1938 *Present* : **Moseley and Wijeyewardene JJ.**

FONSEKA *v.* FONSEKA.

S. C. 148—D. C. Colombo, 5,440.

Legacy—Payment due at marriage—Delay due to lack of funds—Claim for interest—Mora—*Roman-Dutch law.*

F, by his last will, directed his trustees to fund the income of several estates and, out of the fund created, to pay each of his daughters on marriage a sum of ten thousand rupees in each and a further sum of five thousand rupees for the purchase of jewellery. The testator died in April, 1926. The plaintiff, one of the daughters, got married in October, 1926. At the marriage the defendants, the trustees, raised a loan and paid her the legacy of ten thousand rupees due to her. In November, 1927, and January, 1932, the defendants paid her two instalments of thousand rupees each out of the sum of five thousand due for the purchase of jewellery. The plaintiff claimed in the plaint a sum of Rs. 6,947.08 on the footing that the sum of Rs. 5,000 became payable to her on the date of mariage and that the defendants were liable to pay not only the balance sum of Rs. 3,000 but also interest at 9 per cent. from October, 1926. It was established that the defendants had no funds after the payment of debts, sufficient to pay the legacy due in respect of the purchase of jewellery till 1935.

Held, that the defendants were not liable to pay interest on the legacy.

Where the obligation to pay a legacy is suspended until an uncertain date or an uncertain condition (*e.g.*, marriage of the legatee) the executor cannot be put in *mora* except by demand, and interest can be claimed from the date of *mora*.

Lack of funds may be pleaded by the executor as an excuse for *mora* in which case he is not liable to pay interest.

APPEAL from a judgment of the District Judge of Colombo. The facts are stated in the head-note.

H. V. Perera, K.C. (with him *N. Kumarasingham* and *H. A. Chandrasena*), for plaintiff, appellant.—According to law, the plaintiff is entitled to interest on Rs. 5,000 from the date of marriage. The interest can be claimed both under the Roman-Dutch law and the English law. Section 554 of the Civil Procedure Code also specifically provides for it. The fact that no money was available at the time payment was due is no defence. The District Judge thinks that if in the fund mentioned in the will there was no money available the legacy need not be paid on the date of marriage. Interest is payable from the date fixed for the payment of the legacy—*Steyn on the Law of Wills (1935) p. 86 ; Van Leeuwen's Censura Forensis (Barber and Macfadyen's Translation), pt. I., bk. IV., Ch. 4, ss. 15, 18 and 21 ; 2 Nathan (1904 ed.), p. 612, Art. 812 ; Sinnathamby Vannithamy v. Thamby Ramanathan*[1] ; *Annamalai Chettiar v. Thornhill*[2]. *Van Leeuwen's* view is adopted in *Bell's South African Legal Dictionary (2nd ed.), p. 364* in connection with the word *mora*. See also *Kotze's Van Leeuwen (1921 ed.), vol. I., p. 400 ; Morice's English and Roman-Dutch Law (2nd. ed.), p. 96.*

As for the English law, the rule of English law is embodied in Order 55, Rule 64 (*1937, Annual Practice p. 1196*). See also *Williams on Executors, vol. II., pp. 1153, 1154, 1158 ; p. 917* deals with the position of

[1] (1936) 1 C. L. J. Rep. 20. [2] (1935) 36 N. L. R. 358.

legacies to be given out of a particular fund—if the fund gets exhausted, the legacy becomes and will rank as a general legacy and has to be paid out of the general estate. Interest is payable from the date fixed by the will for the payment of the legacy—*Wood v. Penoyre* [1]; *Pearson v. Pearson et al.* [2]. The decision in *Lord v. Lord* [3] has been misapplied by the District Judge.

Nine per cent. interest is provided for by Ordinance No. 5 of 1852, section 3 in a case like this.

