[WILSON, P., ZEKIA, VASSILIADES AND JOSEPHIDES, JJ.]

SAID GALIP,

Appellant-Defendant,

v.

UMIT SULEYMAN IN HIS CAPACITY AS REPRESENTATIVE OF VEHID S. SOUBHI,

Respondent-Plaintiff.

(*Civil Appeal No.* 4408).

Practice—Counterclaim—Excluding counterclaim from the action—The Civil Procedure Rules, Order 21, *r.* 10*—Proper procedure to be followed—Proper application must be made—And promptly—It is not mandatory that it should be made " before reply "—Discretion of the Court—Application for exclusion of a counterclaim from the action must be made in writing under the relevant rules of procedure—However, an oral application is not a nullity but merely an irregularity which may be cured—Order* 64, *r.* 1, *corresponding to the English Rules, Order* 70, *r.* 1.

Evidence—A document put in evidence for a certain limited purpose, e.g. *for purposes of identification of the other party's signature, is not evidence.*

The respondent brought an action against the appellan claiming £2,000 being instalment due on a bond for £16,00 dated the 17th February, 1960. The defendant (appellant) denied that he signed such a bond and counterclaimed against the plaintiff (respondent) for £2,000 being instalment due on a bond for £16,000 dated the 19th March, 1960. By his reply the plaintiff denied all the allegations of the defendant including the existence of the alleged bond of the 19th March, 1960. At the trial in leading evidence to prove the counterclaim a bond dated the 19th March, 1960, which was marked " A " for identification, was sought to be put in evidence. Objection then was taken by counsel for the plaintiff on the ground that the last mentioned bond was not duly stamped. Counsel for the defendant replied that the Stamp Law, Cap. 328 was no longer in force and, therefore, the bond need not to be stamped. This submission was based on Article 188 paragraph 2 of the Constitution by operation of which laws imposing taxes . . . ceased

to be in force on the 31st December, 1960. Counsel for the plaintiff objected to that submission, and the trial Court ruled as follows :

"We are not prepared to state that Cap. 328 has expired. As far as we can state now Cap. 328 is in force. It has not been repealed."

Defendant's counsel, then applied to the Court under Article 144 of the Constitution to refer the matter to the Supreme Constitutional Court. He applied as follows :—

"Cap. 328 is to-day unconstitutional because it violates the Constitution (Article 188, paragraph 2). I submit that this question be referred to the Constitutional Court for their decision."

Upon this submission plaintiff's counsel applied orally to the Court that the counterclaim of the appellant be excluded from the action on the ground that it may conveniently be tried as a separate action and that to refer the matter to the Supreme Constitutional Court would cause undue delay and hardship to the respondent, who had been waiting in Cyprus for over a month as he normally lived in London.

Defendant's counsel did not object to this procedure *i.e.* that the application by plaintiff's counsel for the exclusion of the counterclaim was made orally, but was content to reply on the merits of the oral application.

The trial Court after hearing counsel's submissions ruled that the reference of the matter to the Supreme Constitutional Court would delay the hearing of the action unduly and would cause embarrassment to the plaintiff, and, thereupon, ordered that : "The counter-claim be and is hereby excluded and struck out from the action ". And the trial Court gave judgment for the plaintiff in the sum claimed.

The defendant appealed against the judgment of the District Court excluding the counter-claim and giving judgment for the plaintiff.

Counsel for the appellant argued the appeal on two main points:

(*a*) that the respondent did not follow the proper procedure in applying for the exclusion of the counter-claim ; and

(*b*) that on the merits the Court was wrong in excluding the counter-claim.

As to the procedural point, submission was based on the provisions of Order 48, rule 9 paragraph (*k*), of the Civil Procedure Rules, which provides that applications for the exclusion of the counterclaim should be made by summons. To that counsel for the respondent replied that under Order 64, rule 1, of our Rules, the order made was not void but that there was an irregularity which was not fatal and the Court had a discretion in the matter.

Finally, counsel for the appellant took the point that bond " A "(which was the subject of the counter-claim) was already in evidence, because it had been put to the respondent in the course of his evidence for the identification of his signature, and that it was too late for the trial Court to exclude it.

