dant's entering and remaining on the property even after the judgment which gave him a right had been set aside. The defendant's solicitor, in his statement of defence, stated that the plaintiff's statement of claim had not disclosed any cause of action. The question which the court has to ask itself is whether the defendant's contention is true. The evidence which has been given clearly shows that this contention is not true, and therefore the answer is in the negative.

Having found from the evidence which has been given that the defendant, by remaining in these premises after the judgment by which he entered into possession had been set aside, has committed an act of commission which is a trespass, it then remains for the court to assess the damages which the plaintiff is entitled to. *Halsbury, op. cit.*, at 858, para. 1508, states: "In an action of trespass the plaintiff, if he proves the trespass, is entitled to recover damages, even although he has not suffered any actual loss." See also the cases of *Hiort* v. *London & N.W. Ry. Co.* (2) and *The Mediana* (3).

The plaintiff deposed that during the time he was put out of his premises he had to secure another place, not only to live with his family but to store his goods, and I therefore assess the damages at £60 together with his taxed costs.

Judgment for the plaintiff.

TIMBO *v.* JALLOH

SUPREME COURT (Luke, Ag.J.): March 3rd, 1952
(Civil Case No. 170/50)

[1] **Land Law—joint tenancy—words of severance—concurrent ownership prima facie construed as joint tenancy—any words indicating intention to divide property negatives joint tenancy—court favours construction creating tenancy in common if ambiguity:** Where property is devised to several persons concurrently, the question whether such persons take as joint tenants or tenants in common depends on the context of the whole will; and although *prima facie* they take as joint tenants, anything which in the slightest degree indicates an intention to divide the property negatives the idea of a joint tenancy, and in the case of ambiguity the court leans to the construction which creates a tenancy in common in preference to that which creates a joint tenancy (page 203, line 38—page 204, line 13).

[2] **Land Law — tenancy in common — words of severance — concurrent**

ownership prima facie construed as joint tenancy—any words indicating intention to divide property negatives joint tenancy—court favours construction creating tenancy in common: See [1] above.

[3] **Land Law—tenancy in common—words of severance—devise to several of testator's sons of property to be used as family property—devisees take as tenants in common to benefit their respective families only:** Where a testator leaves land to several of his sons and instructs that "the property is to be used as family property," the will must be construed in a manner consistent with an intention on the part of the testator to benefit the respective families of the devisees; and therefore the devisees take as tenants in common rather than joint tenants (page 204, line 35—page 205, line 18).

[4] **Succession—wills—construction—joint tenancy and tenancy in common—concurrent ownership prima facie construed as joint tenancy—any words indicating intention to divide property negatives joint tenancy—court favours construction creating tenancy in common if ambiguity:** See [1] above.

[5] **Succession—wills—construction—joint tenancy and tenancy in common—devise to several of testator's sons of property to be used as family property—devisees take as tenants in common to benefit their respective families only:** See [4] above.

[6] **Succession—wills—construction—testator's intention ascertained from will as whole—proved intention competent to supply or strike out words to resolve difficulty or ambiguity:** A testator's intention, which can be ascertained from the will as a whole, must have effect given to it beyond, and even against, the literal sense of particular words and expressions; and this intention, when legitimately proved, is competent not only to fix the sense of ambiguous words and control the sense of clear words, but also to supply and strike out words in cases of difficulty or ambiguity (page 204, lines 15–30).

The plaintiff brought an action against the defendant to recover possession of property to which he claimed to be entitled under a will.

A testator left his home by will to two of his sons with the instruction that it was to be used as family property and not sold. Subsequently, the plaintiff instituted an action for possession against the defendant on the ground that the devise had created a joint tenancy, and that he was entitled to the property thereunder. The defendant maintained that the devise was intended to benefit only the respective families of the devisees, and that therefore a tenancy in common had been created.

Cases referred to:

(1) *Doe d. Hayter* v. *Joinville* (1802), 3 East 172; 102 E.R. 563, distinguished.

