case was not afforded to the respondent. The rules of court governing appeals must be strictly observed.

Appeal dismissed.

JOHNSON v. WILLIAMS

West African Court of Appeal (Macquarrie, J. (Sierra Leone), Strother Stewart, J. (G.C.) and Brooke, J. (Nig.)):
April 16th, 1935

[1] **Civil Procedure — appeals — matters of fact — trial by judge alone — appellate court to be guided by trial judge's opinion as to credibility of witnesses but also to consider other facts that may justify different conclusion:** Where the question of the credibility of witnesses arises an appeal court always is, and must be, guided by the impression made on the judge who saw and heard the witnesses, though there may be circumstances other than manner and demeanour which may show whether a statement is credible and may justify the appeal court in differing from the trial judge (*per* Brooke, J. at page 394, line 28—page 395, line 3).

[2] **Civil Procedure — appeals — matters of fact — trial by judge alone — appellate court to presume judge's decision on facts right — duty to rehear case, reconsider evidence and overrule judge if necessary:** Where a case has been tried by a judge without a jury the appeal court is less bound by the decision of the court below on questions of fact than it is on hearing applications for a new trial after a trial and verdict by a jury, but the presumption is that the decision appealed against is right. As, however, it is the appeal court's duty to rehear the case, it must reconsider the evidence carefully and not shrink from overruling the judgment if on full consideration it concludes that the judgment was wrong (*per* Brooke, J. at page 394, line 7—page 395, line 10).

[3] **Contract — duress and undue influence — undue influence — burden of proof — burden on doctor to disprove undue influence in dispute over transaction with patient:** Where it has been established that a doctor-patient relationship exists, it is presumed that the doctor unduly influences the patient in any transaction between them and the onus is on him to rebut such a presumption (page 392, lines 10—11, lines 37—40; page 393, lines 4—8).

[4] **Evidence — functions of court — appellate court — matters of fact — trial by judge alone — appellate court to be guided by trial judge's opinion as to credibility of witnesses but also to consider other facts that may justify different conclusion:** See [1] above.

[5] **Evidence — functions of court — appellate court — matters of fact — trial by judge alone — appellate court to presume judge's decision on facts right — duty to rehear case, reconsider evidence and overrule judge if necessary:** See [2] above.

[6] **Evidence — presumptions — presumptions of fact — presumption of undue influence in doctor-patient relationship — burden on doctor to rebut presumption in dispute over transaction with patient:** See [3] above.

The appellant brought an action in the Supreme Court against the respondent to have a deed of conveyance set aside on the ground that it was obtained from her by undue influence on the part of the respondent.

The appellant was an elderly widow and the respondent a young doctor who first came to her house to attend a female relative of his who was living with the appellant. From that time on the appellant no longer consulted her previous doctor but only the respondent, who attended her during two serious illnesses and generally became her medical adviser. According to the appellant, she agreed to sell a house to the respondent and he gave her a sum of money as part payment, whereupon she executed a deed of conveyance to him. The full purchase price was never paid, so the appellant returned the sum of money to the respondent and asked him for a receipt as proof that the deed of conveyance was thereby cancelled. The respondent refused to give her a receipt, but returned the deed of conveyance "as a security." According to the respondent, the house was given to him by the appellant as a gift, and the money he gave her was not a part payment for the house but a token of gratitude. He said further that the appellant had ostensibly sold the house to him as she did not want others to know that it had been a gift, and she returned his money when she heard that he had mortgaged a house of his in order to raise it. The action was tried by a judge without a jury; he found that the appellant had made a spontaneous gift of the house to the respondent, and gave judgment in his favour.

On appeal, the West African Court of Appeal considered (a) the presumption of undue influence raised by the doctor-patient relationship; (b) how far, in a case tried without a jury, the court should be guided by the trial judge's opinion as to the credibility of witnesses and his finding on the facts; and (c) what other considerations should be taken into account when deciding whether to uphold or reject the decision of the trial judge.

The appeal was allowed.

Cases referred to:

(1) *Coghlan v. Cumberland*, [1898] 1 Ch. 704; (1898), 78 L.T. 540, *dictum* of Lindley, M.R. applied.

(2) *Colonial Securities Trust Co. v. Massey*, [1896] 1 Q.B. 38; (1895), 73 L.T. 497, applied.

(3) *Macaulay v. Tukuru* (1899), 1 Nig. L.R. 35, followed.

C.E. Wright for the appellant;
Boston for the respondent.

STROTHER STEWART, J. (G.C.):

This is a case in which the appellant seeks that a deed of conveyance in which certain property was conveyed by her to the respondent should, *inter alia*, be set aside on the ground that it was obtained from her by undue influence arising from the fact that the respondent was her medical adviser.

