

tion to surrender. Does that in this case mean fourteen days beginning on the 2nd October?

I have been referred to two cases in this Court. The first is *Ex parte Levitas* (19th December, 1911, not reported), where the facts were similar to those in the present case, and WARD, J., accepted the surrender. But the point does not appear to have been argued, and no formal judgment was delivered. The other case was that of *Jackson v. De Wilde* (supra p. 40) a decision of MASON, J. In that case where the first Gazette notice was for the 20th May and the schedules stated to lie from the 23rd May, the papers were held not in order. As there the statute was not complied with under any mode of computation, the decision is not in point.

Turning to the English cases, I find that in England a clear rule has been established that where a period is to be calculated from the date of an event, the date on which that event actually happens is not to be counted; see *Isaacs v. Royal Insurance Co.* (L.R. 5, Ex. 296); *South Staffordshire Tramways v. Sickness & Accident Corporation* (1891, 1 Q.B. 402); *Radcliffe v. Bartholomew* (1892, 1 Q.B. 161); *In re North, Ex parte Hasluck* (1895, 2 Q.B. 264); *Goldsmiths' Company v. West Metropolitan Railway Co.* (1904, 1 Q.B. 1). As this rule of computation agrees with the decision of WARD, J., in the case mentioned and is consonant with what seems to me the reasonable interpretation of the Insolvency Statute, I find the Statute has been complied with and accept the surrender

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[G.H.]

EX PARTE TRUSTEE OF ZIMAN'S TRUST.

1914. November 19, 20. WARD, J.

Trust.—Power to administer, alienate and dispose of trust property and to apply income for maintenance.—Power to mortgage income.—Power to add unexpended income to capital.—Construction.—No power to mortgage corpus.—Temporary and permanent addition to capital.

Trustees of a fund with power to administer, manage, control, alienate or otherwise dispose of the trust property; to mortgage income therefrom; and to add unexpended income to capital, upon trust to apply income to the maintenance of the *cestuis que trustent*, *Held*, not to include power to mortgage, anything but the income, and only such income as was not permanently added to capital. *Held*, further, that no addition of income to capital was permanent until such addition had been communicated to the *cestuis que trustent*.

Application for leave to pledge certain life policies or alternatively to bond certain fixed property, being assets of a trust known as Ziman's Trust, to enable the trustee to raise a sum of £1,500 for the benefit, urgently needed, of the *cestuis que trustent*.

By a deed dated 2nd March, 1895, one David Ziman constituted the Ziman Trust whereby certain assets including twelve life policies (of £500 each), on the life of the said Ziman, a sum of £1,500 lent on mortgage, and a sum of £6,000 lent at eight per cent. were vested in trustees upon trust (1), that they were to have 'the entire administration, management, control and power of alienation and disposing of or otherwise dealing with the said assets with power to recover and receive the same and to lay out and invest or invest from time to time as they may deem meet such moneys or property arising from the same or any part thereof or otherwise in mortgage bonds or other securities at interest as they shall see fit, to lay out the same in the purchase of immovable or other property, and the same at pleasure to realise or otherwise dispose of or deal with, and in such investing or laying out or other dealings with the said assets to be at liberty to take and act upon the written advice of the said Ziman if they be so minded. (2) Upon trust to apply the income from the said assets: (a) to pay the premiums on the said policies and keep the same on foot, and (b) to apply the whole or portion of the remainder thereof in the discretion of the trustees for the maintenance and support of the said Ziman, his wife, and children and for the education and advancement in life of the latter or some of them as the trustees may deem meet for and during the lifetime of the said Ziman and of his widow.' The deed further declared and directed that the trustees might in their discretion carry forward any unexpended income in any year or years to any subsequent year or years and temporarily or permanently add any income to the capital.

Acting under these powers the trustees had applied the income to keeping the policies on foot, to making such payments as were necessary to preserve the assets intact, and to the acquisition of further assets, but interest since 1911 had been applied not to the maintenance of Ziman and family, but had been accumulated and added to capital. In consequence the value of the assets had increased to £20,000, and the annual income therefrom after paying premiums and trustee's charges was £1,200. Ziman being now in urgent need of a sum of £1,500 the present applicant had endeavoured to pledge the policies or bond the other assets in

order to raise this sum, but had been answered by those approached, including the Rand Townships Registrar, that the deed of trust gave no right to pledge or hypothecate the property of the trust.

M. Nathan, for the applicant, cited *Ex parte de Jongh* (18 C.T.R. 184), and *Ex parte Laurence* (18 C.T.R. 735).

Cur. adv. vult.

Postea (November 20):—

WARD, J.: (After stating the facts and the relevant clauses of the deed of trust cited above, proceeded). The powers thus given mean shortly that the trustees may manage and control the *corpus* of the trust, change the nature of their investments, sell or buy, but no power is given to mortgage anything but income. If the income were sufficient it is clear the trustees could give Ziman the £1,500 required out of the income, but having carried forward income and added it to capital for several years, the difficulty is, does this money so carried forward and added, rank as income or is it capital?

That depends on the question whether it has been added temporarily or permanently. If temporarily, it can be used as income. If permanently devoted to capital, then not the *corpus*, but only the income therefrom can be touched.

The papers give no information as to whether the assets added to capital were permanently added or not. Now, the trustees have the right of deciding at any time whether an investment is to be a permanent addition to assets or not. But a mere decision in their own mind is not sufficient in my opinion to impose permanency upon such allocation. That decision must be communicated to the *cestuis que trustent* before a permanent devotion to capital can be inferred. If there has been no such communication the trustees may at any time decide whether such allocation is permanent or temporary.

Whatever has not been permanently added to capital the trustees may treat as income and pay over to Ziman for the maintenance of himself and family.

But the power given to administer does not give them power to mortgage the permanent assets except for the purpose of preservation.

Therefore the position is that they may realise income, which has not been permanently added to capital, and pay it over for the purposes specified in the deed of trust, and I think that if it is

deemed better for the estate to raise the money now asked for by way of mortgage of such income the Court can authorise the Registrar accordingly. But as I can find no power to encumber or jeopardise the other assets of the trust, there may not be any general clause in the bond, and no liability put upon the permanent assets.

There will be an order therefore authorising the trustee to raise £1,500 by way of mortgage on such portions of the trust property as have not been added permanently to capital, for the purpose of maintaining Ziman, and authorising the Rand Townships Registrar or other proper registering officer to pass such mortgage provided it contains no charge upon any portion of the permanent capital of the trust; an affidavit to be filed with the Registrar of the Court that the specific property intended to be affected has been produced by the income of the trust, and has not been permanently added to the capital. Costs to come out of the income of the trust.

Applicant's Attorneys: *Gregorowski, Scheuerman & Knox-Davies.*

[G.H.]

FEDDER v. McCREADIE.

1914. November 26. BRISTOWE, J.

Practice.—Pauper suit.—Assets recently in possession.—Onus of proof as to means.

Leave to proceed *in formâ pauperis* refused an applicant proved to have been in possession of considerable funds within a month or two of his application, and who could give no satisfactory explanation of their disappearance.

Application for leave to defend an action for specific performance of a contract of sale, in *formâ pauperis*. The defence was that the contract was entered into whilst applicant was in a condition of intoxication. It was admitted by applicant that on the 28th July last he was in possession of a sum of £2,500, and on the 15th October, of a sum of £200. Bank statements were put in, showing that the £2,500 had been spent, but, except as to £585 of