Judgments of the Lords of the Judicial Committee of the Privy Council on the Appeal of Pisani v. *Her Majesty's Attorney-General for Gibraltar and others, from the Supreme Court of Gibraltar; delivered* 14*th May*, 1874, *and* 23*rd June*, 1874.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THEIR Lordships desire to state shortly the grounds why they cannot yield to either of the preliminary applications which have been made to them: one by Mr. Kay to reverse the Decree without hearing this Appeal on the merits; the other by Mr. Fry to dismiss the Appeal.

It will be sufficient for this purpose, without going at length into the facts of the case, to mention that the suit was an information by the Attorney-General, claiming, for the Crown, lands which had belonged to a lady, Manuela Porro, as escheated for want of heirs. He made Defendants to the information Pisani, the Appellant, who claimed under a deed of purchase; a person called Benaim, who asserted that Pisani was trustee for him; and also the present Respondents, Lepri and the two Shakerys, the former being the trustee and the latter the infant *cestui que* trusts under a will of Miss Porro made in the year 1858. The Attorney-General failed to establish the title of the Crown by escheat, and thereupon the suit as originally framed ought to have been dismissed. But in the course of the

cause the opposing claims of the Defendants among themselves became clear, and it was proposed that the information should be amended for the purpose of enabling the Court to determine and declare what those rights were. Such an alteration of the suit could only have been made, it is admitted, by consent, and the question raised by Mr. Kay yesterday was whether there was an agreement to the effect that the suit should be so altered as to give the Court power to declare in that suit the rights of the Defendants between themselves. He denied that such an agreement was, in fact, come to.

Now, what is stated in the Record sent to their Lordships as the result of some proceedings on the 3rd May, 1869, and what is recorded on the Judge's note, is that the Attorney-General applied for leave to amend by inserting an averment in the information by consent. The note is this: "Her Majesty's Attorney-General for Gibraltar, before proceeding with the hearing, moved that the original information by way of Bill of Complaint filed by him in this Honourable Court, and partly heard, be amended by inserting the following words:—'That the rights, if any, of the several Defendants may be ascertained and declared by Decree of this Honourable Court, and that they may be ordered to pay each to the others and other of them their and his costs of this suit, and that this Honourable Court will give such further directions in the premises as shall be necessary.'" Then the note states, Stokes and Cornwell of Counsel for the Defendant Pisani, Recano of Counsel for Lepri, Shakery, Shakery, and Shakery, and Relph of Counsel for the Defendant Benaim, being present and consenting, "the amendment was ordered accordingly." A formal consent order was drawn up, and it has been sent over with the record.

It was contended by Mr. Kay that this was merely an amendment of the information, leaving the question open to be decided whether effect ought to be given to it. Their Lordships, however, think that this is not the true meaning of what was done. It is plain that the amendment was agreed to in view of the probable failure of the Attorney-General upon the original information. In fact, the amendment appears to have been made and the agreement come to at a time when his defeat was imminent.

If the Attorney-General had succeeded in the suit the amendment would have been perfectly useless, since he could not succeed without defeating the claims of all the parties Defendants. He must have swept the board clear of the Defendants before he could have obtained a Decree for the Crown on the ground that the property had escheated. It is evident, therefore, that the object of this amendment must have been to give the Court power to declare the rights of the Defendants between themselves in the event of the failure of the Attorney-General. No doubt that is a wide departure from the ordinary procedure of the Court. It clearly could not have been done without consent; and the only question that is raised on this preliminary application is whether there was an agreement in fact that the Judge should hear the cause and decide the rights of the parties upon that footing. Their Lordships think, having regard to the considerations to which they have alluded, that this really was the intention of the parties, and this is corroborated by the view that has been presented to them of the subsequent course of the cause. It is clear that the Judge and all parties considered that such an agreement had been come to. As soon as the amendment had been made the Judge formally records that "The Attorney-General then read the amendment to the prayers of the Bill, as ordered this day by the Court, to declare and ascertain the rights of the several Defendants."

Their Lordships, therefore, have come to the conclusion that there was an agreement by the Defendants, not merely to an amendment of the pleadings, but that their rights as between themselves should be declared, whatever might be the event of the suit regarding the claim of the Crown. It is enough, upon this preliminary application, to say that this agreement is proved; their Lordships reserving to themselves full power to determine in what way justice can best be done between the parties, when they come to hear the merits of the appeal.