L. A. Rajapakse (with him *M. M. I. Kariapper*), for defendants, respondents.—The fund out of which the legacy was to be paid was exhausted. The delay, therefore, in the payment of interest was inevitable. *Mora* is used throughout in the texts in a special sense. It does not mean delay *simpliciter*. Interest is payable only if the delay was wilful and culpable. The difference that exists between Roman-Dutch law and English law right throughout is that in the former the intention and mental element also count. The delay has to be wilful, and *mora* or no *mora* is a question of fact—*Buckland's Roman Law (1921 ed.), pp. 546, 551 and 552; Voet (XXII. 1, 24); Lee on Roman-Dutch Law 1915 ed.), p. 229.*

There is a distinction between *mora ex persona* and *mora ex re*—*Voet's Commentaries (Horwood's Translation) bk. XXII., tit. 1, ss. 1, 7, 10, 24 27, 29.* Formal demand by the creditor is necessary and interest can accrue only from the *mora* which follows—*Bell's South African Legal Dictionary (2nd. ed.), p. 364; 2 Nathan (1913 ed.), p. 678; Voet 22 (p. 34 of Horwood's Translation); Estate Lloyd v. Estate de Jong et al.* [4]; the article appearing in *1919 S. A. L. J. p. 31; Labuschagne v. Schoeman* [5]; *South African Bible Union v. Estate Schnugh et al.* [6]; *Steyn on the Law of Wills (1935 ed.), p. 87; Pothier on Legacies 2.10.*

In the absence of a special agreement, the executors are liable to pay interest only from the time it was possible for them to pay the legacy. Sufficient funds should come into their hands and interest is payable only *a tempore morae*—*Wright v. Wright* [7]; *Stephen's Estate v. Stephen's Estate* [8]; *Kotze's Van Leeuwen (2nd ed.), vol. II., p. 62.*

Legacies are payable only after debts have been paid in full—*1 Maasdorp (5th ed.), p. 206.*

The rights and duties of an executor may be governed by the English law, but in the substantive law of inheritance the Roman-Dutch law is applicable—*de Silva et al. v. Silva* [9]; *Mohamed Cassim v. Mohamed Hassen* [10]; *Silva v. Silva et al.* [11]; *de Kroes v. Don Johannes* [12]. Even applying the English law, interest is not payable in a case like this—*Lord v. Lord (supra).*

The rule in England that interest should be paid in case of intestacy is based on a statute of Charles II. By analogy the Chancery Courts extended it to wills. Thus the High Court fixed the rate at 4 per cent. by Order 55. In Ceylon we have no such rule.

[1] *(1807) 13 Vesey (Jnr.) Rep. 325 (a).*
[2] *(1802) 1 Sch. & Lef. 10.*
[3] *(1867) L. R. 2 Ch. A. C. 782.*
[4] *(1908) 25 S. C. 136.*
[5] *(1915) C. P. D. 19.*
[6] *(1908) 25 S. C. 717.*
[7] *(1873) 3 Buchanan's Rep. 10 at 12.*
[8] *(1908) 25 S. C. 104.*
[9] *(1938) 18 C. Law Rec. 11.*
[10] *(1927) 29 N. L. R. 89.*
[11] *(1907) 10 N. L. R. 234.*
[12] *(1905) 9 N. L. R. 7.*

Section 554 of the Civil Procedure Code merely gives a right against the executor personally for monies wilfully kept back in his hands.

H. V. Perera, K.C. in reply.—*Mora* means merely default. It does not involve any moral element. Demand is of very little importance for *mora* to commence—*Lee on Roman-Dutch Law, p. 403.* As regards the distinction between *mora ex persona* and *mora ex re,* interest becomes owing on a non-judicial default in the special case of a legacy—*Cens. For. p. 28, Art. 18 and the footnote ; Voet 22, Art. 12.*

Lord v. Lord (*supra*) has been misapplied by the District Judge. *In re Yates*[1] is in point. There is another case where interest was awarded for one year from the date of testator's death, regardless of the fact whether the fund out of which the legacy was payable permitted it or not—*In re Walford*[2].

Cur. adv. vult.

December 14, 1938. WIJEYEWARDENE J.—

This is an action filed by a legatee against the executors of the last will (D 4) of S. R. de Fonseka, Mudaliyar.

The testator made his last will on February 8, 1923, and died on April 12, 1926. The defendants who were the executors and trustees named in the will, proved the will and obtained probate on December 3, 1929.