The appellant is an elderly women who is a widow and is 86 years old. The respondent is a much younger man. They are not related to each other. The respondent commenced practising as a medical man in 1919 and in 1920 attended an elderly female relative of his who was a friend of the appellant and resided with her. The appellant says that that was the first occasion on which he attended her. The respondent says that he had known the appellant since he was a boy, but there is nothing to show that there was any special relationship between her and the appellant up to the time he came to her house after he qualified as a medical man.

The appellant appears to have been a healthy woman for her age, but what ailments she had, after the time the respondent attended his relative who was residing with her, were treated by the respondent. She appears to have had another doctor before such time, but he never attended her again after the respondent began to attend her. The appellant had two serious illnesses in 1928 and 1930, on which occasions the respondent attended her. He also appears to have given her tonics on other occasions. The appellant has had no illness since 1930. I am of opinion that the proper deduction to be derived from the evidence is that the respondent was, up to 1930, the medical adviser of the appellant.

The transaction which is impugned in this case took place towards the end of that year and the beginning of 1931. It concerned one of three houses belonging to the appellant. The versions of the appellant and the respondent differ as to the nature of the transaction.

The appellant says that she agreed to sell the house to the respondent for the sum of £1,500 and that he paid her the sum of

£200 on account. She executed a deed of conveyance of the house to the respondent, dated February 4th, 1931, in which it was set out that the purchase price was £1,500, and receipt of that sum was therein acknowledged. It is common ground that such purchase price was never paid, and the said sum of £200 was subsequently repaid to the respondent by the appellant. The appellant asked the respondent for a receipt for the said sum of £200, as being part payment of the purchase price of the said house, and as cancelling the deed of conveyance already referred to. The respondent refused to give her the receipt she asked for, characterising it as "a wicked receipt," but accepted the said sum of £200 and gave her back the said deed of conveyance "as a security." The respondent, on the other hand, says that the house was given to him as a gift and that the £200 he gave her was not in respect of the purchase of the house, but was a token of friendship and gratitude given by him to the appellant at the suggestion of the appellant. He says that the form in which the house was conveyed to him was also the suggestion of the appellant, as she did not want it to be known that she had given the house to the respondent as a gift, as she might be pestered by other people hoping to benefit in a similar way. He said she returned the £200 to him when she learned that he had mortgaged a house of his in order to raise it. The case is being fought by the respondent on the ground that the house was given to him as a gift.

The learned trial judge decided in favour of the respondent on the ground that the evidence did not disclose a fiduciary relationship as pleaded, and that the relationship between the appellant and the respondent was rather that of *quasi*-mother and son. He said it was difficult to understand how a casual attendance on two occasions could be said to create such a relationship as to make that relationship of a confidential and fiduciary character. He came to the conclusion that the appellant had made the gift spontaneously, and well understanding its effect.

I differ, with great reluctance, from a learned and experienced judge, but I am of opinion that the attendances of the respondent were not merely two "casual" attendances. There is no evidence that her old family doctor ever attended her after 1920, when the respondent first visited her house as a medical man. The evidence on the other hand shows that the respondent attended to all her ailments after that date, and there is nothing to show that she ever dispensed with his services as a medical man, or would not have

called him in as her medical attendant if she had had any illness subsequent to her last one. The appellant admitted that her illness in 1930 was a serious one and that she was in grave danger, and that she thought she would not recover. All the evidence tends to show that she had great confidence in the respondent, and was very much impressed by what he had done for her in her illnesses. I think, therefore, that the relationship of medical man and patient existed at the time the transaction already alluded to took place.

Such a relationship creates a presumption of undue influence, and the onus is upon the respondent to rebut such a presumption. I do not think he has done so. I think that if, in fact, the relationship between the appellant and the respondent became that of *quasi*-mother and son, it is impossible to say that it did arise out of the relationship of medical man and patient.

It is curious that when, according to the evidence of the respondent, he was offered a house, the house he accepted was the best one, and one which was the chief source of the appellant's income. It was the respondent who suggested the solicitor who should advise the appellant as to the transaction, and the respondent saw the solicitor before he interviewed the appellant. The respondent was present when the deed was executed. It was the respondent's wife, who had only known the appellant since the said transaction, who accompanied her when she went to withdraw her will — which dealt otherwise with the property than as set out in the said transaction — from the registry. It was the respondent who paid the cost of the conveyance.

I am not satisfied that the appellant was put in a position to have absolutely independent advice, or to exercise her will entirely free from the respondent.

The appellant appears to have quickly made up her mind to denounce the said deed of conveyance, and it is significant that although she signed the authority to the tenant of the house in question to pay the rent to the respondent when the respondent brought it to her, the very next day, when the respondent was absent, she was personally countermanding such an order.