The High Court in dismissing the appeal (VASSILIADES, J., *dissenting*) :—

Held, (1) there is no doubt that, under the provisions of Order 21 rule 10, of the Civil Procedure Rules, the Court may " at any time " exclude, but not strike out, the counter-claim. Consequently, the correct wording of the order should be : " It is ordered that the counter-claim be and is hereby excluded from the present action ".

(2) (*a*) It has been held that the English Order 70, rule 1 (which corresponds to our Order 64, rule 1), only applies to proceedings which are voidable not to proceedings which are a nullity : 'For those are automatically void and a person affected by them can apply to have them set aside *ex debito justitiae* without going under the rule : *Anlaby & others* v. *Praetorius* (1888) 20 Q.B.D. 764 ; *Craig* v. *Kanssen* (1943) K.B. 256 ; *MacFoy* v. *United Africa Co. Ltd.* (1961) 3 W.L.R. 1405, at page 1409 (P.C).

(*b*) In this case we are of the view that the oral application to Court (instead of an application by summons) for the exclusion of the counter-claim is voidable not void, *i.e.* it is an irregularity but not a nullity. And as appellant did not raise an objection before the trial Court to the procedure followed and as he did not put before the Court any complaint that he was taken by surprise or that he wanted time to defend the application he is not entitled to raise such an objection on appeal (*Davis* v. *Galmoye* (1888) 39 Ch. D, 322).

(3) (*a*) As regards the question of the exclusion of the counter-claim the main ground on which the Court decided the point was that the counter-claim would cause an undue delay in the trial of the action and that it would be embarrassing to the respondent (plaintiff).

In the case of *Gray* v. *Webb* (1882), 21 Ch.D. 802, it was laid down that, under the provisions of the English Order 21, rule 15 (which corresponds to our Order 21, rule 10), power is reserved to the Court to exclude a counter-claim which may be inconvenient, *e.g.* such counter-claim as might cause an undue delay in the trial of the action (at page 805). The Court should consider whether it would be expedient or convenient that the trial of the action should be delayed by the counter-claim.

(*b*) Having regard to the facts of this case, was it expedient or convenient that the trial of the action should be delayed by having the question of the constitutionality of the Stamp Law referred to the Supreme Constitutional Court ? The appellant's counter-claim was based on a bond of £16,000 and the stamp duty (including the penalty) payable was only £38 odd. The respondent in his evidence alleged that his signature on the aforesaid bond was forged. Considering the tactics in the conduct of the appellant's case generally, the smallness of the stamp duty involved *vis-a-vis* the amount of the counterclaim, the fact that the respondent had been waiting in Cyprus for more than a month for the hearing of his case, and that it would take a long time for the matter to be referred to and decided by the Supreme Constitutional Court, it seems to us that it was neither expedient nor convenient that the trial of the action should be delayed by the question raised by the appellant in the course of the hearing of his counter-claim, and we are of the opinion that the trial Court rightly exercised its discretion in ordering that such counter-claim be excluded. The appellant's claim raised in his counter-claim may be conveniently be disposed of in an independent action.

(4) Undoubtedly an application for the exclusion of the counter-claim should be made promptly in accordance with the Rules and should, normally, be made before the hearing stage. But it is not mandatory that it should be made " before reply " (cf. *Gray* v. *Webb* (1882) quoted above) as was expressly provided in the English R.S.C. before their amendment in 1929. Order 21, rule 10, of our Rules provides that the Court may " at any time " order that a counter-claim be excluded (English Order 21, rule 15). In this case we are satisfied that the application was made immediately after it became apparent that the trial of the action would be delayed unduly by the question raised by the appellant for the first time in the course of the hearing.

(5) As to the question of whether or not the Bond of the 19th March, 1960, was in evidence, we think that bond " A " was not in evidence but it was there for only a limited purpose, *i.e.* for the identification of the respondent's signature and no more. The mere admission of a document for a limited purpose does not make it evidence. It must be formally put in evidence.

(6) For these reasons we are of opinion that the appeal should be dismissed with costs.

In the circumstances of this case we direct that the execution of the respondent's judgment be stayed for a month from to-day to enable the appellant to file an independent action if he is so advised (Courts of Justice Law, 1960, section 47). If the appellant fails to file his action within a month the respondent will be at liberty to proceed with the execution of his judgment.

After the institution of his action the appellant will be at liberty to apply to the District Court for a further suspension of the judgment, and the District Court will, in its discretion decide whether a further suspension should be granted or not, subject to such terms as the Court may think just.