The plaintiff who is a legatee under the last will and the first and second defendants are children of the testator. The third defendant is married to a sister of the plaintiff.

By his last will the testator directed the trustees to manage, cultivate and improve certain specified estates for five years from the date of his death. He then gave further directions under the following clauses of the will :—

Clause 28.—I do hereby further charge and direct my said trustees to fund and deposit in any Bank in Colombo all the nett income rents and profits of the said several estates and properties and *out of such fund* to pay (1) my testamentary expenses and estate duty, and (2) the legacies aforesaid.

Clause 29.—I do hereby also will and direct that out of the fund so accumulated my said trustees shall pay to each of my unmarried daughters on her marriage with such consent and approval as aforesaid a sum of ten thousand rupees in cash and a further sum of five thousand rupees for the purchase or making of jewellery for each of them and my said trustees shall also expend a sum not exceeding two thousand rupees for expenses in connection with each such marriage. The said sums shall be retained by them and so far as they are not applied to the purposes aforesaid shall fall into my residuary estate referred to in clause 34.

The plaintiff got married on October 25, 1926, " with the consent and approval " of the first and second defendants as required by D 4. On the occasion of her marriage the defendants admittedly paid her Rs. 10,000 and met " the expenses in connection with her marriage ". On

[1] *(1907) 96 L. T. 758.*
[2] *59 L. T. 397.*

November 18, 1927, and on January 26, 1932, the defendants paid the plaintiff two instalments of Rs. 1,000 each out of the sum of Rs. 5,000 due to her " for the purchase or making of jewellery ".

The plaintiff claimed in the plaint a sum of Rs. 6,947.08 on the footing that the sum of Rs. 5,000 became payable to her on the date of her marriage and the defendants were therefore liable to pay not only the balance sum of Rs. 3,000 but also interest at 9 per cent. from October 26, 1926. This amount is shown in detail as follows :—

	Rs.	c.
Principal sum	5,000	0
Interest on Rs. 5,000 from October 25, 1926, to November 18, 1927 at 9 per cent. ..	479	50
	5,479	50
Paid Rs. 1,000 on November 18, 1927 ..	1,000	0
	4,479	50
Interest on 4,479.50 at 9 per cent. from November 18, 1927 to January 26, 1932 ..	1,688	10
	6,167	60
Paid Rs. 1,000 on January 26, 1932 ..	1,000	0
	5,167	60
Interest on Rs. 4,479.50 at 9 per cent. from January 26, 1932 to June 24, 1936 ..	1,779	48
	6,947	8

The defendants filed answer admitting liability in a sum of Rs. 2,029.20. They claimed the right to set off Rs. 970.80 alleged to have been spent by them in excess of the sum of Rs. 2,000 set apart under D 4 for " expenses in connection with the marriage " and denied the right of the plaintiff to claim any interest. During the pendency of the case the defendants paid plaintiff the balance sum of Rs. 2,029.20 which the plaintiff accepted without prejudice to her rights in the action.

The learned District Judge held that the defendants were entitled to set off a sum of Rs. 643.55 against the plaintiff's claim and were not liable to pay interest to the plaintiff.

He entered judgment for the plaintiff for Rs. 327.25 with legal interest from date of action and ordered the plaintiff to pay half the taxed costs to the defendants. The present appeal has been preferred by the plaintiff. There is no appeal by the defendants against the findings of the District Judge.

There is a conflict of evidence with regard to the purposes for which the sum of Rs. 970.80 claimed as a set off in the answer was spent. The defendants state that this sum was spent in connection with the plaintiff's marriage while the plaintiff contests that position. Though the balance of evidence appears to be in favour of the defendants, it is not necessary however to express an opinion on this aspect of the matter in view of the

decision I have reached that in any event the defendants are not entitled to set off this sum or any part of it—as allowed by the District Judge against the claim of the plaintiff.

