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On the facts found by the jury at the trial and on the pleadings, for the reasons referred to by my brothers *Barton* and *Gavan Duffy*, I hold—though with some doubt—that the full price was recoverable in this case on the unconditional tender of the documents referred to in the contract, and that the appeal should be dismissed.

Judgment appealed from affirmed. Appellants to pay costs of appeal.

Solicitor for the appellants, *A. G. de L. Arnold.*

Solicitor for the respondent, *G. Crichton Smith.*

B. L.

[HIGH COURT OF AUSTRALIA.]

SCOTT AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

PAULY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 26; *Nov.* 2.

Isaacs, Gavan Duffy and Rich JJ.

Practice—Appeal—Appeal from Judge without jury—Question of fact—Conflicting evidence—Duty of Court of appeal.

Trust—Voluntary transfer of property—Parent and child—Mother and daughter—Resulting trust—Advancement—Gift of beneficial interest—Evidence.

Although the question involved in an appeal from the decision of a Judge in an action tried without a jury turns on a matter of fact determined by him upon conflicting testimony, it is the duty of a Court of appeal to decide the matter for itself upon the evidence given at the trial where it is in as good a position to do so as the Judge of first instance.

A testatrix having shortly before her death purchased real property and transferred it to her daughter, her executors and trustees brought an action claiming that the daughter held the property as trustee for her mother. At the hearing, which was before a Judge without a jury, oral and documentary evidence was given, in the course of which appeared some inconsistencies between the defendant's evidence that her mother had given her the property and statements contained in letters written by her indicating that the mother had acquired the property, such letters also concealing the fact that she herself had an interest in it. The defendant explained the reasons for the discrepancies, and other witnesses gave evidence of statements made by the mother corroborating the defendant's evidence. The Judge, disbelieving the defendant because of the letters and of the fact that after the transfer she had handed her mother during her life the rent received from the property, gave judgment for the plaintiffs.

Held, on appeal, that on the evidence the transfer was intended by the mother as a gift of the beneficial interest to the defendant, who was therefore entitled to judgment.

Per Isaacs J.: On the balance of authority as it at present stands, the mere fact that the transfer of the property was by a mother to her daughter is not sufficient to rebut the presumption of a resulting trust.

Bennet v. *Bennet*, 10 Ch. D., 474, considered.

Decision of the Supreme Court of Western Australia: *Scott* v. *Pauly*, 19 W.A.L.R., 55, affirmed.

APPEAL from the Supreme Court of Western Australia.

An action was brought in the Supreme Court by Alexander Scott and John P. Hansen, the executors and trustees of the will of Rebecca Shade deceased, against Mary Ellen Pauly, for a declaration that certain land, which was claimed by the defendant as her own property, formed part of the estate of the testatrix and for an order that the defendant transfer such land to them. On or about 24th June 1914 Mrs. Shade purchased the land for £260 and had it transferred to the defendant, who became the registered proprietor thereof. By the will above mentioned, dated 17th March 1902, the testatrix, who died on 17th September 1914, devised and bequeathed the whole of her real and personal estate to the plaintiffs upon certain trusts for the benefit of her three daughters, of whom the defendant was one. The plaintiffs alleged in their statement of claim that the land was transferred to the defendant to hold in trust for her mother. In her statement of defence the defendant (*inter*

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alia) denied that the land was subject to any trust in favour of her mother or at all. The action was heard by *Northmore* J., who held that the plaintiffs were entitled to judgment. On appeal therefrom the Full Court (*McMillan* C.J. and *Burnside* J.) reversed his decision and ordered judgment to be entered for the defendant: *Scott* v. *Pauly* (1).

The plaintiffs now appealed to the High Court from the judgment of the Full Court.

Other material facts appear in the judgments hereunder.

On a preliminary point under sec. 35 (1) (*a*) of the *Judiciary Act* 1903-1915 as to the competency of the appeal, the COURT decided, by a majority, that it should proceed.