Per VASSILIADES, J., *dissenting :* With the utmost respect for the judgment of the majority of the Court, I am clearly of opinion that this appeal should be allowed and the judgment of the District Court be set aside, both on procedural grounds and on grounds going to the substance. In the circumstances, I would order a new trial of the whole dispute before a different bench.

Appeal dismissed with costs on the above terms.

Cases referred to :

Anlaby & others v. *Praetorius* (1888) 20 Q.B.D. 764.

Craig v. *Kanssen* (1943) K.B. 256.

MacFoy v. *United Africa Co. Ltd.* (1961) 3 W.L.R. 1405, at page 1409 ; (P.C.).

Davis v. *Galmoye* (1888) 39 Ch.D. 322.

Gray v. *Webb* (1882) 21 Ch.D. 802, at page 805.

Appeal.

Appeal against the judgment of the District Court of Nicosia (Dervish, P.D.C., and Emin, D.J.) dated the 9.11.62

(Action No. 2507/61) whereby defendant's counter-claim was excluded and judgment was given for plaintiff for £1,800.000 mils by virtue of a bond.

St. Pavlides with *A. M. Berberoglou* for the appellant.

Ali Dana for the respondent.

The facts sufficiently appear in the judgments delivered by JOSEPHIDES and VASSILIADES, JJ.

WILSON, P.: The judgment of the majority of the Court will be given by Mr. Justice Josephides.

JOSEPHIDES, J.: This is an appeal by the defendant against the Judgment of the District Court of Nicosia whereby the defendant's counter-claim was excluded and judgment was given for the plaintiff in the sum of £1,800 and costs.

The respondent's (plaintiff's) claim was based on a bond dated the 17th February, 1960, the appellant (defendant) having undertaken to pay to the respondent the sum of £16,000, which, it was alleged, he had borrowed in cash. The aforesaid sum was to be paid in eight yearly instalments of £2,000, the first instalment becoming due and payable on the 17th February, 1961.

The appellant by his defence denied the existence of the bond and he further denied that he borrowed £16,000 in cash from the respondent. The appellant further alleged that under a bond dated the 19th March, 1960, the respondent borrowed from him (or was indebted to him in) the sum of £16,000 which the former undertook to pay in eight yearly instalments of £2,000 each, the first instalment becoming due and payable on the 19th March, 1961; and he counter-claimed the sum of £2,000 being the first instalment due. By his reply to the defence and defence to the counter-claim the respondent denied all the allegations of the appellant, including the existence of such a bond.

The respondent, who since 1960 has been living and working in London, had to come specially to Cyprus for the hearing of his case.

It seems that in the course of the hearing, the line of defence was changed, that is to say, the appellant admitted signing the bond but alleged that he did so to accommodate the respondent's wife and the defence then went on

to prove the counter-claim. In leading evidence to prove the counter-claim a bond dated 19th March, 1960, which was marked " A " for identification, was sought to be put in evidence by the appellant. Objection was taken to the admission of this bond on the ground that it was not properly stamped. Appellant's counsel submitted that the Stamp Law Cap. 328, was not in force and, consequently, the bond marked " A " need not be stamped.

Mr. Dana for the respondent objected to that submission and the Court then ruled as follows : " We are not prepared to state that Cap. 328 has expired. As far as we can state now Cap. 328 is in force. It has not been repealed ".

The submission made by appellant's counsel that the Stamp Law, Cap. 328, was not in force, was based on Article 188, paragraph 2, of the Constitution which provides that laws imposing " duties or taxes " shall not continue to be in force after the 31st December, 1960, which was subsequently extended to the 31st March, 1961, by Law 23 of 1960.

After the ruling of the trial Court that the Stamp Law, Cap. 328, had not been repealed and that it was still in force, counsel for the appellant applied to the trial Court under Article 144 of the Constitution, to refer the matter to the Supreme Constitutional Court. The submission of Mr. Berberoglou was as follows : " Cap. 328 is today unconstitutional because it violates the Constitution (Article 188, paragraph 2). I submit that this question be referred to the Constitutional Court for their decision ".

