 27, when the judgment then appealed from was reversed and the case remanded with permission to be refiled after the probation and registration of a power of attorney. It is significant, however, that both in the opinion of the Court as well as in the dissenting opinion of His Honor the Chief Justice there was an apparent unanimity in holding that the debt sued for appeared to the Bench to have been proven and should be duly paid.

The records before us now show that a new case was entered, tried, and judgment was again rendered against defendant, now appellant, who has come hither a second time asking for a reversal of the second judgment.

Before, however, the cause could be reached on our docket, appellant filed a motion to dismiss, which is as follows:

"1. Because although in counts 12 and 14 of appellant's (defendant below) Answer filed in this cause, and in count 4 of his Rejoinder, appellant (defendant below) denied the legal existence of the American Produce Company of New Jersey, U.S.A., and he, defendant aforesaid, now appellant, also denied in said Answer and Rejoinder, the right of Thomas J. R. Faulkner, the supposed agent, to sue in the name of said alleged company, because of the legal reason that said supposed Company was and is a defunct company, still, at the time of the filing of the said Answer and Rejoinder, appellant (defendant below) was not in possession of the necessary authenticated and certified legal documents to conclusively prove said fact, which said necessary legal documents and facts have, since the filing of the appeal in this cause, come into the possession of the appellant (defendant below) as more fully appear by copies hereto annexed and marked exhibits '1' to '5' and forming a part of this Motion."

Appellee, upon the receipt of the filing of said motion, entered and filed a resistance to said motion, which reads as follows, to wit:

1. "Because appellees say that the motion as filed by appellant should have been addressed to the court that entered the judgment in the above entitled case and not to the Honourable Supreme Court. For reliance see 15 R.C.L. p. 688, sec. 140.
2. "And also because appellees submit further that

the legal required time in which motions to set aside a judgment had already elapsed when the said appellant filed the aforesaid motion. For reliance see 15 R.C.L. pp. 690–91, sec. 143.

3. "And also because appellees submit further that appellees being a foreign corporation the cause of said dissolution as set out in the documents made profert by appellant is not a legal and sufficient cause to debar appellees from maintaining their action which had already been commenced before the said purported dissolution. For reliance see 12 R.C.L., p. 102, sec. 80."

An application to dismiss an appeal pending before this Court postulates the neglect of taking some step necessary to bring the case within our jurisdiction. *Wodawodey* v. *Kartiehn,* 4 L.L.R. 102 (1934).

The point raised in this motion is not within that category. Moreover, the case having been once before us and this Court having intimated the impression it then had that the debt sued for was actually due, based largely upon documentary evidence filed by him, the appellant, himself, we cannot but express surprise at this ingenious attempt on the part of counsel for appellant to make us a party to what appears to be an injustice by thwarting the opportunity thus afforded of satisfying ourselves whether or not the impression we had previously obtained in the former case and reiterated above is correct. The said motion appears to us to be without merit and should therefore be denied and the case ordered heard as soon as it shall have been reached on our trial docket; and it is hereby so ordered.

Motion denied.

MR. JUSTICE GRIGSBY, dissenting.

I have found myself unable to harmonize my legal convictions with those of the rest of my colleagues in their opinion arrived at as regards the motion above

cited, and hence I did not sign the opinion of the Court on said motion and, further, have given cause for this my dissenting opinion on said motion.

It appears that the African Produce Company of the United States of America, a company which in March, 1928, was chartered and incorporated under the laws of the State of New Jersey, U.S.A., entered into business relations thereafter with one W. H. Bryant of Royesville and Monrovia, Montserrado County, who seemed to have been at the time also carrying on a mercantile business under the name and style of the Royesville Development Company, in which relations the African Produce Company supplied money and Mr. W. H. Bryant's company was to have shipped Liberian coffee in lieu thereof.

This relationship did not continue long between them, for during the early part of the month of February, 1937, the business of Mr. Bryant closed for want of shipping facilities, as was claimed by Mr. Bryant, and Mr. Bryant signed and forwarded to the said Produce Company a personal credit balance note of $550.76.

The African Produce Company afterwards appointed Mr. Thomas J. R. Faulkner of Monrovia as its attorney in Monrovia with power of attorney issued to him to collect said amount from Mr. Bryant, but as Mr. Faulkner seems to have done nothing for a considerable time after receiving said power of attorney and as one Mr. Sharpe, in whom the said Produce Company seems to have had confidence, was en route for Liberia, the power of attorney which had been previously issued to Mr. Faulkner was revoked by the African Produce Company, with notice served on all parties concerned, and said power of attorney was turned over to the said Mr. Sharpe.

