GODWIN v. CROWTHER

West African Court of Appeal (Deane, C.J. (G.C.), Butler-Lloyd, J. (Nig.) and Macquarrie, J. (Sierra Leone)): October 16th, 1934

[1] **Jurisprudence — reception of English law — incorporation of English law — in Supreme Court Ordinance (cap. 205), s.6 "law and practice for the time being in force in England" means law and practice in force at date of commencement of Ordinance:** The meaning of s.6 of the Supreme Court Ordinance (*cap.* 205), by which the law and practice "for the time being in force" in England is to be administered by the Supreme Court in probate, divorce and matrimonial causes and proceedings, is that the law in Sierra Leone on these matters is that which was in force in England at the time of the commencement of the Ordinance in 1904, since the phrase "for the time being in force," interpreted in its context, does not comprehend laws to be passed in the future (page 379, lines 16—25).

[2] **Jurisprudence — reception of English law — incorporation of English law — intestate succession — by Intestate Estates Ordinance (cap. 104), s.13, Statute of Distribution, 1670 in force in Sierra Leone in 1932, not Administration of Estates Act, 1925:** The phrase "probate causes and proceedings" in the Supreme Court Ordinance (*cap.* 205), s.6 does not mean more than matters connected with the grant or recall of probate or letters of administration, as defined in s.2 of the same Ordinance; so that an action based on the law relating to the distribution and administration of an estate on intestacy is not a probate cause within the terms of the section and remains governed by the Intestate Estates Ordinance (*cap.* 104). Under s.13 of the Ordinance the English Statute of Distribution, 1670 is in force in Sierra Leone and it applies to the administration of an intestate estate in 1932, and not the English Administration of Estates Act, 1925 (page 379, line 37—page 380, line 11; page 380, lines 24—35).

[3] **Statutes — interpretation — "law and practice for the time being in force in England" — in Supreme Court Ordinance (cap. 205), s.6, means English law and practice in force at date of commencement of Ordinance:** See [1] above.

[4] **Succession — intestate succession — law applicable — by Intestate Estates Ordinance (cap. 104), s.13, Statute of Distribution, 1670 in force in Sierra Leone in 1932, not Administration of Estates Act, 1925:** See [2] above.

[5] **Succession — probate and letters of administration — law applicable — by Supreme Court Ordinance (cap. 205), s.6, court to administer law and practice in force in England at time of commencement of Ordinance:** See [1] above.

[6] **Succession — probate and letters of administration — meaning of "probate causes" — "probate causes" in Supreme Court Ordinance (cap. 205), s.6 excludes distribution and administration of intestate estates**

which remain governed by Intestate Estates Ordinance (cap. 104): See [2] above.

The appellant brought an action in the Supreme Court against the respondent for specific performance of a contract for the sale of land.

The respondent was the administratrix of the estate of her deceased husband who had died intestate in 1932. A contract for the sale of land forming part of the estate was concluded between her and the appellant, who paid the price agreed. Later, the respondent refused to complete the sale on the ground that she had since discovered that an infant grand-niece of the deceased was entitled to a share in the estate and that, since this grand-niece had not consented to the sale, it was necessary, by virtue of s.24 of the Intestate Estates Ordinance (*cap.* 104), to obtain the consent of the court to the sale. Having failed to obtain it, she maintained that she had no right to complete the sale and therefore resisted a decree for specific performance and paid the purchase money into court. The Supreme Court found that as the necessary consent had not in fact been obtained, the contract for sale was void, and it dismissed the action.