Upon this submission, respondent's counsel applied orally to the Court that the counter-claim of the appellant be excluded from the action on the ground that it may conveniently be tried as a separate action and that to refer the matter to the Supreme Constitutional Court would cause undue delay and hardship to the respondent, who had been waiting in Cyprus for over a month owing to three adjournments of his case. The last adjournment was clearly due to the appellant's fault.

Mr. Berberoglou for the appellant, did not object to this procedure, that is to say, to the oral application of respondent's counsel for the exclusion of the counter-claim, but he replied on the merits. He alleged that the action and the counter-claim were interwoven, particularly that the document which was sought to be put in evidence was a very material piece of evidence in the action.

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The Court after hearing counsel's submissions ruled that the reference of the matter to the Supreme Constitutional Court would delay the hearing of the action unduly and would cause embarrassment to the plaintiff, and it, thereupon, ordered that "the counter-claim be and is hereby excluded and struck out from the action".

There is no doubt that, under the provisions of Order 21, rule 10, the Court may "at any time" exclude, but not strike out, the counter-claim. Consequently, the correct wording of the order should be: "It is ordered that the counter-claim be and is hereby excluded from the present action".

Today, learned counsel for the appellant argued the appeal on two main points:

(1) that the respondent did not follow the proper procedure in applying for the exclusion of the counter-claim; and

(2) that on the merits the Court was wrong in excluding the counterclaim.

First, as to the procedural point: Mr. Pavlides's submission was based on the provisions of Order 48, rule 9, paragraph (*k*), of the Civil Procedure Rules, which provides that applications for the exclusion of the counterclaim should be made by summons. To that Mr. Dana for the respondent replied that under Order 64, rule 1, of our Rules, which corresponds to Order 70, rule 1, of the English Rules of the Supreme Court, the order made was not void but that there was an irregularity which was not fatal and the Court had a discretion in the matter.

It has been held that the English Order 70, rule 1 (Cyprus Order 64, rule 1), only applies to proceedings which are voidable not to proceedings which are a nullity: for those are automatically void and a person affected by them can apply to have them set aside *ex debito justitiae* without going under the rule: *Anlaby & others* v. *Praetorius* (1888) 20 Q.B.D. 764; *Craig* v. *Kanssen* (1943) K.B. 256; and *MacFoy* v. *United Africa Co. Ltd.* (1961) 3 W.L.R. 1405, at page 1409 (P.C.).

In this case we are of the view that the oral application to Court (instead of an application by summons) for the exclusion of the counter-claim is voidable not void, i.e. it is an irregularity but not a nullity. And as appellant did not raise an objection before the trial Court to the procedure followed and as he did not put before the Court

any complaint that he was taken by surprise or that he wanted time to defend the application, he is not entitled to raise such an objection on appeal (*Davis* v. *Galmoye* (1888) 39 Ch.D.322).

As regards the question of the exclusion of the counter-claim, the main ground on which the Court decided the point was that the counter-claim would cause an undue delay in the trial of the action and that it would be embarrassing to the respondent (plaintiff).

In the case of *Gray* v. *Webb* (1882), 21 Ch. D. 802, it was laid down that, under the provisions of the English Order 21, rule 15, (which corresponds to our Order 21, rule 10), power is reserved to the Court to exclude a counterclaim which may be inconvenient, *e.g.* such counter-claim as might cause an undue delay in the trial of the action (at page 805). The Court should consider whether it would be expedient or convenient that the trial of the action should be delayed by the counter-claim.

Having regard to the facts of this case, was it expedient or convenient that the trial of the action should be delayed by having the question of the constitutionality of the Stamp Law referred to the Supreme Constitutional Court ? The appellant's counter-claim was based on a bond of £16,000 and the stamp duty (including the penalty) payable was only £38 odd. The respondent in his evidence alleged that his signature on the aforesaid bond was forged. Considering the tactics in the conduct of the appellant's case generally, the smallness of the stamp duty involved vis-a-vis the amount of the counter-claim, the fact that the respondent had been waiting in Cyprus for more than a month for the hearing of his case, and that it would take a long time for the matter to be referred to and decided by the Supreme Constitutional Court, it seems to us that it was neither expedient nor convenient that the trial of the action should be delayed by the question raised by the appellant in the course of the hearing of his counter-claim, and we are of the opinion that the trial Court rightly exercised its discretion in ordering that such counter-claim be excluded. The appellant's claim raised in his counter-claim may conveniently be disposed of in an independent action.

