tug and the "Mangoro" of going aground, or of fouling the entrance, but I do not think it was a risk of incurring great damage. It was contended that the "Buffalo" was bound to render the service she did. But, though she is owned by the Government, no authority was shown to me laying down such a rule. The pilot was not bound to take her in at night. I think an aggregate for the services of £300 will meet the case.

The award to the "Buffalo" naturally carries costs; with regard to the "Ingeli" it is clear that the tender was insufficient, as it covered the payment to the "Buffalo," and even if we deduct £250, which in the absence of fresh information, might be considered paid for the services of the master and crew, including special service in the usual form for the master, and in this case for the officers and men left on the "Mangoro," the tender is still insufficient.

The judgment will therefore be for £1,400; £1,100 to the "Ingeli," and £300 to the "Buffalo," with costs in each case.

Attorneys for Union Government: *Bell & Nixon*; Attorneys for Charente Steamship Co.: *Hayman & Godfrey;* Attorney for Defendants: *F. C. Dumat.*

[Reported by *G. Wille,* Esq., Advocate.]

BROWNE v. IRVINE.

1913. *May* 30; *June* 3, 4, 6. WARD, J.

Practice.—Rule 38 (*b*).—*Payment into court.—Right of plaintiff to take out money.*

Defendant before plea paid into Court a sum under rule 38 in satisfaction of a claim. In his plea he allocated the sum to a portion of the claim. Plaintiff filed a replication joining issue, but did not ask for payment out until trial but before judgment. Judgment was given for defendant with costs, and thereafter application was made to restrain the registrar from paying out to plaintiff:—*Held,* refusing the application, that the Court had a discretion to allow payment out at any stage of the proceedings, that before filing his replication the plaintiff had a right to take the money out in satisfaction, and that, subject to leave of the Court, he was entitled to payment out thereafter but before judgment.

Semble, where plaintiff by his delay in taking payment in satisfaction causes costs to defendant, the Court may prevent payment out until such costs are satisfied.
Semble, further, the mere possibility that defendant's costs when taxed may exceed the plaintiff's is not sufficient to justify the detention of the money.
English practice reviewed.
Manasewitz v. *De Sarigny* (1909, T.H. 267) approved.

This was an application, after judgment, in an action, for an order restraining the Registrar from paying out to the plaintiff a sum paid into court by defendant under Rule of Court 38, until defendant's costs of the action had been taxed.

In the action two claims were made: (1) for £750, in respect of water-boring operations carried out by plaintiff at defendant's instance and request, and (2) for £148 19s., being the value of materials supplied and work done in connection with these operations. In all £898 19s., less £100 paid in September, 1912, or £798 19s.

On the 4th April, 1913, defendant, without any allocation, paid into court in terms of Rule 38 (*a*) a sum of £125 19s. in satisfaction of plaintiff's claim.

On the 24th April, 1913, defendant pleaded that the sum of £100 (paid in September, 1912), was paid in terms of the contract for boring, and that "while denying liability for the materials supplied and work done, defendant was ready and willing to pay plaintiff the sum of £147 19s. 8d,. and did on the 4th April, 1913, pay into court in terms of Rule 38 (*a*) in satisfaction of plaintiff's claim the sum of £125 19s., being the aforementioned sum, less £22 10s. 8d. due by plaintiff to defendant. Plaintiff received due notice of the said payment."

Plaintiff did not take the money out, and simply pleaded a general denial in his replication (filed 26th April, 1913). After trial began, application was made to take the money out, but it was agreed that the decision of that matter should await judgment, subject to plaintiff's rights at the time of application. Judgment was given for the defendant on the first claim, and for plaintiff on the second, but as plaintiff failed on the main claim, the court ordered him to pay the costs of the action.

C. F. Stallard, K.C. (with him *H. H. Morris*), for the defendant, applied as above. The money should not be paid out until defendant's costs had been taxed.

J. P. van Hoytema, for the plaintiff: Plaintiff is entitled to payment out at any time, before trial or after, so long as the issue

is in doubt. Payment into court with a denial of liability is on the same footing as a tender; see *Grabie* v. *Pretoria Municipal Council* (1908, T.S. 862, at 867).

Stallard, K.C., in reply: Our rule draws no distinction between payment in with or without a denial of liability. For the English rules, see Order 22, Rule 7; *Powell* v. *Vickers, Sons & Maxim* (1906, 1 K.B. 71).