Pilkington K.C. and *Stawell*, for the appellants. The testatrix bought the land and transferred it to the respondent; this raises *primâ facie* a resulting trust for the testatrix. The law is settled that if the donor is the father of the donee there is a presumption of law in favour of such a transaction being an advancement or gift to the child, but this presumption is not so strong if the donor is the mother, in which case, for the donee to succeed, there must be clear evidence that no resulting trust was intended (see *Fowkes* v. *Pascoe* (2); *Beecher* v. *Major* (3)).

[RICH J. referred to *Ex parte Cooper*; *In re Foster* (4), per *Lindley* L.J.]

Where evidence has been given *vivâ voce* in a case depending on the credibility of witnesses and there has been a conflict of evidence, the Court of appeal will not reverse the decision of the Judge of first instance unless that decision is clearly wrong (*Dearman* v. *Dearman* (5)). As the question in this case is one of fact and *Northmore* J. heard the witnesses and thought the statements made by the respondent were unreliable, this Court will not reverse his decision. Letters written by the respondent conflict, in material points, with her sworn testimony. The mother's intention in transferring the property to the daughter without consideration was not to make a

(1) 19 W.A.L.R., 55.
(2) L.R. 10 Ch., 343, at p. 349.
(3) 2 Drew. & Sm., 431.
(4) W.N. 1882, 96.
(5) 7 C.L.R., 549.

gift, but was merely a mode of conveniently managing her affairs and of preventing her husband from knowing of the transaction (see *Marshal* v. *Crutwell* (1)). The rent was collected by the respondent, and handed over to the mother.

Downing (with him *Lohrmann*), for the respondent. Though where a purchase has been made by a mother in the name of her daughter there is a presumption in favour of a resulting trust, this presumption is not a strong one, as in the case of a purchase in the name of a stranger, and very little evidence is required to rebut it (*Christy* v. *Courtenay* (2) ; *Sayre* v. *Hughes* (3) ; *Bennet* v. *Bennet* (4)). When evidence has been given to rebut the presumption, the Court of appeal is in the same position as a jury, and is in as good a position to weigh the evidence as if that Court had heard the witnesses (*Fowkes* v. *Pascoe* (5)). The Court will be guided by the principles laid down in *Coghlan* v. *Cumberland* (6) for the hearing of appeals raising questions of fact. The statements in letters written by the respondent inconsistent with her sworn testimony were written with the object of concealing the transaction from her sisters, and are sufficiently explained by her evidence, which is corroborated by her witnesses. The surrounding facts and circumstances taken in conjunction with the evidence of independent witnesses entirely outweigh the statements in the letters. The motive of the mother in making a gift to her daughter was obviously to reward her for her services.

Pilkington K.C., in reply.

Cur. adv. vult.

Nov. 2.

The following judgments were read :—

ISAACS J. The appellants are the executors and trustees of the will of Rebecca Shade, who died on 17th September 1914. At the time of her death the respondent, Mary Ellen Pauly, was the registered proprietor of certain land in Claremont. The appellants sued

(1) L.R. 20 Eq., 328.
(2) 13 Beav., 96.
(3) L.R. 5 Eq., 376.
(4) 10 Ch. D., 474.
(5) L.R. 10 Ch., at p. 352.
(6) (1898) 1 Ch., 704.

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the respondent, claiming a declaration that the land belonged to the estate of Rebecca Shade, and consequential relief, on the ground that the testatrix had purchased the land for £260 and that it was transferred to the respondent to hold in trust for Rebecca Shade. The respondent in her defence denied that the testatrix had purchased the land, and said that, if she did, it was purchased for the respondent in return for services or by way of gift, and she also set up estoppel, on the ground of expenditure acquiesced in. The trial took place before *Northmore* J., who gave judgment for the appellants. An appeal to the Full Court before *McMillan* C.J. and *Burnside* J. was allowed. The questions as to services and estoppel disappeared. From the judgment of the Full Court the present appeal is brought.

