inspection of the exhibits that Ahmed Alhadi did not convey the hereditaments referred to in Exhibits K, L, M: and it is not unlikely that the incorrect premise as to who did in fact convey the hereditaments referred to in Exhs. K, L and M, might have misled the trial judge in properly directing his mind to the evidence before him.

The evidence of the Cause Book and of the recitals in Exhibits K, L, M, irresistibly draw us to the conclusion that the deed of family arrangement was approved by a judge's order dated July 14, 1948. Having so held, it follows that the Supreme Court was not competent to renew the judge's order dated July 14, 1948.

No. 2 Kissy Road, however, was not included in the deed of family arrangement. The facts are that the testator at the time of his death had not fully paid the price for these premises.

By his will he devised No. 2 Kissy Road to the defendant/appellant for the term of her life or until remarriage with remainder to Antumani his heirs and assigns in fee simple and as tenants in common.

The learned trial judge described the conveyance of these premises to the defendant/appellant as a flagrant breach of trust and contrary to the expressed provision of the testator's will. It is clear that on testator's death part of the purchase price on No. 2 Kissy Road was unpaid. That unpaid purchase price became a charge on No. 2 Kissy Road and unless there was a contrary intention in the will the provisions of the Real Estate Charges Acts, 1854–1877 (Locke Kings Acts), should apply.

We can find no contrary intention in the will. The premises No. 2 Kissy Road are charged with the payment of the unpaid purchase money and the administrator cannot apply moneys from the estate to pay off this charge. The defendant/appellant who is residuary devisee and legatee under the will paid off the charge and the hereditaments were in our opinion rightly conveyed to her.

For the reasons already stated we will allow this appeal and set aside the judgment (including the order as to costs) of the learned trial judge.

On the question of costs the defendant/appellant will have her taxed costs in this court and in the court below.

[COURT OF APPEAL]

Freetown
July 3,
1961

THOMAS GODWIN . . . . . *Appellant*

v.

REGINA . . . . . *Respondent*

Ames P.
Benka-Coker
C.J.
Bankole Jones
J.

[Cr. App. 3/61]

Criminal law—Procedure—Trial—Evidence—Deposition—Condition to be satisfied before deposition may be put in evidence—Criminal Procedure Ordinance (Cap. 39, Laws of Sierra Leone, 1960), s. 58—Whether defendant would have been convicted on evidence other than deposition.

Appellant was convicted of stealing a welding machine. The most important witness for the prosecution, one Alhusine Kamara, was not present at the trial, and his deposition, taken by the committing magistrate, was put in evidence.

Section 58 (*a*) of the Criminal Procedure Ordinance provides that a deposition may be put in evidence if the following conditions are satisfied:

> "the deposition must be the deposition of a witness whose attendance at the trial is stated to be unnecessary in accordance with the provisions of section 115 or of a witness who cannot be found, or whose attendance cannot be procured without an amount of delay, expense or inconvenience which, in the circumstances of the case, the court considers unreasonable, or who is proved at the trial by the oath of a credible witness to be dead or insane, or so ill as not to be able to travel, or to be kept out of the way by means of the procurement of the accused or on his behalf."

The evidence led by the prosecution as the ground for admitting the deposition in evidence was given by a police sergeant, who testified:

> "It was part of my duty to warn witnesses to come to court for these sessions. In the course of my duty I went to the house of one Alhusine Kamara, Delco Road, Lunsar, on April 9, 1961, at about 9 a.m. I did not meet him. I left a message for him. I sent a wireless message yesterday to the police at Lunsar from Makeni. The witness is not in court."

The sessions at Makeni opened on April 10, and appellant's case was started on the 11th and completed on the 12th, which was the day on which the deposition was admitted in evidence. Lunsar is not more than an hour's journey from Makeni by motor.

Held, quashing the conviction (1) that the deposition was wrongfully admitted; and

(2) that it was not possible to say that, if the deposition had not been admitted, appellant would have been convicted on the other evidence.

The appellant appeared for himself.

John H. Smythe (Solicitor-General) for the respondent.

AMES P. The appellant was convicted of stealing a welding machine. The machine is a heavy thing, weighing five cwt. When it has to be moved, it is loaded into a lorry by means of a crane. It was stolen from the P.W.D. Compound at Massorie, Mile 90, during the Christmas holidays.

The wire fencing around the compound was not damaged, and there is a gate watchman, and at night also an inside watchman.

It was recovered on January 4, when it was found in the compound of one Mr. Kanu at Marampa Road, Lunsar.

The most important witness for the prosecution, one Alhusine Kamara, was not present at the trial, and his deposition, taken by the committing magistrate, was put in evidence.

The appellant was not represented by counsel, and his third ground of appeal objects to the admission in evidence of this deposition, and means that it was wrongfully admitted in evidence.

This matter is governed by section 58 of the Criminal Procedure Ordinance, Cap. 39. The conditions, which have to be satisfied before a deposition may be put in evidence, are set out in items (*a*), (*b*) and (*c*) of that section, which are as follows:

> "(*a*) the deposition must be the deposition of a witness whose attendance at the trial is stated to be unnecessary in accordance with the provisions of section 115 or of a witness who cannot be found, or whose attendance cannot be procured without an amount of delay, expense or inconvenience which, in the circumstances of the case, the court considers unreasonable, or who is proved at the trial by the oath of a

credible witness to be dead or insane, or so ill as not to be able to travel, or to be kept out of the way by means of the procurement of the accused or on his behalf;

(*b*) it must be proved at the trial either by a certificate purporting to be signed by the magistrate before whom the deposition purports to have been taken or by the clerk to such magistrate, that the deposition was taken in the presence of the accused, and that the accused or his advocate had full opportunity of cross-examining the witness;

(*c*) the deposition must purport to be signed by the magistrate before whom it purports to have been taken."

These conditions have to be proved by the prosecution to exist. In this case (*b*) and (*c*) were shown to exist.

Item (*a*) contains various alternatives. The evidence led by the prosecution, as the ground for admitting the deposition in evidence, was given by a police sergeant, and was:

> "It was part of my duty to warn witnesses to come to court for these sessions. In the course of my duty I went to the house of one Alhusine Kamara, Delco Road, Lunsar, on April 9, 1961, at about 9 a.m. I did not meet him. I left a message for him. I sent a wireless message yesterday to the police at Lunsar from Makeni. The witness is not in court."

The sessions at Makeni opened on April 10, and this case was started on the 11th and completed on the 12th—and it was on the 12th that the deposition was admitted in evidence. So the police did not try to warn the witness until the day before the session was due to start. The sergeant did not say if he took a subpoena; he says that he left a message for him, which suggests that the witness was living there, but happened to be out when the sergeant called. So he was not a man "who cannot be found." His place of residence was correctly known. A message was left for him, which is not to say that any message reached him. The distance from Lunsar is not more than an hour's journey by motor. There was nothing whatever to suggest that to get the witness would have caused such delay, expense or inconvenience as would be unreasonable "in the circumstances of the case." Nor was the witness dead, insane, too ill to travel, or being kept out of the way by the accused. He was not a witness conditionally bound over under section 115.

We find that there was no sufficient proof of the existence of any ground on which this witness's deposition could have been put in evidence, and we hold that it was wrongfully admitted.

Its wrongful admission did not vitiate the whole trial. It makes it necessary to consider what evidence there was, apart from this deposition. It is not possible to say that the appellant would nevertheless have been convicted on the rest of the evidence. On the contrary we think it most unlikely.

Consequently the conviction must be quashed.