(2) *In re Haygarth, Wickham* v. *Haygarth*, [1913] 2 Ch. 9; (1913), 108 L.T. 756, *dicta* of Joyce, J. applied.

(3) *Lucas* v. *Goldsmid* (1861), 29 Beav. 657; 54 E.R. 783, *dicta* of Romilly, M.R. applied.

(4) *Robertson* v. *Fraser* (1871), 6 Ch. App. 696; 40 L.J. Ch. 776, *dictum* of Lord Hatherley applied.

(5) *In re Woolley, Wormald* v. *Woolley*, [1903] Ch. 206; (1903), 117 L.T. 511.

Legislation construed:

Wills Act, 1837 (7 Will. IV & 1 Vict., c.26), s.28:
The relevant terms of this section are set out at page 203, lines 26–29.

Edmondson for the plaintiff;
O.I.E. During for the defendant.

LUKE, Ag.J.:

The solicitors for the plaintiff and the defendant drew up an issue arising out of the dispute on which an action was pending for argument before the court. The issue was: "Whereas the plaintiff affirms and the defendant denies that Alimamy Janneh and Mormodu Janneh (alias Mamadu Janneh) took hereditaments and premises the subject-matter of this action as joint tenants."

The devise which appears in para. 1 of the will reads:

> "To my natural sons Alimamy Janneh and Mormodu Janneh my house and premises at Jenkins Street in which I at present reside. The property is to be used as family property and is in no wise to be sold."

The plaintiff's solicitor submitted that it was a joint tenancy, and the defendant's solicitor that it was a tenancy in common. In order to be able to arrive at a correct interpretation of a will, certain canons of construction are maintained, *e.g.*, what is the intention of the testator disclosed by the will, and how can effect be given to that intention?

In this will the wording is very vague and it is not very easy to ascertain the testator's intention. Reading the will, the words used are: "To my natural sons Alimamy Janneh and Mormodu Janneh

my house and premises at Jenkins Street," which give the impression that the testator would like them to take as joint tenants. This is the construction or interpretation which the plaintiff's solicitor has asked the court to uphold, and in support of his contention refers to *Jarman on Wills*, 6th ed., at 1783 (1910), which reads: "A devise to two or more persons simply, it has been long settled, makes the devisees joint tenants . . . ."

In this devise there is no limitation, and, in order to be able to ascertain what the intention of the testator is and how to give effect to that intention, it will be necessary to read the entire will to see what it says. There is nothing in the other paragraphs of the will to assist save the sentence used in the same first paragraph which reads: "The property is to be used as family property and is in no wise to be sold."

The plaintiff's solicitor in his argument said the words "to be used as family property" are void for uncertainty and read some cases in support, but two of them dealt with personal property and in the last, *Doe d. Hayter* v. *Joinville* (1), the estate consisted of both real and personal property and not of real estate exclusively as in this case, a circumstance which has been deemed material.

The defendant's solicitor contended that the devise should be construed as a tenancy in common, and in support stated that prior to the Wills Act of 1837 such a devise would have given the two devisees a life estate; but by s.28 of the Wills Act, which will be found in *Cheshire's Modern Real Property*, 5th ed., at 113–114 (1944) —"such a devise . . . shall pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

Having ascertained that by the Wills Act no words of limitation give the devisees a fee simple or all whatever interest the testator had in the property at the time unless a contrary intention appears in the context of the will, it remains to be seen which of the two estates the two devisees took, whether a joint tenancy or a tenancy in common.

28 *Halsbury's Laws of England*, 1st ed., at 780, para. 1422, states:

> "Where property is given to several persons concurrently, the question whether these persons take as joint tenants or tenants in common, and in the latter case what shares they take, depends on the context of the whole will. They *prima facie*

take as joint tenants; but in considering the context it has been said that anything which in the slightest degree indicates an intention to divide the property negatives the idea of a joint tenancy, and that in case of ambiguity the court leans to the construction which creates a tenancy in common in preference to that which creates a joint tenancy."