In the answer filed by the defendants there was no averment that this excess expenditure was incurred at the request of the plaintiff or that the plaintiff, at any time, agreed to such amount being deducted from the legacy of Rs. 5,000 due to her. At the trial the defendants sought to establish the liability of the plaintiff for this sum on the basis of such a request coupled with an agreement. The evidence led by the defendants on this point was very meagre. The first defendant in the course of his evidence referred in very general terms to the instructions given by plaintiff that moneys due on orders placed by her in connection with her marriage should be deducted against her share of the estate. The first defendant himself has very frankly admitted that he had no personal knowledge of " the dealings between the executors and the various heirs as that part of the work was done " by the second defendant who is now away in England. On a careful consideration of his evidence on the point, I think it will be unfair to the first defendant to conclude that he intended by his evidence to establish knowledge on his part of a specific request made by the plaintiff to incur such expenditure or of an agreement by her to the deduction of such excess amount from her legacy. The plaintiff on the other hand has denied on oath that she made such a request or gave such an undertaking. It is not improbable in view of the close relationship between the parties that the excess expenditure if any was incurred by the plaintiff's brothers without any intention of recovering it from the plaintiff. The pleadings in the case as well as the documents D 5, D 6, D 7 and P 12 corroborate the plaintiff's testimony. The following passage occurs in letter D 5 of September 10, 1935, written by the defendants' proctors to the plaintiff giving details of the various payments made to her under clause 29 of the last will :—

" You will see that the expenses incurred in connection with your marriage exceed the amount provided therefor by the will by Rs. 970.80 and this amount is *now* being deducted from the sum due to you under clause 29 ".

By D 5 of October 1, 1935, the plaintiff replied—

" With regard to the marriage expenses the executors had no right to spend over Rs. 2,000. They had no authority either from me or my husband to spend anything over Rs. 2,000. In fact both of us were quite against any sort of reception. I decline to allow the executors to claim a sum of Rs. 970.80 from me ".

Instead of joining issue with the plaintiff and reminding her about her alleged request and agreement the defendants' proctor chose to state in D 7 of November 21, 1935—

" You will find, on reference to the intermediate account and our letter of September 10 last, that out of the sum of Rs. 2,000, which the executors were authorized and directed to expend, they have expended Rs. 636.56 on your wedding reception. In respect of the balance sum of Rs. 1,363.44 therefore, which has not been applied to

the purpose indicated by the testator, the executors have decided that this sum " shall be retained by them, and shall fall into the residuary estate referred to in clause 34 ".

The defendants' proctors prepared a statement of facts P 12 for submission to Counsel whose opinion was sought with regard to the mode of payment of the legacies and the administration of the estate in general. In that statement a sum of Rs. 3,000 was given as due to the plaintiff under clause 29. It is difficult to understand why a sum of Rs. 3,000 and not a sum of Rs. 2,029.20 was mentioned if the plaintiff had agreed to her legacy being reduced by the excess expenditure of Rs. 970.80.

I hold that the defendants have failed to discharge the burden of proof in respect of issue 3 which raises the question of the plaintiff's indebtedness to the defendants in the sum of Rs. 970.80.

I shall set out briefly the facts connected with the plaintiff's claim for interest before I discuss the questions of law arising in respect of that claim.

At the time of the testator's death his debts secured and unsecured amounted to about Rs. 110,000 while the only cash that was available was a sum of about Rs. 1,500 in a bank. The fund that was established by the executors under clause 28 of the will amounted to only Rs. 40,904.37 at the end of the period of five years. Some of the purposes for which this fund had first to be utilized were—

	Rs.	c.
Estate duty and other testamentary expenses ..	42,378	53
Funeral expenses, &c.	2,379	28
Executorship expenses	7,058	91

It will thus be seen that it was not possible for the defendants to have made to the plaintiff the payments required by clause 29 of this fund when the plaintiff got married about six months after the death of her father. In fact, the evidence shows that the defendants had to negotiate certain loans in order to pay plaintiff the cash dowry of Rs. 10,000 and meet the expenses in connection with her marriage. The defendants, however, were able by a judicious administration of the estate to realize from the sale of a property which formed part of the residuary estate funds which after the discharge of the debts of the estate left sufficient money in their hands in 1935 for the payment of the sum due to the plaintiff on account of the jewellery. The evidence establishes clearly that it was not possible for defendants to make the payment out of the funds of the estate prior to 1935.