One contention of the appellants, pressed in the Full Court and here, affects the whole position, and must be dealt with first. It is, that as *Northmore* J. heard the witnesses, and on the whole thought the statements made by the defendant and on her behalf not credible, the Court of appeal should not reverse his decision.

Credibility of testimony is, of course, not confined to the honesty of the person who gives it; it involves everything personal to the witness. Without attempting to exhaust the personal elements of credibility, it includes, besides honesty and demeanour, such qualities as power of recollection, decision, judgment and experience. But it also includes the analysis of the testimony of the witness himself, and, on occasions, its consistency with undoubted facts or unquestioned circumstances. Consequently it is impossible to lay down an iron rule that whether the testimony of a witness is credible or incredible is always a matter for the primary tribunal alone, and sacrosanct territory on appeal.

In *Dearman* v. *Dearman* (1) the duty of an appellate Court was summed up as gathered from decisions of authority. Material available to the primary Judge, and unavailable to the appellate Court, may be either essential, or non-essential, to the ultimate decision. It may, if non-essential, be nevertheless so important that without it no conclusion adverse to the primary decision can safely be arrived at; or it may, in the opinion of the ultimate tribunal, be clearly outweighed by the other circumstances of the

(1) 7 C.L.R., at p. 561.

case. This was explained in *Dearman* v. *Dearman*. It must never be forgotten that as it is the function and duty of the Court of appeal to decide the matter for itself so far as it can, it must, in every case, judge how far the absence of the unrecorded material affects the question before it.

In *Dearman* v. *Dearman* (1) reference was made to the case of *The Glannibanta* (2), where *Baggallay* J.A. delivered the judgment of the Court. After referring to *The Julia* (3) and *The Alice* (4) he said (5) :—" Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a Judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on question of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect." It should be added that " due allowance " may go so far as to prevent the Court from altering the primary judgment.

In *Khoo Sit Hoh* v. *Lim Thean Tong* (6) the Privy Council, speaking by Lord *Robson*, say : " Of course, it may be that in deciding between witnesses he " (that is, the Judge) " has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony." So that there is no

(1) 7 C.L.R., 549.
(2) 1 P.D., 283.
(3) 14 Moo. P.C.C., 210.
(4) L.R. 2 P.C., 245.
(5) 1 P.D., at p. 287.
(6) (1912) A.C., 323, at p. 325.

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cast-iron rule. "Long hesitation" is not the same as "absolute refusal." Long hesitation means very careful and cautious examination and consideration before arriving at a conclusion. The Privy Council, in accord with the Court of Appeal, emphasize the importance of giving due weight to the circumstance that the primary Judge has had the great advantage of seeing and hearing the witnesses, and therefore is in a better position to judge of their credibility; they say that is a circumstance that should always be borne in mind, and, where relevant, must cause the Court of appeal to "hesitate long" before reversing the primary decision; but they assume that, nevertheless, the case may be one where the other circumstances are sufficiently potent, and the probabilities are sufficiently cogent, to lead the Court to the conclusion that justice demands of it the reversal or modification of the judgment appealed against. Any Court of appeal which does not so weigh the matter out for itself, and assign its relative importance to the advantage possessed by the primary tribunal, would so far abdicate its functions and deprive the suitor of the right which the law gives him. That would convert a rule of guidance observed in order to prevent injustice into a mere shibboleth destroying its own purpose.

In this case, in applying the principle indicated, it seems clear that the Full Court was justified in deciding the matter for itself, leaving it now to be considered by us in turn whether the decision of the Full Court was right or wrong. *Northmore* J. had before him the oral testimony of the respondent as to the actual transaction between Rebecca Shade and herself, and he had also the oral testimony of various witnesses who deposed to what Rebecca Shade had afterwards told them, her statements being, it must be observed, against her own interest. His Honor did not accept the oral statements as credible; if he had so accepted them, he would have believed and acted on them. But he did not believe them as accurately representing the truth. As to the respondent herself, his Honor had before him her distinct sworn statements in her own favour; but he gave no credence to them because he accepted her own prior statements in preference. Probably he distrusted her personally, and thought she had changed her story deliberately, and more than once. Whether that is so or not, he gave several

