W. O. DESHIELD, JAMES H. DESHIELD and HARIETTA WILLIAMS-BANGURI, Appellants, *v.* JOSEPH J. MENDS COLE, MAUDE FAGANS-FREEMAN, by and through her husband, GEORGE M. FREEMAN, and MABEL FAGANS-HILL, by and through her husband, SAMUEL D. HILL, surviving heirs of EDMUND CHAVERS, Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued October 15, 1969. Decided January 30, 1970.

1. A judge is not disqualified by reason of the fact that counsel to a party and he are married to sisters.
2. A judge may reverse a ruling he has made during the course of a proceeding, and in the absence of error his judgment in retrospect is not a ground for reversal.
3. Although the illness of a party is a justification for granting a motion for continuance, the supporting papers in all such motions must set forth and establish that the testimony of the unavailable witness or party is relevant and material to the issues to be tried, and that the continuance is sought in good faith and not for the purpose of delay.

An action in ejectment was commenced by plaintiffs, who are appellees herein, by which they sought to recover the property they contended was illegally claimed by the defendants. Both sides alleged title by descent through the same person in a suit going back to 1960, motions for continuance of the trial having frequently been made by defendants, although plaintiffs appeared anxious for trial. At the trial of the action the trial judge denied defendants' motion to disqualify himself because of consanguinity to counsel through marriage, but acceded to the request, and then reversed himself after argument, adhering to his original ruling. He also denied a motion by defendants for a continuance on the ground of the illness of one of them. The jury returned a verdict for plaintiffs and defendants appealed from the judgment entered against them. *Judgment sustained.*

Alfred L. Weeks and *O. Natty B. Davis* for appellants. *Morgan, Grimes and Harmon* for appellees.

MR. CHIEF JUSTICE WILSON delivered the opinion of the court.

During the December 1960 Term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, the appellees brought suit as surviving heirs of Edmund Chavers, in an action of ejectment against appellants, contending that the defendants were wrongfully withholding from them a 60-acre parcel of land described in title deeds made profert with their complaint, which they contended descended to them from the late Edmund Chavers. The defendants appeared and answered. Pleadings progressed as far as the surrebutter.

According to the record the issues of law were resolved, but although assignment for trial was requested several times by the plaintiffs, the defendants filed motions for continuance from term to term. During the June 1967 Term Judge Joseph P. Findley, presiding by assignment, upon request of plaintiffs, assigned and called the case for trial. The defendants again filed a motion for continuance on the ground that James H. DeShield, one of the defendants, was ill. This motion was opposed, argued and denied. In a further attempt to delay the trial, defendants filed a motion requesting the trial judge to excuse himself on the ground that he and one of the counsel for plaintiffs were married to sisters, and, therefore, he was disqualified from serving impartially as judge. This motion was also opposed, argued, and its legal sufficiency denied, but the trial judge held that because it appeared that defendants did not want the case tried by him, he would excuse himself. To his recusation plaintiffs objected on the ground that the trial judge was without authority to disqualify himself from the trial of the case and thereby promote further delay in the administra-

tion of justice, especially so when the ground laid in the motion had been overruled. The trial judge, conceding this contention, rescinded the recusation and ordered the trial to proceed, to which defendants excepted.

The trial before a jury began and the first of plaintiffs' witnesses was Mabel Fagans-Hill, who testified to plaintiffs' relation to Edmund Chavers and produced two title deeds for 30 acres each, issued in favor of Edmund Chavers by President Warner, dated August 10, 1866. She testified that defendants had entered upon the premises involved and were illegally in possession. Mrs. Margaret Robinson, the second witness for plaintiffs, testified that Edmund Chavers and Marenna Chavers were brother and sister, and Edmund died without issue, resulting in the property descending to Marenna. She further testified that she was married to Jerome Fagans from which union Maude and Mabel were born, who inherited said property *per stirpes,* as tenants in common with Joseph J. Mends Cole, son of Maude Skinner, who had married Dr. Mends Cole. According to her, she never heard of any other person laying claim to the property in question from the year 1922 on, the year of her marriage into the family, until 1959, when the DeShields contended that they were also heirs of Edmund Chavers and entitled to the property. She further testified that Claudius Skinner, her brother-in-law, had used the property as his farm, where he raised cattle, chickens and planted fruits, all without molestation from any person or persons.