The plaintiff's claim for interest is based on the contention that she became entitled to recover Rs. 5,000 on account of jewellery, on October 25, 1926, and that she is therefore entitled to claim interest from the estate as from that date whether or not the estate had sufficient funds to make a payment on that date. This raises a difficult question of law.

I agree with the learned District Judge that the liability of the defendants to pay interest should be decided according to the principles of Roman-Dutch law. Unfortunately, it is not only somewhat difficult to reconcile the various opinions of the Roman-Dutch law writers on the question, but it is at times even difficult to harmonize the views expressed by the same writer on the different aspects of the question.

Under the Roman law interest could be claimed in *stricti juris* actions only if there had been a stipulation. A mere pact sufficed only in a few exceptional cases, *e.g., nauticum fenus,* loans by cities, loans of fungibles other than money and loans by bankers. Apart from any agreement, interest became due by law in certain transactions, *e.g.,* in debts to minors, in debts to the *Fiscus* and in some cases of *dos.* There was a further class of transactions in which without any agreement interest became due by law, *a tempore morae.* They were *bonae fidei* transactions and claims for certain forms of legacy.

In discussing the doctrine of *Mora,* Buckland states in his text book of *Roman Law (1921 ed. at p. 546)* :—

> *Mora* is failure to discharge a legal duty on demand made at the proper time and and place. This is sometimes called *mora ex persona, as* distinct from *mora ex re,* where *dies interpellat pro homine.* But this latter expression is unwarranted. There was no *mora ex re* in some cases, some of the effects of *mora* were produced where there was, in strictness, no *mora, e.g.,* liability to interest on price from delivery of goods sold. The expression is suggested by a test which says that where there is no one from whom the demand can be made, there is no *mora in re.* But this case and that of a defendant who holds a thing by theft or similar delict, who is said to be always in *mora,* seems to have been the only cases in which demand was not necessary.
>
> The delay must be wilful and wrongful : there was no *mora* if the debtor was unable, through no fault of his own, to be at the place, or if he had reasonable grounds for doubting that the debt was due, provided, in this case, he was ready to litigate at once. *Mora* or no *mora* was a question of fact rather than law : the *judex* must decide it on all facts.

The Roman-Dutch law effected certain changes in the Roman law with regard to the liability to pay interest. According to *Voet* (*Voet's Commentaries, bk. XXII., tit 1, Horwood's Translation, paras. 11 and 12*) the differences which existed between *bonœ fidei* and *strict juris* matters were for the most part disregarded and the rule was that interest was not to be decreed solely because of extra-judicial *mora* either in *bonae fidei* or in *strict juris* matters, but in both matters it should be granted after *litis contestatio. Voet* proceeds to say that there are however, " by the present practice of the Courts " some cases in which a defendant is decreed to pay interest solely because of extra-judicial *mora* and after giving a few instances, adds—

> " Interest may be claimed after extra-judicial *mora* in an action for a legacy . . . . because of favour shown to the last wishes of testators the fulfilment of which is a matter of public concern ".

Voet defines *mora* as culpable delay in making or accepting performance and says it is in the discretion of the Court to decide whether *mora* has occurred in any transaction since " it is a difficult thing to define ". He divides *mora* into *mora ex persona* and *mora ex re* and says :—

Mora ex persona is brought about when the creditor demands from the debtor performance at a suitable time and place and the latter does

not perform his part . . . . It can be produced by a single demand legally made, whether judicial or extra-judicial provided that the creditor keeps pressing the debtor.

Mora ex re occurs without any demand, being brought about by law without any human act . . . . It is not only men who make demands but the law or even a date may demand instead of a man, provided only that a fixed date was made a term in the obligation. For if the obligation is suspended until an uncertain date or an uncertain condition the better opinion is that the debtor cannot be put in *mora* except by a demand made through human agency . . . . The coming into existence of the condition has only this result that he who so far was not a debtor begins to be one, and as in unconditional debt, so too in this, which has now become unconditional and sprung into existence, it is equitable that a demand be made . . . . Even in those cases in which *mora ex re* does occur, texts do state that there is sometimes no *mora* so long as there is no *mora ex persona* arising out of a demand made. *Voet's Commentaries, bk. XXII., tit. 1, Horwood's Translation paras. 24, 25, 26 and 27.*)

The Roman-Dutch law jurists recognized the fact that even a party who would otherwise be in *mora* could plead that he is not guilty of *mora* in the legal sense in view of certain extenuating circumstances. *Voet* says: " Still it sometimes happens that *mora* (delay) deserves to be excused to this extent that it is not everything causing delay that can be called *mora* (in the technical sense) . . . ."