As to costs, see *Michau* v. *Ashe* (19 S.C. 517). Under the judgment, they are ours. As plaintiff has not taken the money out before judgment, it must remain in, to pay what is due under the judgment. The equity is with us.

[WARD, J.: You owe £149, and you refuse to let defendant take payment out unless he pays your costs.]

He could have taken the money out, but did not.

Cur. adv. vult.

Postea (June 6):—

WARD, J.: Payment into and out of court is governed with us by Rule 38, which is the same as the Cape Rule 332, which in turn was derived from the English Rules of Chancery, 1875, Order 30, now superseded by Order 22. It will be necessary therefore to examine the English practice.

Rule 1 of the old Order 30 reads as follows: "Where any action is brought to recover a debt or damages any defendant may, at any time after service of the writ and before or at the time of delivering his defence, or by the leave of the court, or a Judge, at any later time, pay into court a sum of money by way of satisfaction or amends. Payment into court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified."

Rule 4 is as follows: "The plaintiff, if payment into court is made before delivery of a defence may within four days after receipt of notice of such payment, or if such payment is first stated in a defence delivered then, may before reply accept the same in satisfaction of the causes of action in respect of which it is paid in, in which case he shall give notice to the defendant in the form No. 6, Appendix B, hereto, and shall be at liberty in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs and in case of non-payment, within 48 hours to sign judgment for his costs so taxed."

In 1877 it was held in the case of *Spurr* v. *Hall* (2 Q.B.D. 615) that the above rule did not permit a defendant in an action for nuisance raising a question of title, to plead a payment into court and deny the plaintiff's right of action in respect of the same part of the statement of claim.

In 1878 in *Berdan* v. *Greenwood* (3 Ex. D. 251), this decision was questioned, and it was held that a defendant may by a statement of defence deny the plaintiff's cause of action, and at the same time plead payment into court in respect of the whole or any part of it. THESIGER, L.J., delivered judgment for himself and BRETT, L.J., and went carefully into the history of payment into court. He says on p. 256 *re* Order 30: "The sum is absolutely appropriated to the purpose of satisfaction or amends. The plaintiff may obtain the payment of it out to himself in manner provided by the third Rule of the Order (corresponding to our Rule 38 (*b*)), and may either under Rule 4 accept it in satisfaction of the causes of action in respect of which it is paid in, and if he accept it in satisfaction of the entire cause of action, may tax his costs and sign judgment for the costs so taxed; or if he think proper, may go on with the action for the purpose of recovering something more, in which event the issue *quoad* the defence of payment into court, will be the same as it was before the coming into operation of the Judicature Acts."

In 1879 in the case of *Greeves* v. *Fleming* (4 Q.B.D. 226) it was held that where the defendant paid money into court in satisfaction of the plaintiff's claim and gave notice of such payment to plaintiff, and the latter did not give notice that he accepted the money in satisfaction of the claim within four days, but afterwards accepted that sum in satisfaction, he was entitled to take this money out after the four days, but he lost his right to tax his costs under the particular Rule of Court. His right to come would be dependent on the exercise of the discretion of the Court in an application in which any prejudice caused to defendant by the delay could be considered.

So that under the English practice the plaintiff could take the money out of court and proceed for the rest of his claim, or he could take it out in full satisfaction at any time, but could not sign judgment for his costs unless he complied with the order of court.

After this Order 22 came into force, and that provided under Rule 6 (*c*) "if the plaintiff does not accept in satisfaction of the claim or cause of action in respect of which payment into court has

been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action or any part thereof, the money shall remain in court and be subject to the order of the court or Judge. . . . If the plaintiff proceeds with the action in respect of such claim or cause of action or any part thereof and recovers less than the amount paid into court, the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim, and the balance (if any) shall, under such order, be repaid to the defendant. If the defendant succeeds in respect of such claim or cause of action, the whole amount shall, under such order, be repaid to him."

In 1887 the case of *Maple* v. *Earl of Shrewsbury* (19 Q.B.D. 463), decided that where money was paid in with a defence denying liability and the plaintiff does not accept it in satisfaction, an order for payment of such money out of court cannot be made until after the trial or the determination of the action. BRETT, M.R., said: "If the view of the divisional court were correct (*viz.*, that the money could be paid out to the plaintiff), I think the object of the rule would be frustrated, and we should be driven again into all the difficulties which arose under the former practice as established by *Berdan* v. *Greenwood*."