One Momo Toomey testified that his father was the caretaker of the premises for the appellees for many years, and after his father's death, he had lived on the premises and had never been approached by or heard of the appellants laying claim thereto. According to the record, Mr. Toomey was in a position to point out a boundary line which was in dispute between Mr. Mends Cole, one of the appellees herein, and one Nathaniel

Richardson, of the City of Monrovia. According to Mr. Toomey, the first time he ever saw or heard of the DeShields was when he was approached by Mr. Richardson, in company with one of the DeShields, who asked him to point out the Mends Cole boundary line, which he did. The last witness for appellees, J. J. Mends Cole, in testifying, confirmed the testimony of Mabel Fagans-Hill and Chavers. He testified that the possession by the family of the land went back as far as he could remember and that the original deeds for the premises were in their possession. Further, that in 1951 the Govenment of Liberia announced by newspaper publication that the Government had need for a portion of the area for the construction of an airfield and invited all landowners to produce their title deeds in the Department of Public Works and Utilities, which was done and a survey made which took in a majority of their land. He pointed out that in obedience to this publication four other families presented deeds to the Department, but that the appellants did not as much as appear to claim title to premises in the area. He testified, further, that much later in 1959, the DeShields, in his presence, presented to one Slagmoleun of the Department of Public Works, a deed, contending that the instrument covered the property in these proceedings. That the said Mr. Slagmoleun, upon inspection of the deed, informed the DeShields that the instrument presented by them, by its description, applied to property separate and distinct from that claimed by appellees. According to Mr. Mends Cole, the instant proceedings were made necessary when some time later he had to leave the Republic to seek medical treatment abroad and the defendants herein, taking advantage of his absence from the Republic, illegally entered upon the premises, commenced to sell portions at a price so low as when selling stolen goods, and that immediately upon his return and discovery of this situation, these proceedings were instituted to retrieve the property.

The foregoing testimony, together with the two title deeds, a map, and sundry letters offered in evidence, constituted the case of the plaintiffs, the appellees herein.

Plaintiffs having rested, Mrs. Harietta Williams-Banguri was sworn, took the stand and testified in her own behalf that she was the great great-granddaughter of the late Governor A. D. Williams, and that her grandmother was married to the late John Chavers, brother of the late Edmund Chavers, who never married, but had a sister and died without any issue. That she and the codefendants are his next of kin. According to her, the old folks told her about their ancestors and people, as did Marenna Williams, wife of the late Col. A. D. Williams, once Secretary of War. That the said Marenna Williams often told her about her ancestors, especially when she had misbehaved. That she was told about John, their grandfather and about Edmund Chavers, and that Marenna did not know whether he was living or dead. She testified, further, that when she was a child, Monrovia was not developed, that people living on Crown Hill did not know each other, though they were friendly, so that nobody paid any mind to Edmund Chavers, or whether he was dead or alive and thus they lost contact with others. That in 1959, or thereabouts, Mr. Nathaniel Richardson and Hon. Joseph J. Mends Cole, got into a dispute about the airfield and someone's house located there, at which time they exchanged some caustic letters. That it was Mr. Nathaniel Richardson who at that time informed them of the land which they have claimed as theirs, which they immediately investigated. That they thereafter consulted their lawyer, Counsellor Dukuly, who said they had discovered more land belonging to them. According to her, Counsellor Dukuly is supposed to have told them that he had never heard of Joseph J. Mends Cole being a Chavers; that the only Chavers existing in Libera were the defendants. They thereafter took more definitive steps. She testified that she again