An objection was taken that the agreement was invalid, and did not bind any of the parties, because there were two infants, Defendants, for whom consent could not be given. It is to be observed that, in the state in which matters stood at the time when

the agreement was come to, it was apparently for the benefit of the infants, who thereby obtained the assistance of the Attorney-General, that such an agreement should be made ; and further, whether that be so or not, their Lordships think that Mr. Pisani, after entering into it with a knowledge of the fact that the parties were infants, cannot be now heard to object that his consent does not bind him.

Then, to come to Mr. Fry's application. He, for the Respondent, not only contended that the agreement was made and was binding, but urged what is really a preliminary objection, that the decree, so far as it declares the rights of the Defendants, must be regarded as the award of an arbitrator, and consequently that the appeal is incompetent. Their Lordships would be most unwilling to uphold the agreement at all if this were to be the effect of it, because, in their opinion, such a result would be opposed to the intention of the parties. They clearly meant to keep themselves *in curia*, and the Judge clearly so understood them. It is plain also that the parties and the Judge thought that an appeal was open. It is true that there was a deviation from the *cursus curiæ*, but the Court had jurisdiction over the subject, and the assumption of the duty of another Tribunal is not involved in the question. Departures from ordinary practice by consent are of every day occurrence; but unless there is an attempt to give the Court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of Appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal.

The cases referred to by Mr. Fry do not bear out his contention. The first he cited, and the only one where the Appeal was declared incompetent, is the case of White *v.* the Duke of Buccleuch. In that case the Court made an order *ultra vires*. The Interlocutor directed a surveyor to set out a road, deputing to him an authority which the Court had no power to give. The Interlocutor appears to have had this vice, that the Court either had no jurisdiction to make such an order at all as to the road, or, having it, could not delegate it to the surveyor. The Lord

Chancellor, in giving his opinion to the House, puts the objection upon the ground that the Court had made an Interlocutor which was *ultra vires*. He says: "The Court below had no power whatever to direct a road to be laid out equally convenient to that to which the public were clearly entitled. They have not given the public any way which they had been accustomed to use, but they have consulted the convenience of the defender, and they have directed Mr. Wylie to ascertain a road which will be equally convenient to the public with that to which they were entitled, and not inconvenient to the defender. There is no doubt whatever, therefore, that in this Interlocutor, the Court having proceeded *ultra vires*, all the subsequent Interlocutors which were founded on this as their basis were taken out of the judicial course, and consequently were not a subject of appeal." (White *v.* the Duke of Buccleuch, Scotch and Divorce Appeals, 76.)

In another case, cited from the same volume, (Rickett *v.* Morris, at page 52), the Lord Ordinary had heard, by consent, a case which ought to have been tried in the Jury Court. There was in that case the assumption on the part of the Lord Ordinary of the duty of another Tribunal, and the observations made by the Lord Chancellor point to that state of things. The objection is noticed in this way by the Lord Chancellor: "The first question to be considered is the competency of the present appeal. It appears to me that this is one of the actions appropriate to the Jury Court under the 28th section of the Scotch Judicature Act 6 George IV, cap. 120, being an action on account of injury to land in which the title was not in question. By the word 'title' I do not understand to be meant the right to do the act which occasioned the injury, but the title to the land itself to which the injury is alleged to be done." Then he says, after going through the facts: "The cause ought, therefore, in regular course, to have been remitted to the Jury Court, and the Lord Ordinary had no authority to order the proofs to be taken by Commission." But in that case their Lordships did not hold that the Appeal was wholly incompetent, for they retained it, and heard the cause on the merits. They held the objection had been waived

by the Appeal which had been made from the Lord Ordinary to the Inner Court. That case, therefore, shows that the House of Lords considered that it was discretionary with the House to hear the Appeal or not; that it was not beyond their jurisdiction to hear it; and that the objection pointed to an irregularity only, capable of being waived.

The remaining case referred to was before Lord Cottenham (Stewart *v.* Forbes, 1 Macnaghten and Gordon, 145). There the Vice-Chancellor had undertaken to determine a fact proper for the jury. On looking into that case, it appears that the Lord Chancellor at first inclined not to hear the Appeal, but in the end thought himself bound to hear it. He says this:—"In a celebrated case of legitimacy (Morris *v.* Davies) Lord Lyndhurst adopted a similar course"—that is a course similar to that of the Vice-Chancellor in the case then under Appeal—"and upon appeal to the House of Lords from his decision the House thought itself bound to consider and decide upon the case so entertained by the Court of Chancery, though not according to the usual course of its jurisdiction. I did not, therefore, feel myself at liberty to decline hearing the cause, although the parties had, by their consent recorded in the Decree appealed from, precluded themselves from asking for, or me from directing, an investigation of their claims before a jury, the only proper Tribunal for the purpose of the matter were really one of doubt." Therefore, in the end, Lord Cottenham came to the conclusion that he was not at liberty to decline to hear the Appeal. He goes on to say:—"Besides which, I thought that the Plaintiff ought to be permitted to show, if he could, that what he claimed was so free from doubt as to entitle him to the Decree which he now asks." That is really a subordinate reason. His first ground is that he thought he was bound to hear the Appeal.