" What if some supervening accident or some act of the creditor himself makes very difficult what was easy for the debtor when he bound himself by the contract, e.g., if a slave sold or promised falls into the hands of the enemy ? It would scarcely be just to the debtor to be liable on the ground of *mora* brought about by some obstacle of this sort. The reverse would hold if the difficulty had been caused by his negligence or if at the time when the liability was undertaken, the difficulty of fulfilment was already in existence and known to the debtor. For then the debtor has only himself to thank in that of his own free will he laid the burden upon himself since difficulty of performance does not avoid a stipulation ". (*Voet's Commentaries, bk. XXII., tit. 1, Horwood's Translation, para. 29*).

Nathan sets out the limitations to the maxim *dies interpellat pro homine* as follows :—

" *Mora ex re* takes place without the making of an interpellation or demand upon the debtor—that is to say, it is considered to happen by mere operation of law, without the intervention of any person. From this arises the maxim *dies interpellat pro homine*. The maxim applies where a certain date has been fixed upon for performance of the obligation. If no such date has been fixed the creditor must make the usual formal demand ; and this will be the case where performance by the debtor depends upon the fulfilment of a certain condition by the creditor "—vide *Nathan's Common Law of South Africa (1913 ed.), vol. II., p. 676*).

In " *The Law of Wills in South Africa*" (1935 ed., p. 87), Steyn says : " the rule that interest runs on a debt only from the time that the debtor

is in *mora* applies to legacies and interest on a legacy of a sum of money can therefore, only be claimed from the date of demand ".

In his "*Introduction to Roman-Dutch Law*" (*2nd ed., pp. 405, 406*) Professor Lee deals with the question of *mora*-interest and says:—

> "We have seen that if B owes A a sum of money and, when payment falls due, fails to pay, A may claim the amount due with interest even where there is no agreement for interest in the contract. This is *mora-interest*. It begins to run from the time when the debtor is in default; and, therefore, where demand is necessary, from the date of demand. But what constitutes demand for this purpose? Some writers consider an extra-judicial demand sufficient; others require a judicial demand, *i.e.*, a writ of summons; others postpone the currency of interest to the moment of *litis contestatio* (Grot. 3.1.46 and Groenewegen *ad loc.*; V. d K. Th. 483 and *Dictat.* ad Gr. *loc. cit.*), which in modern practice is reached when the pleadings are closed and matters are at issue between the parties. *Meyer's Exors v. Gericke (1880) Foord* at p. 18, per de Villiers C.J. In *Victoria Falls and Transvaal Power Co. v. Consolidated Langlaagte Mines (1915) A.D.* at p. 31 Innes C.J. said 'The Courts of Holland would seem to have adopted the rule that in all cases where liability for interest depended upon the existence of *mora ex persona* the stage of *litis contestatio* constituted that due demand from the date of which *mora* existed and interest began . . . .' It may be that close investigation would reveal a tendency on the part of South African Courts to depart from the Dutch rule and to regard the letter of demand or failing that a summons as marking the inception of liability for interest."

In *Labuschagne v. Schoeman*, N.O.[1] Searle J. said: "There are Roman-Dutch authorities from which it may be gathered that where a specific date is fixed under a will at which a sum of money is to be paid, there is no *mora ex re* if the money is not paid on that date, quite independently of whether any interest has been earned or not. No case has been quoted, however, where that has been actually followed with regard to legacies, but the Court has rather seemed to throw out that the legatee should claim such interest as has actually accrued to the estate . . . . There are authorities which certainly seem to point in the direction that where the testator has said nothing about interest in his will, and where it is not shown that there any interest has accrued, the interest cannot be exacted from the estate.". The decision of Hopley J. in *South African Bible Union v. Estate Schnugh and another*[2] appears to suggest that a legatee entitled to a legacy on marriage could claim interest only from the date of demand. He also refers to the fact that the executor in that case had funds from which the payment could have been made.