went to the airfield, this time with her son, John Taylor, and others, to inspect the newly discovered property, and there met Mends Cole, in possession of a paper which he called a will. She did not deny selling the land, but contended that the land was not sold at low prices but rather at high prices, from seven to eight hundred dollars a lot. On cross-examination, in answer to a question, she stated that she could not remember how old she was when she was told about Edmund Chavers, nor did she know her present age. When asked to locate her dwelling place at that time of her life, she could not remember. She stressed that J. J. Mends Cole was not a Chavers, but did not know the Chavers family herself, and that those relatives who had told her about Edmund Chavers did not know his whereabouts, or whether he was dead or alive.

The evidence having been presented by both sides, argument was entertained, the jury was charged by the court and returned a verdict in favor of plaintiffs to which defendants excepted and gave notice of intention to appeal. In accordance with this notice, defendants filed a motion for a new trial which was opposed, argued and denied, and a final judgment entered in favor of the plaintiffs, from which they have appealed on a bill of exceptions containing sixteen counts.

During the October 1968 Term this Court granted a motion for a continuance of the hearing because counsel substituted for defendants' deceased counsel was out of the country.

During the October 1969 Term this case was called for hearing. Appellants contended: (1) that the trial judge erred in rescinding his ruling denying the motion for recusation and (2) that the trial judge erred in denying the motion for continuance on the ground of the illness of co-defendant James H. DeShield. Appellees contended that the denial of the latter motion by the trial judge was in accord with the law and that to rescind and/or modify

a ruling is a prerogative of the court, especially so when the initial ruling was contrary to the law. Appellees contended that in the absence of any legal ground the trial judge is unauthorized to disqualify himself and that the judge in the instant case, having realized that his disqualification was without legal foundation had no alternative but to rescind his ruling, and in so doing, did not err.

> "A judge is not disqualified by the fact that the husband of his wife's sister is a party to the cause, there being no relation by affinity between them." 30 AM. JUR., *Judges,* § 69.
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> "A judge will not ordinarily be disqualified by reason of the fact that the judge's spouse is related by consanguinity to the spouse of a party." *Gardner* v. *Neal,* 13 L.L.R. 422 (1959).

And upon amending a prior ruling:

> "Upon motion of a party made before the end of the session of court or upon its own motion, the court may at any time during such session amend its findings or make additional findings and amend the judgment accordingly. . . ." Civil Procedure Law, 1956 Code 6:824.

We are, therefore, of the opinion that the ruling denying the motion for disqualification after the judge had disqualified himself was in accord with law, because the grounds of the motion did not permit the judge to disqualify himself, and he rightly rescinded the recusation.

We come now to count 2 of the bill of exceptions in which it is contended that the trial judge erred in denying the motion for a continuance supported by a medical certificate.

Illness of a material witness or a party is ground for the granting of a motion for continuance. But, certain essentials must be present.

> "The party applying for the motion of continuance must in all cases make it appear that his application

is made in good faith and not for the purpose of delay, and the continuance may be refused if the circumstances cast suspicion on the good faith of the application and induce the belief that it was intended only for delay." 9 CYC. 1378.

In order that the court may judge the materiality of the evidence sought to be introduced at the trial, the affidavit should set forth the substance of the testimony desired. And when it fails to state facts necessary to make the testimony of the absent witness relevant and material, the presumption is that it is not so and the continuance will be denied.

Moving papers in a motion for continuance must allege that the continuance is not sought for the mere purpose of delay. *Tugba* v. *Republic,* 12 L.L.R. 218 (1955).

The supporting papers in the motion are deemed insufficient in that they failed to show: (a) that it was not filed for the mere purpose of delay; and (b) that the witness was incapacitated or otherwise not available; and (c) it does not state what is intended to be proved by the witness in order to substantiate the materiality of his testimony.

In view of the foregoing, the application for continuance was properly denied.

It is therefore our opinion that the judgment of the court below is in accord with the evidence and the law and is hereby affirmed. And it is so ordered.

Affirmed.