The case of Morris *v.* Davies, to which Lord Cottenham refered, seems to their Lordships to be a strong authority against Mr. Fry's objection. In that case there had been a trial before a jury, a motion for a new trial, and a decision that a new trial ought to be granted. But instead of sending it down for a new trial Lord Lyndhurst, by the consent of the parties, heard and disposed of the case. Upon an appeal to the House of Lords an

objection was formally taken by the Attorney-General to the competency of the House to hear the Appeal. The case is reported in the 5th Clark and Finnelly's Reports, and the objection of the Attorney-General appears on page 222. "The Attorney-General and Mr. Temple, for the Respondents, took a preliminary objection, insisting that no Appeal lay from a Decree to which all the parties by their Counsel consented to submit in order to save the expense and delay of another trial at law. The parties could not be then placed in the same relative situation for a new trial if the Decree should be reversed." After an argument by the Counsel for the Appellant, Lord Lyndhurst said:—"When I proposed to the parties to decide the question upon the evidence they were to lay before me instead of sending it again for trial before a jury, I did not consider that my Decree was to be exempt from appeal. I never contemplated such a consequence. The saving expense and further delay was my object." Now this appears to have been the object in the present case; the parties, as it appears to their Lordships, never contemplated that they were doing other than keeping the cause *in curia*, or that the Judge was to hear it otherwise than as a Judge, or that it was not to go on subject to all the incidents of a cause regularly heard in Court, of which an Appeal is one of the most important. The Judge clearly so understood the arrangement. To recur to Morris *v.* Davies, the Lord Chancellor says:—"The House cannot entertain the objection to the regularity of the Appeal." Then he says:—"That objection was disposed of by the Appeal Committee upon evidence which is not before the House. We have only the record of the Decree before us, and in that no consent appears not to appeal. If it were alleged that the Appeal was brought in breach of good faith the House might put off the hearing until the objectors produced proof of that allegation. It is admitted that there was a consent, but how far it was meant to extend is the matter in dispute. It nowhere appears that the parties agreed that the Decree should be final and conclusive." In Morris *v.* Davies there was a consent that the cause should be heard in an unusual way, upon which Lord Lyndhurst acted, and although it was not put into his Decree,

it was regarded as a perfectly binding consent, which might be proved *aliunde* The House of Lords gave effect to this consent according to the intention of the parties, for it was allowed to operate so as to make Lord Lyndhurst's Judgment, which would have been otherwise irregular, a regular Judgment, and was not allowed to operate so as to deprive the party of his right of appeal, which had not been stipulated for. That case is in these points not unlike the present.

For these reasons, considering also that this objection was not taken in the Court below when an application was made for leave to appeal; that it was not taken here, as it might have been, by a petition to the Queen before the appeal came on for hearing; and considering, also, that this Board has always exercised a large discretion in dealing with matters of procedure on appeals from Colonial Courts, their Lordships think that they ought to hear this appeal on its merits.

[*Mr. Kay then proceeded to open the Appeal.*]

Their Lordships having heard the argument of Counsel on the Appeal, and deliberated thereon, proceeded, on the 23rd June, 1874, *to deliver the following Judgment on the merits:*—

The general nature of this information has been already stated. The Attorney-General made three sets of persons Defendants, claiming adversely to each other, viz., (1) the Appellant, Mr. Pisani, who claimed the property as a purchaser from Miss Porro; (2) Mr. Benaim, who alleged that Pisani had bought as trustee for him; and (3) the Respondents, who claimed under a will made by the deceased lady in 1858. The original prayer of the information was that the deed of conveyance to Pisani should be declared void, and be delivered up to be cancelled; and that it be decreed that Miss Porro died without heirs and intestate: the Attorney-General alleging that the will of 1858 relied on by the Respondents was revoked by a subsequent will made in 1868, which, although disposing of personalty only, contained a clause revoking former wills. After the irregular amendment had been made, by which the Court obtained power, by consent, to declare the rights