I refer to the cases of *Robertson* v. *Fraser* (4), particularly the judgment of Lord Hatherley, and *In re Woolley, Wormald* v. *Woolley* (5), particularly the judgment of Joyce, J. which refers to the case of *Robertson* v. *Fraser*, where Lord Hatherley states (6 Ch. App. at 699): "[A]nything which in the slightest degree indicates an intention to divide property must be held to abrogate the idea of a joint tenancy." [These words do not appear in the report of the case at 40 L.J.Ch. 776.]

As the will is so disjointed, in order for the court to give effect to the intention of the testator, words may be added or subtracted to give it a meaning; the authority for that is found in the case of *In re Haygarth, Wickham* v. *Haygarth* (2), in which Joyce, J. states ([1913] 2 Ch. at 15; 108 L.T. at 758):

> "There are various cases with regard to striking out or supplying words in wills when you cannot get at what is to be done by construction of the document itself, and I think it is settled that 'the intention of the testator, which can be collected with reasonable certainty from the entire will, . . . must have effect given to it, beyond, and even against, the literal sense of particular words and expressions. The intention, when legitimately proved, is competent not only to *fix* the sense of ambiguous words, but to *control* the sense even of *clear* words, and to *supply* the place of express words, in cases of difficulty or ambiguity.'"

There is no controversy in the fact that this is one of the many wills which are drawn by laymen and, to use the expression of the defendant's solicitor, is a bogus will. It therefore becomes necessary for a court called upon to interpret it to endeavour to explore all the known canons of construction. In this first paragraph the testator stated that the "property is to be used as family property." If the words "respective families" are interposed to follow after the devise (*i.e.*—"To my natural sons Alimamy Janneh and Mormodu Janneh and their respective families my house and premises at Jenkins Street") the intention of the testator may be nearer approached. In *Jarman, op. cit.*, at 1585, the word "family" is said

to mean children and "where the gift is to the families of named persons the parents are excluded."

Reading the devise as suggested, the devise will be governed by the case of *Lucas* v. *Goldsmid* (3), where it is stated by Sir John Romilly, M.R. (29 Beav. at 660; 54 E.R. at 784):

> "There is no case relating to real estate in which the word 'family' has not been held to imply inheritance or that species of succession which belongs to inheritance. If a man says, 'I desire that my estate shall belong to the family of A.B.,' the meaning is, that the property shall be handed down from father to son . . . . The testator does not say that they are to take for their lives, but that the property 'shall be divided equally between my two sons, who shall enjoy the interest thereof.'"

Under the circumstances of this will I am of opinion upon the construction of the devise of para. 1 that the two sons, Alimamy Janneh and Mormodu Janneh, take this house and premises at Jenkins Street as tenants in common.

Order accordingly.

LOKO v. PAULINE AND COMPANY

SUPREME COURT (Beoku-Betts, J.): March 14th, 1952
(Civil Case No. 234/51)

[1] **Bailment—hire of chattels—obligations of hirer—hirer bound to exercise reasonable care—injury to chattel during hire raises prima facie presumption against hirer:** The fact that a chattel is injured whilst in the hirer's possession raises a *prima facie* presumption that the hirer is responsible for such injury (page 209, lines 2–4).

[2] **Bailment—hire of chattels—obligations of hirer—hirer bound to exercise reasonable care—liable for employees' acts in course of employment—liability extends to operative of chattel not employed, but controlled, by hirer:** Under a hirer's duty to take reasonable care of the chattel hired, he is always liable for the acts of his employees in the course of their employment; and this liability extends to the acts of persons not employed by the owner but supplied to operate the hired chattel if they are under the hirer's control, and especially if they are paid by the hirer (page 209, lines 13–14; page 210, lines 3–27).

[3] **Bailment—hire of chattels—obligations of hirer—hirer bound to exercise reasonable care—must restore chattel to owner in original condition or show reasonable care exercised:** In a contract of hiring,