On appeal to the West African Court of Appeal, the appellant contended that the respondent's grand-niece was not entitled to a share in the estate under the existing law since the English Administration of Estates Act, 1925, which came into force before the death of the intestate and which would have altered the law of devolution in intestacy so as to have entitled the grand-niece to a share, did not apply in Sierra Leone. The appellant based her contentions on the fact that the English law "for the time being in force," which was introduced into Sierra Leone by s.6 of the Supreme Court Ordinance (*cap.* 205), should be interpreted as meaning the English law in force "at this time," that is, at the date of the commencement of the Ordinance in 1904, thereby excluding the application of the Administration of Estates Act, 1925. She also contended that the English law relating to "probate causes and proceedings" which was introduced by the Supreme Court Ordinance, s.6 could not be interpreted as including the law relating to testamentary succession or distribution of estates on intestacy; and that, even if the Administration of Estates Act applied, the consent of the court to the sale would not be required. The respondent contended (a) that s.6 of the Supreme Court Ordinance (*cap.* 205) was in effect an exception to the rule that

no statute of general application not in force in England in 1880 could apply to Sierra Leone, in that it intended "probate causes" to be governed by any future English law on the subject; (b) that the phrase "probate causes" did include the law as to testamentary succession and distribution of intestate estates; and (c) that s.6, by the application of the Administration of Estates Act, 1925, repealed s.13 of the Intestate Estates Ordinance (*cap.* 104), dealing with the distribution of real estate, and that section only.

The appeal was allowed.

Legislation construed:

Intestate Estates Ordinance (Laws of Sierra Leone, 1925, *cap.* 104), s.13:

"All land of any deceased person, whereof he shall not have disposed by his will, shall be divisible and distributable in the same manner as personal estate is now divisible and distributable, and amongst the same persons. . . ."

Supreme Court Ordinance (Laws of Sierra Leone, 1925, *cap.* 205), s.2:

". . . 'Probate actions' shall include actions and other matters relating to the grant or recall of probates, or of letters of administration other than common form business."

s.6: The relevant terms of this section are set out at page 378, lines 35—39.

Barlatt and *Beoku-Betts* for the appellant;
Davies and *Boston* for the respondent.

MACQUARRIE, J. (Sierra Leone):

This is an appeal from a judgment of the Supreme Court of Sierra Leone in its ordinary jurisdiction, dated January 3rd, 1934 dismissing an action for specific performance of a contract for the sale of land on the ground put forward by the respondent vendor that she had no sufficient right to sell. The respondent in the court below is the administratrix of the estate of her husband who died intestate in November 1932. In August 1933 a contract of sale of land forming part of the estate was concluded between her as administratrix and the appellant. The appellant paid the price agreed, but the respondent later refused to complete on the ground that she had, since making the contract, discovered that an infant grand-niece of the deceased was entitled to a share in the estate and that, under s.24 of the Intestate Estates Ordinance (*cap.* 104), it was necessary to obtain the consent of the court to the sale, as the consent of "all persons beneficially interested" could not be obtained; that this not having been done, she was unable to complete the sale. She therefore resisted a decree for specific performance and paid the purchase money into court.

The court below held that the infant grand-niece was entitled to a share in the estate and that, as the necessary consent of the court had not been obtained to the sale of the land, the contract "was void in that the vendor was legally incapacitated from disposing of the land without the consent of the court." For these reasons the action was dismissed with costs. No claim was made that the respondent, the administratrix, should obtain the consent of the court; nor did any question arise as to the incapacity being due to her own inaction.

This decision involves two findings which are incorporated in the judgment of the court, namely: (a) that the phrase "for the time being" in s.6 of the Supreme Court Ordinance (*cap.* 205) means the time when any event might occur in respect of which the law was to be administered — in this case the death of the respondent's husband, intestate, in November 1932; and (b) that the phrase "probate causes and proceedings" in the same section includes, in the words of the trial judge, "matters *sui generis*" — by implication the English Administration of Estates Act, 1925 which amongst other matters altered the law of devolution in intestacy, admittedly giving the grand-niece in the circumstances of this case a right to share in the estate.

The grounds of appeal may be summarised as follows:

(i) The phrase "for the time being" must be interpreted in reference to its context, and to mean "at this time" *i.e.*, the date of the Ordinance, namely May 30th, 1904, thereby excluding the application of the Act of 1925.