of the Defendents *inter se*, the further peculiarity occurred that the Attorney-General, when he had apparently abandoned the hope of establishing the Crown's title by escheat, continued to conduct the cause in the interest of the Respondents. This led to a very anomalous proceeding: for whereas in the information the Attorney-General alleged that the will of 1858, under which the Respondents' claim, was revoked by the will of 1868, his utmost efforts were afterwards employed to show that this latter will was obtained by the undue influence of Pisani and others when the testatrix was *in extremis*, and, therefore, was not a valid revocation of the former one. The result of the suit, thus distorted, was a Decree, by which it was declared and ordered that the lands had not escheated to the Crown; that the deed of conveyance to the Appellant, Pisani, be delivered by him into Court to be cancelled; that Benaim had no title or interest; and further, that the will of 1868 (the parties taking under it, it is to be observed, not being before the Court) was void, and ought to be set aside, and that the will of 1858, under which the Respondents claim, was valid. The Decree further ordered that the Appellant should account to the Respondents, and directed that he should pay the costs of the Respondents and of Benaim.

The Attorney-General for the Crown and Benaim have acquiesced in the Decree; and in dealing with the present Appeal, to which the Respondents, claiming under the will of 1858, and the Appellant are alone parties, the case may be considered as if the Respondents had brought a suit to impeach the Appellant's conveyance. This deed bears date the 25th January, 1868, and is a conveyance in fee of the property from Miss Porro to the Appellant, in consideration of the payment of an annuity of 125 dollars per month, *i.e.*, 1,500 dollars per annum.

Two principal questions arise in the appeal, (1), whether the conveyance can stand, and, (2), whether, if not, the will of 1858 was revoked. But in the view their Lordships take of the first of these questions, it will not be necessary to consider the last.

The case of the Respondents to impeach the conveyance is, that Pisani, who is a barrister, and practises also, as is usual in Gibraltar, as an

Attorney, was the legal adviser of Miss Porro, and that having purchased whilst he was such adviser, he has not discharged the burden, cast upon him by that relation, of showing that the bargain was the best that could be made for his client.

It appears, from the evidence, that the property in question was devised by the father of Miss Porro, who died in 1855, to his widow and six children; and that Miss Porro, in consequence of the deaths of the other devisees, claimed to be the sole owner of it. No doubt seems to rest on the deaths of any of the devisees, except one brother, José. This José left Gibraltar about thirty-three years before the transaction in question, and from letters which Miss Porro received soon afterwards she believed he had been murdered near Madrid. Nothing more appears to have been heard or known of him.

Miss Porro was about 59 years of age at the time of the conveyance. The property was held in fee simple, and consisted of a large house and other buildings. There is abundant evidence that the house was in a dilapidated condition, and required a large outlay to put and keep it in repair. It was let to poor tenants and to women of bad character, and the rents were varying and precarious. A lease was put in, dated December 1866, by which a part of the house was let to a man named Benaluz for three years at 36 dollars a month. It contained the significant condition that, in the event of the Government or the police opposing the residence of prostitutes in the house, the contract might be avoided by the lessee. It is not to be wondered at that a lady should be desirous of getting rid of this troublesome and disreputable property. Accordingly, we find that she had, during many years, made efforts to do so, and had made up her mind to dispose of it for an annuity.

An unimpeachable witness, M. Lepri, one of the Respondents, and trustee of the will of 1858, says that Miss Porro offered the property to him before 1858 for an annuity of 60 dollars a-month. He refused the offer, and it is important to observe the reason given for his refusal is that he did not know what had become of the brother José. He also says the house was inhabited "by a loose and disreputable class of tenants." In 1867 Miss Porro proposed to sell the property for an annuity to

Mr. E. Recano, who refused to buy. It appears from M. Lepri's evidence that, hearing of her renewed attempts to get an annuity, he applied to Miss Porro on behalf of Mr. Shakery, the father of the infant devisees under the will of 1858, and she then offered to sell the property to Shakery for an annuity of 100 dollars per month. M. Lepri says he told Shakery of Miss Porro's offer, who replied that he would give 90 dollars a month, "but should require some time to consult about it, and to see into the difficulty which might arise from her brother José's rights." Mr. Shakery might therefore, if he had chosen, have had the property for 100 dollars per month, but he declined it, raising a difficulty about the brother José. The fact must then have been plain to him which, from all the evidence in the case is beyond dispute, that Miss Porro had a fixed intention to part with the property for an annuity, the effect of which would, of course, be to defeat the will she had made in 1858 in favour of his children.

Besides her desire to get rid of a troublesome and disreputable property, and to increase her income by an annuity, Miss Porro was anxious to do so speedily, as she wished to leave Gibraltar. Her intimate friend Madame Suarez says she wanted to finish the business of the house, so that she might go to live at Seville.