reasons for preferring her earlier statements, and it cannot be denied that they are reasons entitled to weight, though in the end the circumstances of the case as a whole overcome them. But as to the other witnesses, his Honor, in declining to give credence to the conversations as they deposed to them, did so, so far as can be discovered, because he thought them mistaken, and he thought them mistaken because the conversations being casual were less likely to be reliable than the version of the arrangement contemporaneously recorded by the respondent herself, and therefore he discounted the accounts given by them as erroneous recollections or impressions. I must confess that I am also pressed by the weighty considerations that led *Northmore* J. to his conclusions. But, being free, and therefore bound, to form my own conclusions, the true result appears to me to be on the whole that reached by the Full Court.

The position as it presents itself to my mind works out in this way:—The appellants start their case by showing that Rebecca Shade bought and paid for the land, and that the respondent Pauly, into whose name it was transferred by Markell, the vendor to the testatrix, gave no consideration for it. This, on well established principles, raises *primâ facie* a resulting trust for Rebecca Shade, and, if nothing more appeared, that would have to be so determined (see *In re Scottish Equitable Life Assurance Society* (1)). But something more does appear: Rebecca Shade was her mother, and the doctrine of presumed advancement is invoked in her behalf. On the balance of authority as it at present stands, that single circumstance is not sufficient to rebut the presumption of resulting trust. No doubt, when all the circumstances are before the Court, the intention of the purchaser to make or not to make the holder of the title trustee is to be determined as a question of fact. But the burden of proof (see *Sugden on Vendors and Purchasers*, 14th ed., p. 704) may also seriously affect the conclusion, and the burden of proof may shift. Therefore, it is necessary to consider the steps. The case of a father having an obligation in conscience to provide for a child, either unadvanced or treated as unadvanced, is different from the case of a mother dealing with a daughter, and particularly where the

(1) (1902) 1 Ch., 282.

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daughter is married and in fairly good circumstances (*Bennet* v. *Bennet* (1)). In the first case the facts are in themselves sufficient to rebut the presumption of resulting trust ; in the second, according to *Bennet* v. *Bennet*, they are not. That case, drawing a distinction between father and mother, has not, so far as I am aware, been judicially doubted (see *Re Orme* ; *Evans* v. *Maxwell* (2), and *Preston* v. *Greene* (3)). Some text-writers doubt it, while others do not. It is unnecessary now to consider its correctness, and I assume it is right. If it ever comes to be questioned, it may be that the solution will be found in the circumstance that the " presumption " there spoken of is an *inference* which the Courts of equity in practice drew from the mere fact of the purchaser being the father, and the head of the family, under the primary moral obligation to provide for the children of the marriage, and in that respect differing from the mother. In case of his death the inference called a presumption as to the mother might well be different from that where the father was still alive.

Another circumstance affecting *Bennet's Case* (1) is referred to in the books, namely, the *Married Women's Property Act* 1882, sec. 21 (reproduced here in 55 Vict. No. 20, sec. 20). To make that section applicable at all, some statutory obligation of the husband is necessary. In England there is the Poor Law (see *Lush on Husband and Wife*, 3rd ed., p. 33). We have not been referred to any Statute here which would give any effect to the section, whatever force it would have in England. But we must in any event start with the presumption of law as to resulting trust, and there must be some sufficient evidence to overcome that. So much is clear beyond dispute. Subject to that, it cannot be put more clearly than in the words of *Mellish* L.J. in *Fowkes* v. *Pascoe* (4). The Lord Justice says :—" But, in my opinion, when there is once evidence to rebut the presumption, the Court is put in the same position as a jury would be, and then we cannot give such influence to the presumption in point of law as to disregard the circumstances of the investment, and to say that neither the circumstances nor the evidence are sufficient to rebut the presumption. Now, the

(1) 10 Ch. D., 474.
(2) 50 L.T., 51.
(3) (1909) 1 I.R., 172.
(4) L.R. 10 Ch., at p. 352.

presumption must, beyond all question, be of very different weight in different cases." Then the learned Judge proceeds to differentiate as to the weight of the presumption in diverse cases, requiring evidence of varying cogency to rebut it.