I do not think, therefore, that the respondent has discharged the onus placed upon him of proving that the transaction complained of was not the result of the influence he had acquired over the appellant as her medical adviser.

I think, therefore, that the appeal should be allowed with costs

in this court and in the court below, and that an order as prayed by the appellant be made. The court below is to carry it out.

MACQUARRIE, J. (Sierra Leone):

I agree. In my opinion, the presumption of undue influence which arises from the existence of the relationship of doctor and patient at or about the time of the execution of the deed has not been rebutted by the respondent, on whom lies the onus of doing so. The learned trial judge held that the respondent had proved that the gift was the spontaneous act of the appellant fully appreciating the effect of the deed she signed. I am unable to agree with this finding. The finding that the respondent never at any time used his influence or suggested to the appellant that she should make this gift is of a negative nature and, in view of his conduct throughout, is not such as to rebut the presumption. He took a part in getting the solicitor, Mr. Barlatt, for the appellant, gave him information concerning the transaction before he went to see the appellant; was himself present with the solicitor's clerks and no one else at the execution of the deed; and was the channel of communication between the appellant and Mr. Barlatt after their interview. Some of these matters also bear on the question of Mr. Barlatt's independence, on which question the court below said he was not the respondent's solicitor at the time. I do not think this is a sufficient proof of Mr. Barlatt's independence, so as to make his advice to the appellant such as should be given in her interests only. And on careful consideration of Mr. Barlatt's evidence, I am unable to hold that he sufficiently brought home to her the exact consequences of her act in signing the deed; although no doubt he acted in all good faith.

Finally, the presence of the respondent, the recipient of the gift, and the absence of anyone to advise the appellant, at the actual execution of the deed, are to my mind circumstances which, amongst others, make it impossible to infer a spontaneous act of free will on the part of the appellant.

The statements made by her to the respondent's mother and wife do not appear to me to be of any value. The former went to thank the appellant actually before the deed was made; while the latter met the appellant for the first time after it was made. At such time the appellant was still subject to the influence of the relationship.

This opinion does not in any way ignore the findings of fact by the court below, but does draw inferences from these facts which

differ from those drawn by the court below. For these reasons I agree with the order proposed in the judgment that has just been delivered.

BROOKE, J. (Nig.):

Counsel for the appellant in opening his case rightly prefaced his remarks with a reference to the fact that the judgment is appealed from as being against the weight of evidence. It is appropriate to consider, as in the case of *Macaulay* v. *Tukuru* (3), the principle on which this court should act when dealing with the question as to whether a judgment is against the weight of evidence. It has been held in England that an appeal from a judge is not governed by the rules applicable to the granting of new trials after a trial and verdict by a jury. This was laid down by the Court of Appeal in *Coghlan* v. *Cumberland* (1). The following is an extract from the judgment of the court, delivered by Lindley, M.R. ([1898] 1 Ch. at 704—705; 78 L.T. at 540):

> "The case was not tried with a jury, and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant

the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

An extract from the judgment of Lord Esher, M.R. in *Colonial Securities Trust Co.* v. *Massey* (2), quoting Lopes, L.J., may also be mentioned ([1896] 1 Q.B. at 39—40; 73 L.T. at 498):

"Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant."

Applying this principle one comes with great reluctance to the conclusion now arrived at in the judgment just read, after listening to the exhaustive arguments of counsel and reviewing all the facts, that the relationship of medical attendant and patient was established, that the presumption of undue influence thereby created has not been rebutted, and that this appeal must be allowed.

Appeal allowed.

REX v. SARD

West African Court of Appeal (Webber, C.J. (Sierra Leone), Strother Stewart, J. (G.C.) and Brooke, J. (Nig.): April 16th, 1935

[1] **Courts — Supreme Court — jurisdiction — criminal jurisdiction — Governor's fiat transferring case under s.50 of Protectorate Courts Jurisdiction Ordinance, 1932 not condition precedent to court's power to try non-native for offence against native in Protectorate:** Section 50 of the Protectorate Courts Jurisdiction Ordinance, 1932 is permissive and merely gives a general power to the Governor to transfer proceedings to any court of the Colony; so that its terms cannot be read as being a condition precedent to the assumption of jurisdiction by the Supreme Court to try a non-native for an offence against a native in the Protectorate (page 400, line 34—page 401, line 3).

[2] **Criminal Law — provocation — consideration in judge's summing-up — where evidence of provocation, jury to be directed on it even though defence not raised:** Where there is evidence of provocation which would, if the jury believed it, justify a verdict of manslaughter rather than murder, the judge must put that possibility to the jury even though the accused has not relied on that defence (page 402, lines 17—20).

[3] **Criminal Procedure — appeals — appeals against conviction — wrongful admission of corroborative evidence — fatal to conviction unless jury**