The said Mr. Sharpe was also unsuccessful in collecting anything from Mr. Bryant and the matter lagged until somewhere in the year 1934 when the said Mr. Faulkner became active again and, acting upon the cancelled

power of attorney hereinbefore referred to, commenced an action of debt for the first time, after the lapse of a period of nearly seven years, against Mr. Bryant for the recovery of said sum.

The action was prosecuted and defended. The judgment, having terminated in favor of the Produce Company in the lower court, was appealed to this Honorable Court, and, after the hearing here, said judgment was reversed with costs against the Produce Company, but giving it the privilege of commencing a new action for the recovery of said sum at any time within three years from the date of said opinion.

This briefly is the synopsis of this matter up to the beginning of this present action, which synopsis I have thought necessary to recount for clarity to those who might not have known the history thereof.

This Court, having set aside the power of attorney in our first opinion because the same had been recalled as before observed, was evidently of the opinion at the rendering of said judgment not only that said African Produce Company still existed, but also that it was clear that, the distance between the suitors being great, three years should be allowed in order that Mr. Faulkner might be enabled to secure another valid power of attorney upon which to act.

Following our opinion first handed down as above mentioned, Mr. Thomas J. R. Faulkner, styling himself as attorney for the said African Produce Company of the United States of America, did, on or about the twenty-fourth day of May, 1937, commence a second action of debt against the said W. H. Bryant for the recovery of the amount hereinbefore mentioned, but said action of Mr. Faulkner as alleged attorney was based upon an alleged power of attorney supposed to have been issued to him on the twenty-seventh day of March, 1935. The defendant Bryant in his answer, in pleas twelve and fourteen thereof, denied the legal existence of such a company at the time

the action was commenced and denied that Thomas J. R. Faulkner therefore had any legal authority as its alleged attorney to commence said action against him.

This fact seems to have been left unproven at the time of the trial because defendant Bryant later on made it known that he was not in possession of the necessary evidence at the time, nor was he actually certain that the same existed.

After this case was completed in the lower court, with verdict and final judgment rendered against the said W. H. Bryant, now appellant, he subsequently, that is to say, after this case had been appealed to this Honorable Court, obtained the necessary written evidence to prove his position taken in the said counts twelve and fourteen of his answer.

There was no legal way by which he could then be benefited by the said newly discovered and obtained evidence except to apply to this Honorable Court by way of a motion for a remand to set aside the verdict and judgment and to permit the parties to plead over and to grant a new trial; accordingly he, the said W. H. Bryant, did on the ninth day of December, 1939, file such a motion, the body and substance of which reads as follows, to wit:

> "And now comes W. H. Bryant, appellant, in the above entitled cause, by and through his Attorney, A. B. Ricks, counsellor-at-law, and most respectfully prays and motions this Honourable Court to grant unto him a remand of this cause to the Court below with a direction to the Judge of said court, setting aside the verdict of the petty jury and the Final Judgment entered in said cause, and that the parties thereto be permitted to plead over and a New Trial granted for the following legal reasons, to wit:
>
> "1. Because although in counts 12 and 14 of appellant's (defendant below) Answer filed in this cause, and in count 4 of his Rejoinder, appellant

(defendant below) denied the legal existence of the African Produce Company of New Jersey, U.S.A., and he, defendant aforesaid, now appellant, also denied in said Answer and Rejoinder the right of Thomas J. R. Faulkner, the supposed Agent, to sue in the name of said alleged Company, because of the legal reason that said supposed Company was and is a defunct Company, still, at the time of the filing of the said Answer and Rejoinder, appellant (defendant below) was not in possession of the necessary authenticated and certified legal documents to conclusively prove said fact, which said necessary legal documents and facts have, since the filing of the appeal in this cause, come into the possession of the appellant (defendant below) as more fully appear by copies hereto annexed and marked exhibits '1' to '5' and forming a part of this Motion.

"WHEREFORE your appellant and petitioner most respectfully prays that Your Honours will be pleased to grant unto him, this his humble petition, in order that substantial justice may be done in the premises. "All of which your humble petitioner will ever pray and stand ready to prove.

"Respectfully submitted.
(Sgd.) W. H. BRYANT, appellant, for himself and by and through his Attorney,
(Sgd.) A. B. RICKS,
Counsellor-at-Law"

"Dated at MONROVIA, *this 8th day of December A. D. 1939.*
Verified.

The appellant in the above entitled cause is moving this Honorable Court to vacate the verdict and judgment rendered in the court below in this case because of additional and newly discovered evidence, which appellant discovered and obtained since the same was brought to this highest tribunal for review on appeal.

