# ARNOLD HENRICHSEN, Agent for WEST AND COMPANY, LTD., Grand Bassa County, Appellants, *v.* THOMAS M. MOORE, for his Wife ROSE A. MOORE, formerly ROSE A. MILLER, Appellees.

APPEAL FROM A PROCEEDING IN EQUITY.

Argued January 3, 1939. Decided January 13, 1939.

Where there is a blending into one or two incompatible causes as though they were cognate actions, the proper course is to demur to the bill and pray its dismissal on the ground of duplicity.

Plaintiff-appellees brought a proceeding in equity for relief from fraud and for cancellation of an agreement to pay a debt. The charge of fraud was repudiated in the court below, but the defendant appealed. *Judgment modified and affirmed as modified.*

*Edwin A. Morgan* for appellants. *David A. B. Worrell* for appellees.

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

In December, 1926, Isaiah R. Miller of Grand Bassa County died leaving an estate incumbered by his indebtedness to West and Company, Ltd., in a sum of $1551.59.

The probate court appointed Josiah S. Mitchell as administrator and Rose A. Miller, the widow, as administratrix of the said estate, to whom in due course the bill for said amount of $1551.59 was by West and Company, Ltd., presented for payment.

It would appear that, except as hereinafter stated, there were not sufficient assets available for the liquidation of this indebtedness; whereupon the administrator and administratrix on the 6th day of June, 1928, approached one Jacob West, the then agent, and incidentally a part-

ner of the firm now appellants, with a proposition for the gradual but regular retirement of the debt. We can justly presume that negotiations followed, for not until September 29th of said year 1928 was an understanding reached, which understanding was embodied in two written documents which are as follows: (1) An agreement between the appellants, represented by the said Jacob West, of the one part, and Rose A. Miller, the widow, as administratrix and Josiah Mitchell, administrator of the other part, according to which Isaiah Miller's portion of the money as it should become due on account of a lease of certain premises to Messrs. P.Z. & Co., Ltd., Grand Bassa by the intestate and one Mrs. Hiranda Boyce as coparceners should by said firm be divided into three equal parts, one of which should be paid direct to the widow as part of her dower, and the other ⅔ to the firm of West and Company, Ltd., against the indebtedness of the intestate. (2) The second document was an order drawn on said firm P.Z. & Co., Ltd., to pay to West & Co., Ltd., the sum of $2327.38, $775.79 of which was for the widow's dower, and the balance of $1551.59 would be sufficient to liquidate the debt. It is significant that according to a statement of account filed in the records before us, an item of $93.09 had been charged as one year's interest from January 6, 1927, to the same date in 1928 making a total of $1644.68; but the pen had been run through said item, and the balance of $1551.59 again struck after deducting $93.09.

This agreement appears to have worked well for a time, but eventually two things happened which interfered with the further smooth working of the plan for settlement of the debt. The first was that the said Jacob West was succeeded by another agent who saw fit to charge interest on the debt at six percent per annum, the second that Rose A. Miller again married, her second husband being Thomas M. Moore, who, with his wife, is the appellee in this case.

At some time in 1934 (the record does not say what part of the year) a new statement of account was forwarded to the administrator and administratrix in which interest at six percent per annum from the said year 1928 to 1934 was charged. The new husband taking grave exceptions to that act persuaded his wife to join him in this suit for relief against fraud and for cancellation of the agreement above referred to.

The least that can be said of this procedure is that it was taken rather precipitately, and without sufficient thought. Nowhere in the records does it appear that appellees ever undertook to call attention to the error, or to show by the surrounding circumstances that the charging of interest on unpaid balances was the very antithesis of what the parties had had in mind when the agreement was drawn up. Had the approach to West & Co., appellants, been made other than by the filing of a suit, the matter might, and probably would, have been amicably adjusted, and much time, energy and money expended in the suit by both parties might have been saved. But as the result of a proceeding in the first instance to file a suit for fraud, which involved the reputation of the business, the appellant firm resented same bitterly and became equally bellicose—hence this is now the fifth year since the proceedings have been pending, and the second time an appeal of this same cause has been prosecuted to this Court.

Both in the first and second trials the trial judge found that no fraud had been committed, and appellees, apparently convinced of their error, conceded the point, and put on record that they had mistakenly accused appellants of fraud. That in our opinion cleared the firm of the aspersion which they felt that appellees had cast upon them.

But appellants, nevertheless, contended that inasmuch as the allegation of fraud had been thus and thereby disposed of, the case should have been dismissed with costs

against appellees and cited as authority our opinion in the case of *Nassre and Saleby* v. *Elias Brothers,* 5 L.L.R. 108, decided at our November term, 1935.

As pointed out in the above cited opinion, when an allegation of fraud made against a defendant has been decided in his favor, whether or not the case should automatically be dismissed depends upon under which of the three general heads of equity jurisprudence the suit was brought. Said we then:

> "There are two reasons for taking this view. First of all, as has been said, a bill in equity for cancellation, like an action of injunction, belongs to the subdivision of the cases exclusively cognizable in courts of equity which belongs to the administration of protective or preventive justice. Such suits are not like suits, for example, demanding proper accounting, or discovery, or other possessory suits for relief against fraud wherein when the equity jurisdiction once attaches the court, having received the accounts or obtained the discovery, will retain the jurisdiction so as to give complete relief. For, it has been held that,
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> > 'The necessity of obtaining a discovery in such cases therefore constitutes the sole ground of equity jurisdiction; and if upon such a bill no discovery is obtained, the cause fails and the bill must be dismissed.' "

Now in the case under review appellees, plaintiffs in the court below, blended into one two incompatible causes of action. Appellants' proper course would have been to demur to the bill and pray its dismissal on the ground of duplicity which they admitted during their arguments at this bar they had neglected to do. They cannot then derive any benefit from the error committed by appellees, nor complain of the judgment rendered by the trial judge who, finding in the pleadings two divergent paths therein opened, chose the one he thought most likely to prevent a multiplicity of suits. For this course he had some

authority in the case *Moore* v. *Solomon,* 1 L.L.R. 347 (1900), referred to in the case *Nassre and Saleby* v. *Elias Brothers* hereinbefore referred to.

The former was a case of a possessory character brought under the third general head of equity jurisdiction, known as the ancillary, in which plaintiff claimed that defendants had fraudulently refused to pay an amount due. The Court said that there was no fraud, nor were the defendants as such obligated to pay; but that H. J. Moore, one of the defendants in whom the assets of his copartners had vested by operation of law, should pay.

In *Nassre and Saleby* v. *Elias Brothers,* the case as we saw it fell under the second general division known as the exclusive, and the Court having found that there was no fraud, the jurisdiction did not attach. In this cause, however, plaintiffs sought to defeat their own deed by alleging fraud in their opponents. Fraud, as before pointed out, was subsequently withdrawn from the consideration of the court, but this Court will not thereby allow the suit to so fail as to allow the question, whether or not appellees shall be compelled to perform their contract of September 20, 1928, to be left in a state of doubt.

This Court is, therefore, of opinion that the decree of His Honor Judge Brownell, rendered August 23, 1938, should be so modified as to include a provision that the agreement between the parties dated September 20, 1928, and the concurrent order on P.Z. & Co., Ltd., or their assignee, to pay the amounts therein specified, shall remain in full force and virtue until the total amount thereof shall have been fully paid to appellants and that said decree should in all other respects be affirmed with costs against appellants; and it is hereby so ordered.

*Judgment modified.*