Their Lordships will now pass to two transactions which immediately preceded the sale to Pisani, and are, indeed, connected with it, viz., the abortive sales to Larios and Bergel. Before doing so, it is necessary to notice that Miss Porro had employed for eighteen years M. Gonzalez (whose description is not given, but who appears to have been a man accustomed to business) to manage her property. She spoke of him as "her confidential adviser." Other persons, and among them Belilo and Benoliel, were also engaged in the endeavour to sell the property for an annuity.

In December 1867 Miss Porro agreed to sell to Larios, for an annuity of 1,560 dollars. The bargain was arranged by Gonzalez, and the conditions of sale prepared by him. M. Recano, a barrister, was employed to prepare the deeds, which were, in fact, executed by Larios. It seems that Miss Porro felt some doubt respecting the transac-

tion, and sent for Mr. Pisani to come to her at the Spanish Hotel, where she was living. This is the first occasion on which they met. In this interview Pisani, who was a nephew of Larios, was consulted as to the correctness of the deeds, and he then told Miss Porro there was some question as to the state of Larios' mind, and suggested a medical certificate. Gonzalez afterwards called on Pisani, and told him there was difficulty in obtaining such a certificate. Pisani then suggested that the two sons of Larios should execute a deed of guarantee to secure the annuity. Such a deed was accordingly prepared, not by Pisani, but by Recano, on instructions from Gonzalez. The sons, however, refused to sign it, and the matter ended. No imputation was made at their Lordships' Bar upon Pisani, for the advice he gave on this occasion, nor was there any attempt to show that what he stated with regard to Larios was not warranted by the fact.

A week or two after the sale to Larios had gone off, Miss Porro sent for Belilo, and it appears that she wished him to find another purchaser. She told him she would not sell for less than she had agreed with Larios, viz., an annuity of 1,560 dollars. Belilo gave the particulars to Mr. Bergel, a man of position and wealth, and entered upon a negotiation with him. After looking over the property, Bergel made an offer of 1,400 dollars. It was communicated to Miss Porro, who refused it; and Bergel, after an interval of a week or ten days, increased his offer to 1,500 dollars. During this treaty, Pisani was spoken to, it would seem, in the first instance, by Belilo, and saw both Miss Porro and Bergel on the subject of the sale. It appears that he so far recommended her to accept Bergel's terms that he told her he thought 1,500 dollars from a man like Bergel preferable to 1,560 dollars from Larios. Miss Porro ultimately agreed to accept Bergel's offer, provided she was kept free of all legal and other expenses in the sale. This was assented to by Bergel, subject to a good title being made out, and he agreed to give Pisani 150 dollars for preparing the deeds. Pisani prepared the conveyance, but before executing it, Bergel required to be satisfied about the brother José, and whether there was proof of his death. Pisani told him the circumstances, and what Miss Porro knew and

believed, insisted there could be no doubt of José's death, and urged the acceptance of the title. Bergel, after consulting another lawyer, Mr. Stokes, refused to complete the purchase, because, to use his own words, the title did not suit him. Pisani, according to the testimony of Mr. Bergel and other witnesses, was very angry at this refusal. His charges, amounting to about 50 dollars, were paid by Bergel. Their Lordships see no reason to doubt that Pisani acted in perfect good faith throughout this transaction with Bergel.

Upon the refusal of Bergel, Pisani proposed to Belilo, and afterwards to Miss Porro herself, that he and his brother should purchase on the same terms Bergel had agreed to. Miss Porro assented to this proposal, and afterwards, on his brother refusing to join in the purchase, she agreed to sell to Pisani alone. Accordingly, he prepared deeds of conveyance, which he left with Miss Porro, suggesting that she should get another professional man to peruse them. She, however, consulted Gonzalez about them, who advised that clauses should be inserted to the effect that Pisani should keep the premises in repair, and make no alteration in them in Miss Porro's lifetime without her consent, and that if the annuity should be in default for twelve months he should forfeit what he had previously paid on account of it. These suggestions appear to their Lordships to have been fairly carried into effect by the deed which provides that, upon default as above, the moneys already paid shall be forfeited, and the estate reconveyed.

Benaim's claim arose as follows: After Miss Porro had agreed to sell to Pisani, Belilo mentioned to Pisani that Benoliel had told him that Benaim wished to purchase. Pisani thereupon went to Benaim and asked if he would do so at the price for which it had been sold to Bergel. Benaim asked for time to consider, and Pisani gave him until the evening. There is conflicting evidence as to this negotiation. But it is evident that Benaim himself saw Miss Porro, and that she declined to accept him as a purchaser, giving as her reason that she had already sold to Pisani. She afterwards told Gonzalez that she would never sell to Benaim because he was not a man of responsibility. The Court below has declared, and, in their Lordships' opinion, rightly,

that Benaim's claim has no foundation in law or in equity.