(ii) The words "probate causes and proceedings" cannot include the law as to testamentary succession or as to distribution of estates on intestacy.

(iii) Even if the English Administration of Estates Act, 1925 applies, the consent of the court would not be required.

I am of opinion that the appellant succeeds on points (i) and (ii).

Firstly, as to the meaning of "for the time being" in s.6 of the Supreme Court Ordinance (*cap.* 205) which reads as follows:

> "The jurisdiction hereby conferred upon the Court in probate, divorce and matrimonial causes and proceedings may, subject to this Ordinance and to Rules of Court, be exercised by the Court in conformity with the law and practice for the time being in force in England."

Mr. Barlatt, for the appellant, at first argued that the Supreme Court Ordinance, 1932 applied, but later agreed that it could not

apply as it only operates as from January 1st, 1933, while the death took place in November 1932.

In his fourth ground of appeal he argued "that the phrase is restricted from application in its general sense," *i.e.*, "from time to time," by the context.

The learned trial judge based his opinion of the meaning of the phrase on a passage in 3 *Stroud's Judicial Dictionary*, 2nd ed., at 2058) which reads as follows:

> "The phrase 'for the time being' may, according to the context, mean the time present, or denote a single period of time; but its general sense is that of time indefinite, and refers to an indefinite state of facts which will arise in the future, and which may (and probably will) vary from time to time,"

and apparently considered that the context did not affect its application. Here, with respect, I disagree with him. The cases referred to in *Stroud* do not include such a case as this, and it seems to me that these words are not apt in a statute to apply laws which might be made in the future. I think the "time" must be taken to be the time when the Ordinance speaks, *i.e.* at its commencement.

Again, the phrase "from time to time" in the penultimate line of s.2 of the Ordinance is used to express the meaning of "for the time being" contended for. Those words might have been expected to be used here, and not the latter.

Mr. Boston, for the respondent, referred to the intention of the Ordinance and submitted that s.6 is in effect an exception to s.7. It appears to me that strong evidence would be required of the intention of the legislature to effect such an unusual purpose as the wholesale application of all future English law, whatever it might be, on the subject in question, as well as on those of divorce and matrimonial causes. No such evidence exists.

I am prepared to agree with Mr. Boston to this extent — that s.6, so far as it can be considered an exception to s.7, may affect it to the extent of applying the law at May 30th, 1904, instead of January 1st, 1880, but no further.

This being so, by s.13 of the Intestate Estates Ordinance (*cap.* 104) the law as to distribution is the Statute of Distribution, 1670 and the grand-niece has no interest.

This is sufficient to dispose of the case, it being admitted that, if the grand-niece has no interest, the consent of the court is

unnecessary and the respondent, the administratrix, would have no defence to the action.

Also, as to the meaning of "probate causes and proceedings," Mr. Barlatt contended that the phrase cannot mean more than causes and proceedings connected with the grant or recall of probate or letters of administration. He pointed to the definition of "probate actions" in s.2 of the Supreme Court Ordinance (*cap.* 205) and argued that s.13 of the Intestate Estates Ordinance (*cap.* 104), which provides that land should on intestacy be "divisible and distributable in the same manner as personal estate is now divisible and distributable, and amongst the same persons," was not affected. The effect of that section is to make land divisible and distributable according to the Statute of Distribution, 1670. Mr. Boston argued that the phrase in question does include the law as to testamentary succession, devolution or intestacy and administration of assets; but that one effect of s.6 is, by the application of the Administration of Estates Act, 1925, to repeal s.13 of the Intestate Estates Ordinance, and that section only. I am unable to agree with him; it seems to me it would follow that the whole Ordinance would stand repealed, with the result that s.24, requiring the consent of the court to a sale of land, would no longer be in force and the defence to the action would disappear. I am, however, of opinion that the phrase in question has the meaning contended for by the appellant.