Appellant says that he mentioned the possibility of such evidence existing in counts twelve and fourteen of his answer filed in this case in the court below, but he was unable at the time to secure said evidence, as more fully appears by copies of documents filed with this motion in this Honorable Court and made a part hereof.

Appellant submits that it was through no fault or negligence of the parties that the facts discovered were not in the trial of the cause, nor was it through any laches or waiver on the part of the defendant below, now appellant, but the said facts defendant could not obtain at the time as the evidence of the same was far away from this jurisdiction in the United States of America. The appellant had no definite knowledge how to obtain said facts at the time of the trial below.

Appellant further submits that this Honorable Court has power and authority to grant this motion under the law.

The said W. H. Bryant supported said motion not only by the case decided by this Court, *Harmon* v. *Republic of Liberia,* 6 L.L.R. 186 (1938), but also by five exhibits attached to said motion which are filed in the clerk's office of this Court. (See exhibits filed.)

From the foregoing motion and the exhibits filed with it, it can be clearly seen that at the time of trial in the court below, although Mr. Bryant, appellant in this Court, suspected that the Produce Company had become defunct at the time the second action now before the Court was commenced against him, yet he could not prove same at the trial because he was not in possession of the necessary evidence. Further, it can be clearly seen that he has obtained the said newly discovered evidence since this case has been docketed in this Court on appeal.

In the case of *Harmon* v. *Republic of Liberia,* 6 L.L.R. 186 (1938), cited by the appellant, Mr. Harmon made no profert of copies of any newly discovered evidence with his petition to this Court nor in his motion to the court below, but only stated that he had discovered such

evidence and it was possible for him to obtain the same.

This brings us to the consideration of two important points: (1) Whether or not the newly discovered evidence is relevant and cogently in favor of appellant and he should be afforded an opportunity to present same at a trial; and (2) What effect would it have on the case at bar if his motion be denied.

It is clear that the evidence sought to be put in by him is both relevant and cogently in his favor, for his exhibits four and five show clearly that on the eighteenth day of January, 1935, the State of New Jersey revoked and totally cancelled the charter of the said African Produce Company for the non-payment of taxes, thereby rendering said company at an end until such time as said charter would be reinstated by compliance with law. Notwithstanding this, the said defunct company, acting through its alleged officers, attempted on the twenty-seventh day of March, 1935, to issue to Mr. Faulkner the power of attorney upon which he acted and commenced this action against the appellant. On this point, we are of the opinion that not only is it a legal clarity that a defunct company cannot fraudulently impose itself upon the public and force any obedience of alleged obligations to it as such through the courts of law, but, moreover, that it is further legally obvious that such a defunct company has no power to appoint an attorney and issue a power of attorney to anyone to act for it; that is to say, it is a legal certainty that a judgment rendered in favor of a company that does not exist cannot be endorsed and any person attempting to enforce a void judgment may be held as a trespasser.

Mr. Bryant, the appellant, further submitted in his motion quoted herein that this Court has the power and authority to grant said motion. Let us therefore examine a few citations of law and glean therefrom the soundness of this statement made by him.

Under our statutes and Constitution, this Court has the power and authority to rescind, vacate or set aside any final judgment rendered in any lower court of this Re-

public and, further, to render such judgment as would promote justice and the law of the land.

Further in *Cyclopedia of Law and Procedure* the following provision of law is made:

> "A judgment may be vacated or set aside where new evidence is discovered or new facts occur, after the judgment, or too late to have been presented on the trial, which show that a different judgment should have been rendered, or that the judgment as it stands should not be enforced, provided the party also shows that he was ignorant of such evidence and could not have discovered it in time to adduce it at the trial, by the exercise of due diligence, and that it is material and such as to affect the decision of the issue and not merely cumulative or additional to that which was introduced at the trial." 23 Cyc. of Law & Proc. *Judgments* 929–30 (1906).

In addition to the law already quoted, in *Ruling Case Law* the following principle is laid down:

> "It is no bar to a demand for a new trial on the ground of newly discovered evidence that an appeal has been taken from the judgment rendered in the case, or that such judgment has been collected upon execution after affirmance by the appellate court. If, however, the satisfaction of the judgment is voluntary, it is a bar to a new trial. In a criminal case it has been held that the right of a defendant to make a motion for a new trial, within the time provided by law, is not forfeited by the fact that sentence had been pronounced upon him prior to the making of such motion." 20 R.C.L. *New Trial* § 11, at 226 (1918).

In the case *Harmon* v. *Republic of Liberia*, 6 L.L.R. 186 (1938), this Court sustained the application of Counsellor Harmon for a writ of mandamus, based on the same principle of newly discovered evidence, which principle was not sustained in this present case; hence, this my dissenting opinion.