Much minute inquiry took place at the hearing as to Miss Porro's health, which it is sometimes difficult to follow. The summary of it may be found in some general opinions given by the medical witnesses. Dr. Patron, who had attended her professionally for ten or twelve years, says this: "Miss Porro had a delicate constitution, and was of a highly nervous temperament. She had tolerable health; she was always complaining, but I never attended her for any serious disease until her last illness. I have not attended her for any chronic disease. . . . I was sometimes called in to attend her during colds or nervous attacks, which lasted seven or eight days, but never for any serious illness." Dr. Patron had been pressed in cross-examination by the Attorney-General as to her chances of life. On re-examination he thus explains:—"I have stated that Miss Porro might live for years or die next day; but, in reply to your question whether she had to my knowledge any disease which would prevent her living for years, I have stated that she was nervously constituted, and I have stated that she was healthy, and she might be both at the same time." He adds, persons of such a constitution are more liable to disease, and to complications when they are ill.

It appears she suffered at times from an affection of the throat, and Dr. Hauser, who examined it, states: "There was no hoarseness—no pain at all, but a sensation of tickling. I considered it not serious, but a very common complaint in this country arising from the climate."

There is no doubt that, during the attempts to obtain the annuity, representations were made to Bergel and others by Miss Porro's agents that her health was in an unsatisfactory state, and that the bargain would be a good one. This was said to enhance the annuity, but it does not seem to have obtained credit. On the contrary, there were persons who took an opposite view. Mr. Stokes, a surgeon who had been in the habit of meeting Miss Porro at the houses of friends and in public places, deposed to having seen her a month after the transaction in the streets, and at a ball at the theatre, when she appeared in a perfect state of health. He says she used to consult him as a friend, and seldom met him

without asking him some question relative to the state of her stomach or her diet. He thought her complaints were imaginary and of a trifling nature, and that she took a great deal of care of herself. Mr. Stokes says that, knowing the property, and having a good opinion of the lady's chance of long life, he dissuaded Pisani's brother from joining him in the purchase. It appears, also, that Bergel, during his treaty, consulted Dr. Patron about the lady's health, who told him she might live ten or fifteen years, or might die in a short time; and that, if he wished to make a good calculation, he might reckon the period of her life as ten years.

Miss Porro died on the 26th March, 1868, from pyæmia, which followed upon an abscess on the arm. The abscess came on suddenly. Dr. Patron was called in on the 4th March. He then considered it trifling, and everything went on well until the 17th, when, he says, she got a chill. It may be collected from Dr. Patron's evidence that the abscess came on suddenly, and was not connected with any previous disease, but that Miss Porro's constitutional temperament rendered her more than ordinarily liable to pyæmia.

The case originally made by the information was that Pisani knowing or having reason to believe that Miss Porro was suffering from a disease tending materially to shorten life, made fraudulent representations to Benaim to induce him to decline to purchase, and that he fraudulently represented to Miss Porro that Benaim had so declined, and that no other person would purchase for an annuity of 1,500 dollars, and by these means obtained the conveyance to himself. The Counsel for the Respondents, Mr. Fry, detached himself, to use his own phrase, from the case of the Attorney-General. He absolved Pisani from the charge of conscious fraud, and admitted that there was no evidence to support the imputation that he acted in the belief that Miss Porro was suffering from disease likely to shorten her life. The learned Counsel rested his case entirely on Pisani's relation of Attorney to Miss Porro, and on the principles acted on by Courts of Equity when that relation exists.

Several decisions on this subject were referred to. It results from them that the Court does not hold that an Attorney is incapable of purchasing from his

client; but watches such a transaction with jealousy, and throws on the Attorney the onus of showing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser.

The principle is thus stated by Lord Eldon in Gibson *v.* Jeyes, 6 Vesey, 271:—

> "An attorney buying from his client can never support it, unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger; that must be the rule. If it appears that in that bargain he has got an advantage, which with due diligence he would have prevented another person from getting, a contract under such circumstances shall not stand."

The doctrine of the Court is stated much in the same way by Lord Cranworth, L. C., in Savory *v.* King, 5 H. L., 655. The Lord Chancellor says:—

> "Where a solicitor purchases or obtains a benefit from a client, a Court of Equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess; and that the solicitor has done as much to protect his client's interest as he would have done in the case of the client dealing with a stranger."