Undoubtedly an application for the exclusion of the counter-claim should be made promptly in accordance with the Rules and should, normally, be made before the hearing stage. But it is not mandatory that it should be made " before reply " (cf. *Gray* v. *Webb* (1882) quoted

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above) as was expressly provided in the English R.S.C. before their amendment in 1929. Order 21, rule 10, of our Rules provides that the Court may "at any time" order that a counter-claim be excluded (English Order 21, rule 15). In this case we are satisfied that the application was made immediately after it became apparent that the trial of the action would be delayed unduly by the question raised by the appellant for the first time in the course of the hearing.

Finally, learned counsel for the appellant took the point that bond "A" (which was the subject of the counter-claim) was already in evidence, because it had been put to the respondent in the course of his evidence for the identification of his signature, and that it was too late for the trial Court to exclude it.

With great respect to counsel's submission, we think that bond "A" was not in evidence but it was there for only a limited purpose, i.e. for the identification of the respondent's signature and no more. The mere admission of a document for a limited purpose does not make it evidence. It must be formally put in evidence.

For these reasons we are of opinion that the appeal should be dismissed with costs.

In the circumstances of this case we direct that the execution of the respondent's judgment be stayed for a month from today to enable the appellant to file an independent action if he is so advised (Courts of Justice Law, 1960, section 47). If the appellant fails to file his action within a month the respondent will be at liberty to proceed with the execution of his judgment.

After the institution of his action the appellant will be at liberty to apply to the District Court for a further suspension of the judgment, and the District Court, will, in its discretion, decide whether a further suspension should be granted or not, subject to such terms as the Court may think just.

WILSON, P.: I agree with the judgment which has been delivered.

ZEKIA, J.: I also agree.

WILSON, P.: Mr. Justice Vassiliades will deliver the dissenting judgment.

VASSILIADES, J.: With the utmost respect for the judgment of the majority of the Court, I am clearly of opinion that this appeal should be allowed and the judgment of the District Court be set aside, both on procedural grounds and on grounds going to the substance. In the circumstances, I would order a new trial of the whole dispute before a different bench.

I propose to deal now roughly with the reasons which lead me to this conclusion, stating at the same time that I may have to revise or clarify certain points in the transcribed notes of my oral judgment, considering the strong probability, as far as I can see, of further litigation between these same parties after the result of the present appeal, upon what, in my opinion, must unavoidably be, in substance, the same dispute.

As far as procedural grounds are concerned, the matter was ably put by learned counsel for the appellant as follows: The trial Court, could not, under our Rules, and should not, in the circumstances of this case, accede to an oral request on behalf of the plaintiff, at that advanced stage of the trial to "exclude" the counter-claim from the proceedings; claim and counter-claim were being tried together and the Court should not make the order appearing at p. 33 of the record "that the counter-claim be and is hereby excluded and struck out from the action", while the defendant was still in the witness-box, and his cause was actually being tried.

The counter-claim was made and filed with the defence in June, 1961, and was opposed by plaintiff's reply in December, 1961. The trial, commencing in January, 1962, was continued in February and it was on the fourth day of hearing, on February 8, that counsel for the plaintiff applied, in the way he did, for the counter-claim to be excluded. Surely between the filing of the defence in June, and that stage in the trial in the following February, the plaintiff had ample opportunity to take the steps indicated in the Rules for the exclusion of the counter-claim, if he considered that there existed sufficient reasons for which the counter-claim could not be tried together with the claim, and should be pursued by independent action.

But on the contrary, in this particular case, there existed strong reasons, in my opinion, pointing in the opposite direction. The counter-claim was based on the allegations of fact constituting the defence. The defendant rejecting liability for the claim denied that he was indebted to the

plaintiff for £2,000 as claimed, under a bond for £16,000 dated 17th February, 1960, out of which £2,000 became due on 17th February, 1961, as alleged by the plaintiff; and in his turn, the defendant went on to allege in the defence that it was the plaintiff who was indebted to him (the defendant) in an equal sum of £16,000 under a bond dated the 19th March, 1960, out of which the first instalment of £2,000 became due on the 19th March, 1961, for which the defendant now counter-claimed. On the face of these pleadings the connection between claim, defence, and counter-claim is, in my view, so strikingly apparent as to make it necessary that they should be heard and determined together.