In *Estate Lloyd v. Estate de Jong and others*[3] a testator bequeathed different sums of money to several legatees on respectively attaining the age of 25 years and "subject to the payment of such legacies" he bequeathed the residue of his estate to his wife. The question raised was whether the legatees were entitled to claim interest from the death of the

[1] *(1915) South African Law Reports, Cape Provincial Division 19.*

[2] *(1908) 25 Cape Supreme Court Reports 717.*

[3] *(1908) 25 Cape Supreme Court Reports 136.*

testator. Answering the question in the negative, de Villiers C.J. said in the course of his judgment:—

The general rule seems to be correctly stated by Pothier (on Legacies C. 2 S 10) as translated by Van der Linden " when the legacy consists in a sum of money, the interest is due to the legatee from the day of demand, provided he did not make the demand before the sum was due ". In other words it is delay on the part of the heir in paying a legacy which entitles the legatee to claim interest, and if there is no delay, then there is no interest.

The principles that appear to be deducible from the various authorities on Roman-Dutch law examined by me and relevant to the present case are—

(*a*) Where the obligation to pay a legacy is suspended until an uncertain date or an uncertain condition (*e.g.*, marriage of the legatee), the executors cannot be put in *mora* except by demand.

(*b*) That such demand, if extra-judicial should be more or less of a formal nature.

(*c*) That interest runs only from date of *mora*.

(*d*) That in certain circumstances lack of funds may be pleaded as an excuse by the executors for their *mora* in which case the estate will not be liable to pay interest.

The Civil Procedure Code, 1889, contains certain provisions which appear to throw some light on the question whether the estate will be liable to pay interest if the delay in the payment of the legacy was due to want of funds. While section 720 (*b*) gives a legatee the right to petition a Court asking for an order directing an executor or administrator to pay the legacy, section 721 enacts that where the Court receiving the petition is not satisfied that there is money applicable to the payment of the legacy, the Court shall dismiss the petition.

When the present action came up for trial certain issues were framed. The only issues dealing with the liability of the defendants to pay interest were issues 1, 5, 6. The learned District Judge ruled that the *onus* of proof in respect of these issues was on the plaintiff and the plaintiff's Counsel then submitted to Court that he would present his argument on those issues without calling any evidence. The defending Counsel called the first defendant to give evidence on the issues on which the burden was ruled on him. When the case for the defendants was closed, the plaintiff's Counsel called evidence in rebuttal and in the course of giving evidence on matters relevant to other issues, the plaintiff in very general terms and the plaintiff's husband spoke of a demand having been made from the executors.

I do not think it would be fair and just to the defendants to decide those issues except on the basis on which the plaintiff's Counsel agreed to present his case. If the plaintiff's Counsel led evidence on issues 1, 5, and 6, the Counsel for the defence would have had an opportunity of combating such evidence and proving that either the demand was not properly made or that certain circumstances existed which freed them from liability to pay.

There is also another fact that may be taken into consideration. The last will D 4 was made in 1923. Though for certain purposes a will is no

doubt said to speak from the death of the testator, I think the date of 1923 cannot be ignored in considering whether the testator could have reasonably anticipated that the plaintiff who had consistently expressed her desire to take the veil would get married a few months after his death in 1926 or that at such time there would be a difficulty in paying the legacy to the legatee. On the evidence led in this case it has been proved that until 1935, it was not possible for the executors to pay the legacy. There is no evidence to justify me in holding that, in the words of *Voet* "at the time liability was undertaken, the difficulty of fulfilment was already in existence and known" to the testator.

I hold therefore that the defendants are not liable to pay interest.

I set aside the judgment of the District Judge and direct that decree be entered for the plaintiff for Rs. 970·80 and legal interest from date of action to date of payment. The plaintiff will be entitled to half the taxed costs of the trial in the District Court. I make no order as to the costs of the appeal.

MOSELEY J.—I agree.

Judgment varied.