The Counsel for the Respondents insisted that, in applying these rules to the case of a purchase from a client in consideration of an annuity, the utmost care should be taken by the Attorney before entering into it; and especially that it was his duty to point out other modes of sale which might be more advantageous, and to ascertain accurately the value of the client's life, and the state of the property to be sold, and he strongly relied on the observations of L. J. Turner, in the case of Holman *v.* Loynes, 4 McN. and Gordon, 278. Their Lordships have no doubt that, as a rule, this would be the duty of the Attorney; but every case must be decided on its own circumstances, and they think there are grounds for holding that the advice and investigation referred to were not called for in the peculiar circumstances of the present sale.

In the first place, Mr. Pisani was not the general or confidential adviser of Miss Porro. He was called in as a stranger, for the first time, to advise her on the sufficiency of the deeds upon the sale to Larios, all the conditions of which had been before settled under other advice. The further

security he suggested was even then prepared by Recano. He intervened in the treaty for the sale to Bergel, without apparently having been employed by Miss Porro to obtain a purchaser. But no doubt he did interpose in that treaty, and became the attorney of both parties in preparing the deeds and completing the purchase. This was the extent of his employment on behalf of Miss Porro, except in a small unexplained matter relating to a distress.

In a case where a solicitor, employed by a woman to procure an advance upon an annuity to which she was entitled, took a transfer of it to himself, of a kind which raised a doubt whether it was a sale or a mortgage, and no other solicitor was employed, the woman brought a suit to set aside the transaction :— Lord Justice Knight Bruce, in giving judgment, said, "He could not view the case as one between solicitor and client. It happened, it was true, that one of the parties was a solicitor, and the other of them had no legal advice except from that solicitor; but there had existed no previous relation of solicitor and client between them, and, therefore, that confidence which was the basis of the rule of the Court in similar cases did not appear to have existed, and he could not consider the case came within it." Lord Justice Turner took the same view. (Edwards *v.* Williams, 32 L. J. Ch., 763.)

Their Lordships do not go the length of that case in the present. They think that the relation of solicitor and client existed, so far as to make it necessary for Pisani to show that the bargain he made with Miss Porro was a fair one; but in dealing with the facts, the circumstances of the employment may be considered, and the amount of influence estimated; and they find no reason to suppose that, in this case, a high degree of confidence existed, or that much influence had been acquired.

Upon the general facts it is indisputable that Miss Porro had, for a long time before Pisani was called in, and upon other advice, resolved to sell the property for an annuity; this was a natural desire, for she wanted to increase her income, and had no relations. She had made proposals to friends and strangers, and had actually sold the property to Larios in this way, after consultation with her confidential adviser, Gonzalez, and after having had an opportunity of consulting Mr. Recano.

Under these circumstances their Lordships cannot think that Pisani was guilty of any breach of duty in not suggesting to her other modes of disposing of the property.

Then as to the terms of the sale in question. It was said on Pisani's behalf that he did no more than take up the bargain which Bergel had abandoned. This is really what occurred, but the onus still lies upon him to show that the bargain was a fair one, and the more as on the treaty with Bergel, he had himself proposed to Miss Porro the abatement of the annuity from 1,560 dollars to 1,500 dollars. Their Lordships have thought it right carefully to examine the evidence relating to this treaty, for, unless there was perfect *bona fides* on the part of Pisani in the transaction with Bergel, it would have been impossible to sustain his own subsequent purchase. They are, however, on a review of it, satisfied that he acted with good faith; that, in proposing to Miss Porro to accept the offer of 1,500 dollars, he had reason to think it was as much as could be obtained from Bergel or any other eligible purchaser; and that he did all in his power to induce Bergel to complete the purchase.

But *bona fides* alone would not be sufficient, for Pisani, having taken Bergel's bargain, is bound to show that it was, in fact, a fair one, and that he has not lost, for want of due diligence, better terms for his client.

On the question of value, the dilapidated nature of the property and the disreputable character of the tenants, the fact that the annuity had been hawked in Gibraltar for many years, and refused even at a lower rate by those who knew all the circumstances; and the cloud which rested on the title, from the uncertainty as to José's death, which had been made an objection, whether well or ill founded, by Lepri and Shakery, must be borne in mind as circumstances likely to depreciate the marketable value of the property. When, with a knowledge of all these circumstances, and under the advice of her confidential agent, Gonzalez, Miss Porro sold the property to Larios for an annuity of 1,560 dollars, it may reasonably be presumed that this was the highest offer that could be obtained. Some evidence was given of the rents, outgoings, and repairs, and of the value of the property; but it does not furnish an

inference that the sale to Larios was not for the largest annuity that could be obtained.