It would, I think, be contrary to general rules of interpretation of statutes to hold that by such words the law of devolution and distribution on intestacy is radically altered, and that such an important Ordinance, the Intestate Estates Ordinance, which was passed in 1887 and has since been amended from time to time, is repealed. In the words of its long title it is "an Ordinance to alter the succession to real estate, and to amend the law relating to the distribution and administration of the estates of intestates and to provide for the due administration of estates whereof there is no administrator and for other purposes." In my opinion the subject of such Ordinance is not included in the phrase "probate matters and proceedings." This also disposes of the third ground of appeal to which I have referred, namely, that the consent of the court is not required even if the Administration of Estates Act, 1925 is held to apply.

It follows that the consent of the court to the sale is not required; and that the respondent has no defence to the action for specific performance. The parties agree on £24 in respect of mesne

profits. In my opinion, therefore, the appeal should be allowed and there should be judgment that the appellant is entitled to specific performance; to the payment of £24 as mesne profits, and her costs in this court and the court below.

BUTLER-LLOYD, J. (Nig):

The facts of this case are not in dispute and are sufficiently set out in the judgment which has just been read and with which I fully concur. It seems to me, however, that the matter may be stated even more simply.

The appeal turns on the construction to be given to s.6 of the Supreme Court Ordinance (*cap.* 205) which has already been read.

This Ordinance was passed in 1904 and it is argued for the respondent that by virtue of this section the English Administration of Estates Act of 1925 was in force in Sierra Leone at the material time, namely, 1932. It is admitted that if this is not the case the respondent must fail since, by the Statute of Distribution, 1670, which was applied to this Colony by s.13 of the Intestate Estates Ordinance (*cap.* 104), the interest of the grand-niece of the deceased, on which the defence is founded, would not arise.

Now, whatever may have been the exact intention of the legislature in framing s.6, nothing is clearer than that that section is subject to and overridden by s.8 which makes all statutes applied by the Ordinance subject to existing ordinances of the Colony not thereby repealed. The Intestate Estates Ordinance was not repealed and must be taken to remain in full force and effect.

This disposes of the respondent's case, but I desire to point out that even were the Intestate Estates Ordinance repealed by s.6 of the Supreme Court Ordinance (*cap.* 205), the respondent would be no better off since she rests her case on s.24 of that Ordinance, and I am certainly not prepared to accede to the proposition that s.24 remains in force while s.13 does not.

In my opinion the appeal should be allowed.

DEANE, C.J. (G.C.):

I have had the advantage of reading the judgment of my learned brothers, and agree with the conclusions at which both have arrived, *viz.*, that the Intestate Estates Ordinance has not been repealed by s.6 of the Supreme Court Ordinance (*cap* 205). I would only add that it is to me almost inconceivable that the legislature, had they meant to repeal that Ordinance, would not have said so, instead of leaving to inference such an important result.

The appeal will be upheld, and there will be an order for specific performance and judgment for £24 damages by way of mesne profits. The respondent must also pay the costs of this appeal and of the proceedings in the court below.

Appeal allowed.

CONTEH v. ANTHONY

Circuit Court (Webber, J.): February 8th, 1935

[1] **Evidence — burden of proof — negligence — duty of care — driver in collision with straying animal ought to prove collision unavoidable by exercise of reasonable care:** The fact that an animal is straying wrongfully in the highway does not relieve the driver of a motor vehicle of his duty to drive with reasonable care so as to avoid it, and in the event of a collision with the animal the burden of proof lies on the driver to establish that he took all reasonable care and that despite this the collision was unavoidable (page 383, line 30—page 384, line 14).

[2] **Road Traffic — negligence — duty of care — injury to animals — driver in collision with straying animal ought to prove collision unavoidable by exercise of reasonable care:** See [1] above.

[3] **Tort — negligence — duty of care — injury to animals — driver in collision with straying animal ought to prove collision unavoidable by exercise of reasonable care:** See [1] above.

The plaintiff appealed to the Circuit Court against the decision of the District Commissioner at Bo dismissing his claim for damages for the loss of a cow.