But in addition to their apparent similarity and connection on the face of the pleadings, these claims were also connected together, at that stage of the trial, by the evidence already received. And could no longer be disconnected, as evidence relevant to the one, directly affected the other.

Before leaving the procedural aspect of this appeal, I must add that I am not aware of any case, either in our local courts or elsewhere (and none has been cited in these proceedings) where the course of excluding a counter-claim at that advanced stage of the trial, upon an oral application, was adopted; and I would certainly not be inclined to support it in this case. The matter had reached the stage where both parties to the counterclaim were entitled to have the cause therein, determined by a judgment; and not "excluded" in a manner enabling it to be brought back de novo by a fresh and independent action.

Now as regards substance, the position of the appellant is even stronger, in my opinion. I do not propose going extensively into the judgment of the trial Court especially in the evidence behind it, because I think that the substance of the dispute which it purports to determine, shall inevitably be the subject of fresh litigation. I shall only refer to the last part of the judgment at p. 46 of the record, which reads:—

> "What we have to decide,—the District Court say—is whether the defendant owes £16,000 to the plaintiff."

Indeed that was the substance of the dispute between the parties. And in this connection it was most relevant to enquire at the trial and to make a finding in the judment on the allegations in paragraph 3 of the defence to the effect that about a month after the signing of the bond

upon which the claim was being made, the plaintiff signed a counter-bond for exactly the same amount and in the same tenor, upon which the defendant was making his counter-claim.

The pleading of the defendant may well be subjected to severe criticism ; the cause of action may not have been accurately described on the specially endorsed writ of the plaintiff either ; but to me the position as it developed at the trial, is perfectly clear. The substance of the dispute was not confined to the signing of the bond by the defendant on the 17th February, 1960, (which was admitted by the defendant in the witness-box and was never specifically traversed in his pleading) but it was to be found in the question whether the defendant was indebted to the plaintiff as claimed at the time of the filing of the action in June, 1961.

The District Court found against the defendant on this question " because he admitted that he owed the above sum to the defendant", (they must mean the plaintiff) when he (the defendant) signed the bond in February. But the Court made that finding without admitting and considering evidence on the issue whether the plaintiff signed, in his turn, a counter-bond for the same amount about a month later as alleged by the defendant in paragraph 3 of his defence. There can be no doubt that if the evidence on this part of the defence were admitted, and if upon such evidence the trial Court made a finding, the judgment based on such a finding would cover the substance of the whole dispute, and would dispose of both claim and counter-claim.

Having excluded the counter-claim and all evidence on what I have described as the counter-bond, the trial Court did not only exclude evidence relevant to the defence, but they also left open to a second decision the question of indebtedness from the appellant to the respondent in February, 1960 (at the time of the signing of the first bond) which is strongly and inseparably connected with the alleged signing of the counter-bond, and is bound to arise for decision, if the appellant will now proceed by an independent action upon the alleged counter-bond.

To put the matter in another form : the substance of the dispute between these parties lies in the question whether or not the appellant really owed to the respondent £16,000 on the 17th February, 1960, before the signing of the first bond. If yes, the signing of the bond is fully justified and the bond is as real as the debt. If not, the bond is fictitious as stated by the defendant ; and the

alleged signing of the counter-bond is sufficiently explained. Therefore, the question of the indebtedness in the amount of £16,000 from the appellant to the respondent before the signing of the first bond, is as relevant to the claim and the defence, as it is to the counter-claim. And if the counter-claim will now become the subject-matter of an independent action, before a different bench, the same question is bound to arise again ; and any evidence showing or tending to show whether such indebtedness was real (as alleged by the respondent) or fictitious (as alleged by the appellant) shall be relevant and admissible in the new action.

In these circumstances, I would allow the appeal on the short ground of the exclusion of material and relevant evidence for the defence ; and setting aside the judgment, I would direct a new trial of both claim and counter-claim before a different bench.

As regards the order for stay of execution made here upon the result of the appeal, I must say that I am unable to share responsibility for that order either. If the respondent is entitled to the judgment which he has obtained in the District Court, he is also entitled, in my opinion, to proceed with the execution of his judgment. And it is for the District Court to order a stay upon an application to that effect made by an interested party under the rules ; and not for this Court to make such an order on its own motion.

Appeal dismissed with costs on the above terms.