Then, in 1906, in the case of *Powell* v. *Vickers, Sons & Maxim, Ltd.* (1906, 1 K.B. 71), it was held that if a defendant in an action for unliquidated damages denies liability, but pays money into court, and the plaintiff proceeds with the action and recovers from the defendant an amount which carries costs, but is less than the sum paid into court, the plaintiff is entitled to the whole costs of the action down to payment in, and the subsequent costs on the issues on which he succeeds.

The making of an order under Order 22, Rule 6 (*c*) for payment out of money paid into court by a defendant with denial of liability is discretionary, but the presumption is that the amount recovered by the plaintiff should be paid out to him and it lies on the defendant to rebut the presumption. In that case the Master ordered the money to be retained until the defendant's costs had been taxed, but COLLINS, M.R., said there were conflicting claims for costs, and there was no evidence before the Master as to which, when both were taxed, would out-top the other. Further, that to allow the money of the plaintiff to remain in court would be to give the defendants a security for costs to which they were not entitled.

FARWELL, L.J., said: "The provision that money is not to be paid out of court except in pursuance of an order of court or a Judge, is intended to give a discretion to be exercised on proper occasions and materials. I do not think that the mere possibility that the defendant's costs when taxed may exceed the plaintiff's costs was sufficient to justify the detention of the money."

From these decisions it will be seen that under the older order the plaintiff would have been entitled to take this money out at any time; and even under the later decisions there is nothing to show that he could not take it out upon his accepting it in satisfaction of the claim.

Though the English courts in the case of *Berdan* v. *Greenwood* decided that the plaintiff could take the money out without accepting it in full payment, it does not follow that our courts should give the same interpretation to a rule worded similarly to the rule on which that case was decided.

The result of the decision led apparently to great inconvenience in practice, and the rule was replaced by a new one.

Our courts in interpreting our rule have followed the later English practice. In *Manasewitz* v. *De Sarigny* (1909, T.H. 267), for instance, BRISTOWE, J., held that a plaintiff is not entitled to have paid out to him money paid into court by a defendant under Rule 38, with a denial of liability, unless he accepts the same in full satisfaction of the claim in respect of which it has been paid in.

He says: "Under Rule 38 the respondent has the right to have the money paid out to him if he takes it in satisfaction of his claim, and otherwise the Court has a discretion to allow it to be paid out or not."

The same question really arises under Mr. *van Hoytema's* application to take the money out. I think, as he has not taken the money out in the time laid down in the rule, he cannot take it out except under an order of court.

The Court has to exercise its discretion according to the circumstances of each case.

In the present case the defendant paid the money in full satisfaction of the whole claim, but in his plea stated it was in full satisfaction of a *portion* of the claim,—the amount paid in together with an amount said to be owed by the plaintiff, which he was willing to allocate to that portion of the claim, making up the full amount of that portion of the claim.

I think defendant was bound by his plea and the plaintiff, before replication, could have taken the money out in full satisfaction.

Plaintiff did not do so, but filed a general denial, thereby putting in issue the fact that he owed defendant any money. There was no dispute as to this, and plaintiff did not wish to raise the question. At the trial Mr. *Stallard* contended that it was too late to take the money out in full satisfaction, but that the claim must abide the result of the trial.

In my opinion that is not so. I think the Court has a discretion to allow the money to be taken out at any stage of the proceedings in full satisfaction, subject to justice being done to the defendant with regard to any costs caused to him by the plaintiff's delay in taking the money out. The rule is intended to stop litigation, and it is clear that by granting an order for the money to be paid out in full settlement the Court is effecting the object of the rule, and is not inflicting any hardship on the defendant. As the plaintiff's rights at the time of the application were reserved, I shall order *nunc pro tunc* that the money be paid out.

The question of the defendant's costs do not arise in this particular case; the extra costs to which he has been put are practically nil, and there is no necessity to consider the question whether the Court should—where the plaintiff has by his delay caused costs to the defendant—order the money to be retained until those costs are satisfied.

With regard to the second point raised, viz., that the Court should not order the amount to be paid out until the defendant's costs have been taxed, it is not necessary for me to give a decision; but this seems to me to be also a matter in the discretion of the Court, and I have thought it well to quote the case of *Powell* v. *Vickers, Sons & Maxim* (*supra*), which Mr. *Stallard* cited as laying down a convenient and common-sense rule, though perhaps a not very elaborate guide to the Court as to how its discretion is to be exercised in the matter.

Plaintiff's Attorney: *J. J. Yates*; Defendant's Attorneys: *Zwarenstein & Heimann.*

[Reported by *G. Hartog*, Esq., Advocate.]