Assuming that the burden is still on the respondent here, and that the evidence to rebut the presumption is to be weighed according to the nature of the case, the Court should find in her favour for the following reasons :—Mrs. Shade on 9th January 1914 had in the Savings Bank a sum of £74, disregarding shillings and pence. She deposited there a sum of £398 more, the proceeds of a Victorian property she had sold. She was in very bad health, and by June in that year, according to the respondent's evidence, was failing, and showed obvious signs of it. This is evidence which could easily have been controverted if wrong. But it is plainly in accordance with the general features of the case, and may be accepted as correct. She had a husband who certainly had no moral claim on her bounty. She had three daughters, all married ; but of these Mrs. Pauly alone had, appreciably at all events, assisted her in her need. One witness, Albert Dent, says he was told by the testatrix that " if Mrs. Pauly had not come to her rescue she would have practically starved."

The observation of Sir *George Jessel* in *Bennet's Case* (1) was that " in the case of a mother very little evidence beyond the relationship is wanted, there being very little additional motive required to induce a mother to make a gift to her child." But in this case that observation must be read in connection with the fact that there were other children unprovided for by the mother except by the will, and, in giving this property wholly to one, she was thereby depriving the others. So that there is, so far, a balance of maternal instinct. It is the very different relations in fact existing between the mother and Mrs. Pauly on the one hand and between her and her other children on the other that constitute a powerful reason for her preferring the respondent.

Then, in June, Mrs. Shade, in company with Mrs. Pauly, bought the house occupied and rented by her husband, and placed it in her daughter's name. Reasons have been given for concealing the real

(1) 10 Ch. D., at p. 480.

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intent of the transaction, and the way it was carried out; but what appeals to my mind very strongly is the cardinal question: "Why did she buy the house at all, if not for Mrs. Pauly?" It was certainly not for her husband's benefit; it was not for her own, because manifestly she herself was not expecting to own or to occupy it long, and it was not for the general benefit of her estate, for on her death it would have to be sold according to the terms of her will, a set of circumstances entailing complications, expense and risk. She still left a substantial sum in her Savings Bank account, which, by her testamentary directions, would be shared equally among all her three daughters; so that they were not entirely excluded. I do not forget the nominal difference of income between rent and interest, but if that were considered by her at all, she must also have considered rates and taxes and insurance and repairs and depreciation. According to the evidence before us on the application to strike out the appeal, the net difference one way or the other is negligible. So that the fact of the transaction itself, at her time of life, and in her condition of health, and in her position, and having regard to the relative terms upon which she stood towards her three children, appears to lend enormous probability to the story of a gift.

The matter was effected without legal assistance, and was therefore not carried out with formalities.

The letters written by Mrs. Pauly do need considerable explanation, but they are not inconsistent with the fact of gift. Some weight is attachable to the fact that the earlier letter is about a fortnight before the completion of the transaction and the conversation said to have taken place on that occasion. The circumstance that Mrs. Pauly gave her mother the rent is not an unfamiliar incident in such cases (see *Commissioner of Stamp Duties* v. *Byrnes* (1)), and may be ascribed to the same impulse as led the daughter previously to assist her mother, assistance resulting in the mother's recognition by way of gift. There is nothing unnatural in the daughter handing to the mother during her life the produce of the property received from her and enjoyable eventually by the daughter alone. And whatever doubt the respondent's own evidence may

(1) (1911) A.C., 386.

have left had her evidence been uncorroborated, there is the most clear and material corroboration of the main facts in her story by disinterested witnesses. The word "corroboration" is the proper word for this reason :—She is alive, and may be expected to prove the actual transaction directly as it occurred. It is the nature of that which is really in issue, and it is her evidence which alone can prove it as against the estate of the deceased. But the evidence of the other witnesses, whose honesty is not impeached, however their impressions may be challenged, who speak of conversations with the mother, not once but several times, over a fairly extended period, affords cogent corroboration of the mother's real intention that the property should belong to the daughter.