Then, as to the duty of Pisani when originally called in, and when he took part in negotiating the treaty with Bergel. Undoubtedly, if the sale for an annuity had been a new matter, it would have been his duty to suggest inquiries as to the value of Miss Porro's life, and the state and value of the property. But their Lordships cannot say that, when consulted at this late period, there was any want of due diligence in his regarding the sale to Larios, made with the advice of Gonzalez and Recano, as representing the value, and in not advising new inquiries, which would have involved further expense and delay.

The sale to Bergel became also an accomplished fact; and if Bergel had not thrown up the bargain, the property would have passed to him irrevocably for the annuity of 1,500 dollars. That sale which, for the reasons already given, their Lordships think was properly and *bonâ fide* concluded, became, in its turn, a criterion of the value which could then be obtained.

If, then, fresh inquiries as to value need not have been made upon the treaty with Bergel, none were necessary when that sale went off, and another purchaser had to be found; and if there would have been no want of due diligence in selling to another at the price Bergel had agreed to give without making them, neither would there be any when Miss Porro agreed that Pisani himself, instead of a stranger, should step into Bergel's contract. His proposal was no doubt precipitate, and if there had been reason to believe that by such further delay as Miss Porro would have acquiesced in, and by further offers to others, more might have been obtained, this sale could not stand. But the evidence does not point to such a conclusion. On the contrary, after all that had occurred in the previous endeavours to sell the property, and the recent refusals of Larios and Bergel to complete, it is not improbable that any further hawking of the property would have depreciated its selling value.

It was urged that one of the motives for Miss Porro's readiness to accept 1,500 dollars from Bergel was that he was a wealthy man, from whom payment of the annuity would be safe, and it was suggested

that Pisani was not wealthy. There is no evidence to support this suggestion, and Mr. Pisani, although subjected to very severe cross-examination, was not asked as to his means. His competency in this respect may therefore be reasonably assumed, and it is to be observed that, by the provisions inserted in Pisani's conveyance, and which were not in Bergel's, the property itself is made a security for the due payment of the annuity.

On the whole, their Lordships think that, having regard to the nature of Mr. Pisani's employment, he would not have been chargeable with want of due diligence if the sale had been on the same terms to a third person, instead of to himself; and they further think that, under the special circumstances of the case, it appears with reasonable certainty that a higher annuity could not have been obtained from an eligible purchaser. The case, therefore, for setting aside the conveyance, in their opinion, fails.

Although their Lordships have come to this conclusion, they feel constrained to say that there is much in the transaction which cannot be approved of. They think Mr. Pisani would have better consulted his position as a barrister if he had been less precipitate in taking up the bargain, and if, instead of only suggesting, he had insisted on the intervention of another professional man. He ought not to be surprised that when Miss Porro died, although from causes which could not have been foreseen, a cloud of suspicion should rest on the transaction, and that an inquiry into it should be instituted. He must, therefore, bear his own costs of the suit and of this Appeal.

In the view their Lordships have taken of the case, it becomes immaterial to consider the circumstances under which the will of 1868 was made, and its effect upon the prior will. The Respondent's Counsel intimated that they did not consider these circumstances had any material bearing upon the question of the validity of the purchase. It is, therefore, unnecessary to refer to them, and it would be improper, without necessity, to do so, as the persons who take benefits under the will of 1868 have not been made parties to the suit.

Their Lordships, in conclusion, cannot but express their regret that, when the title of the Crown

failed, the information was not dismissed, and the Defendants left to establish their rights as against each other in the ordinary way. The irregular procedure introduced by the amendment, and the continued intervention of the Attorney-General, must have caused to the Court below, as they have to their Lordships, great embarrassment. They have, moreover, led to a Decree declaring that the will of 1868 should be set aside, although the parties claiming under it were not before the Court; and to a direction that Pisani should pay Benaim's costs, although the same Decree declares that Benaim had no title in law or in equity. The Decree in these respects cannot, in any view of the case, be supported.

In the result their Lordships will humbly advise Her Majesty that the Decree under appeal, except so much thereof as orders and declares that the hereditaments and premises referred to in the Information have not escheated to the Crown, and so much thereof as orders and declares that Benaim has no title to, or interest in, the said hereditaments and premises, be reversed; and that it be further declared that none of the parties to the said information are entitled to have the said conveyance of the 25th January, 1868, delivered up to be cancelled.

There will be no costs of the Appeal.

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