The defendant, a lorry driver, collided with the plaintiff's cow. He denied negligence, contending that the plaintiff was guilty of contributory negligence in leaving his cow unattended on the highway. The plaintiff contended that even had he been at fault himself, the defendant's duty of care would not have been dispensed with for that reason, and he further contended that the onus was on the defendant to show that he exercised all reasonable care and could not have avoided the accident, which he had failed to do.

The appeal was allowed.

Cases referred to:

(1) *Baker v. Longhurst & Sons, Ltd.*, [1933] 3 K.B. 461; (1932), 149 L.T. 264.

(2) *Butterfield v. Forrester* (1809), 11 East 60; 103 E.R. 926, applied.

(3) *Davies v. Mann* (1842), 10 M. & W. 546; 152 E.R. 588, applied.

(4) *McLean v. Bell*, [1932] All E.R. Rep. 421; (1932), 147 L.T. 262.

(5) *Tart v. Chitty & Co.*, [1933] 2 K.B. 453; [1931] All E.R. Rep. 826.

Beoku-Betts for the plaintiff;
Nelson-Williams for the defendant.

WEBBER, J.:

This is an appeal from the decision of the District Commissioner at Bo dismissing a claim by the plaintiff for £7.3s.0d damages for the loss of a cow. The grounds of appeal are:

(a) The decision was against the weight of evidence and wrong in law.

(b) The District Commissioner had no authority, jurisdiction or power to award the defendant the costs of the former hearing of this case on appeal before the Circuit Court when the judge of the Circuit Court, in allowing the appeal and sending the case for retrial, definitely awarded to the plaintiff the costs of such an appeal.

The gist of the argument as to the first ground was that there was evidence to show that the defendant could have, by reasonable care, avoided the accident and counsel for the plaintiff quoted an authority from 36 *English and Empire Digest*, 1st ed., at 109, para. 726 and the following cases in support of his argument: *McLean* v. *Bell* (4), *Tart* v. *Chitty & Co.* (5), and *Baker* v. *Longhurst & Sons, Ltd.* (1).

Counsel for the defendant argued that there was no finding of negligence on the part of the defendant; in reply counsel for the plaintiff argued that negligence in this case was a question of law, quoting the maxim *res ipsa loquitur*. I am unable to find on the evidence that there was any contributory negligence on the part of the plaintiff nor does the evidence show that the proximate cause of the accident was the plaintiff's negligence. I have examined the cases quoted by the plaintiff's counsel and I find that they support his contention that the onus was on the defendant to show that he exercised all reasonable care and could not have avoided the accident. Even if the plaintiff was at fault, Lord Ellenborough, C.J. in the case of *Butterfield* v. *Forrester* (2) says as follows (11 East at 61; 103 E.R. at 927):

"One person being in fault will not dispense with another's

using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant and no want of ordinary care to avoid it on the part of the plaintiff."

This principle is reaffirmed in the case of *Davies* v. *Mann* (3) in which an ass was killed on the highway. Parke, B. in the course of his judgment said (10 M. & W. at 549; 152 E.R. at 589):

"...[A]lthough the ass may have been wrongfully there, still the defendent was bound to go along the road at such a pace as would be likely to prevent mischief."

And Lord Abinger, C.B. said (10 M. & W. at 548; 152 E.R. at 589):

"The defendant has not denied that the ass was lawfully in the highway... but even were it otherwise, it would have made no difference...."

In this case the court below did not find, nor did the evidence show, that the defendant exercised all reasonable care to avoid the accident. The evidence shows that there was an opportunity of avoiding the accident if proper brakes had been applied and the lorry had stopped. The onus of proof that the accident was unavoidable by the exercise of reasonable care was on the driver of the lorry and this onus he has not discharged.

The decision is reversed and judgment is entered for the plaintiff for £7.3s.0d. and for costs in the court below and in this court. It is unnecessary to deal with the second ground of appeal, but suffice it to say that the court below had no power to award costs of the former appeal.

Order accordingly.