Being satisfied of that, the issue is settled in favour of the respondent, and in my opinion the appeal should be dismissed.

GAVAN DUFFY J. In my opinion it is unnecessary to determine whether the onus of establishing the existence of a resulting trust in favour of Rebecca Shade rests finally with the appellants, or whether it must be taken that they have established a legal presumption of the existence of such a trust and that the onus of rebutting that presumption lies on the respondent. I think that the respondent has satisfactorily established the fact that the transfer from her mother was intended to vest the beneficial interest in her and to effectuate a gift of the land from the mother to the daughter. It is true that in coming to this conclusion I have accepted the story of the respondent though *Northmore* J., who heard her give evidence, rejected it, but I think I am justified in doing so for the following reasons. The gift was such as the mother in the circumstances might be expected to make, and the respondent's story has in itself every appearance of verisimilitude, and is corroborated by a number of witnesses who gave evidence of statements by the mother which indicated either that she intended to make or had in fact made such a provision for the respondent. Apparently the learned Judge believed the corroborating witnesses, but thought that two letters written by the respondent more than countervailed the statements of the mother as to what she had done or intended to do. He says : "I am unable therefore to accept the casual conversation

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with friends and neighbours as against the deliberate written statements of the defendant herself appearing in these letters." The respondent he disbelieved solely because of these letters and because after the transfer of the property to her she habitually handed to her mother the rent which she received from the tenant. The members of this Court are in as good a position to pass on the validity of these reasons for disbelieving the respondent's evidence as if they had heard the witnesses, and we are bound to do so. In the course of her examination-in-chief the respondent said :—" After the purchase of the house Mr. Shade paid to me eleven shillings a month rent, and I used to hand it to mother. I did that to help to keep her." That is all the evidence on the matter, and though it is consistent with the respondent being a trustee for her mother it does not disclose anything which, to my mind, is inconsistent with her being the beneficial owner of the property. We are left in ignorance of any circumstance which could give colour to the transaction because the appellants' counsel did not choose to cross-examine the respondent on the subject. The two letters written by the respondent undoubtedly contain statements which are inconsistent with her sworn evidence, but it is to be observed that they do not suggest that she is a trustee for her mother. They merely indicate that her mother has acquired a property, and that the acquisition must not be mentioned to the mother's husband, and they conceal the fact that she herself is interested in the property either beneficially or as a trustee. She says she wrote at her mother's instigation in order to offer an excuse for refusing to comply with the demand of the sister to whom the letters were addressed for a loan of money from her mother, and at the same time to ensure the concealment of the true facts of the case from an edacious husband and jealous daughters. The relations which existed between the members of the family make this explanation extremely probable apart from any question of the veracity of the respondent. One would expect simulation and dissimulation where the mother considered it necessary to conceal from her husband that the property had been purchased and where the respondent had obtained such a preference over her sisters as she did obtain if her story is true. I think that the order of the Supreme

Court setting aside the judgment of *Northmore* J. is right, and that the appeal should be dismissed.

RICH J. In this case it is unnecessary to discuss the equitable doctrine of presumption of advancement: the question is one of fact.

Northmore J., before whom the case was heard, apparently did not disbelieve the witnesses who corroborated the defendant's evidence, but considered that the letters written by her counterbalanced their evidence. The defendant's story under the circumstances is not improbable, and is amply corroborated. The material parts of the letters are, to some extent, inconsistent with the defendant's story, but it is clear from the evidence that the testatrix and the defendant endeavoured to conceal the transaction from the rest of the family, and the letters were written with that object in view.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Leake, James & Darbyshire.*

Solicitors for the respondent, *L. Lohrmann.*