Freetown
*Feb.* 19,
1963

Ames Ag.P.
Dove-Edwin J.
Bankole Jones
J.

[COURT OF APPEAL]

HEPHZEBAH TAYLOR . . . . . *Appellant*

*v.*

VIDAL F. O. LUKE AND OTHERS . . . . . *Respondents*

[Civil Appeal 3/63]

*Deeds—Wills—Delivery of registered deed containing clause "To commence on the death of the donor"—Effect of clause in subsequent will purporting to revoke deed.*

In 1950 Margaret Macaulay (the testatrix) made a conveyance of her properties in Freetown to Cleopatra Aribaut and Juliana Tharko (the donees) for valuable consideration and for "love and affection and diverse other good reasons." In this deed, it was stated that it was "To commence on the death of the donor." The testatrix registered the deed and delivered it to Cleopatra Aribaut, and the donees then started to receive the rents from the property.

By her will dated May 20, 1955, the testatrix purported to "totally revoke" the voluntary conveyance, and proceeded to devise the property to her executors and trustees upon certain trusts. She died in 1957. Her executors disregarded the revocation clause in her will, and, in their declaration of estate for probate, did not include any realty as part of her estate.

The appellant, who was one of the beneficiaries named in the will, caused an originating summons to be filed against the executors, asking for a declaration that, since the deed of 1950 was only to commence on the death of the deceased, it was no more than an escrow, and that, since the testatrix by her will had revoked the deed, she died possessed of the real property, which was the subject of the trusts created in her will.

The Supreme Court found that the words used in the deed did not create an escrow, that the deed had no revocation clause and that, as it had been sealed and delivered, it could be set aside only on the ground of fraud, coercion or undue influence. The application was dismissed, and appellant appealed against this decision.

*Held*, dismissing the appeal, that, notwithstanding the recital in the deed that it was "To commence on the death of the donor," the unambiguous language of its operative clause, its execution and delivery to the donees, its registration and the entry into possession of the donees by the receipt of the rents from the property from the time of the deed until the death of the donor seven years later indicated that the deed was meant to be, and was, an effective conveyance of the donor's interest in the property to the donees. As such, it could not be set aside by the donor's subsequent will.

Cases referred to: *Governors and Guardians of the Foundling Hospital* v. *Crane and another* [1911] 2 K.B. 367; *Boughton* v. *Boughton* (1739) 26 E.R. 393.

*Nathaniel A. P. Buck* for the appellant.
*Edward J. McCormack* for the respondents.

DOVE-EDWIN J.A. On April 30, 1962, counsel for appellant, Hephzebah Taylor, caused an originating summons to be filed on behalf of his client against the executors of the will of Margaret Maude Hanson Macaulay

(deceased) and one of the beneficiaries. The summons was to determine clause 4 of the will of the said deceased Margaret Maude Hanson Macaulay—to answer three questions set out.

Clause 4 of the will states:

> " I hereby totally revoke the deed of gift of the houses and land situate lying and being at the corner of Regent Road and Horton Street in Freetown to the aforesaid Cleopatra Aribaut and another and I now give and devise the said houses and land to my executors upon trust to put under rentage for a period of one year after my death after the period of one year shall have elapsed I direct that the said property be sold either by private treaty or public auction and the proceeds derived therefrom be disbursed as under " (here testatrix named several beneficiaries).

Hephzebah Taylor, the appellant, was one of the beneficiaries named in the will, which was dated May 20, 1955. The testatrix died on March 13, 1957. On January 11, 1950, Margaret Maude Hanson Macaulay, the testatrix, made and executed a conveyance of her properties, that is, two pieces or parcels of land between Regent Road and Horton Street, Freetown, the southern half of lot 17 in the public register and plan of town lots for Freetown, to Cleopatra Aribaut and Juliana Vitella Davies Tharko for valuable consideration and for " love and affection and diverse other good reasons." This conveyance she registered and handed over to one of her donees, that is, Cleopatra Aribaut in person.

The executors of the testatrix, Margaret Maude Hanson Macaulay, declared her estate to be a total of £553 15s. 6d. personalty and no realty.

In the recital of the deed of January 11, 1950, appear the words " To commence on the death of the donor." In view of these words appearing in the deed and the executors of the will of the testatrix in their declaration of all the estate of the testatrix not including the two pieces of land mentioned in this deed of January 11, 1950, the originating summons was issued and the court asked to say that the words " To commence on the death of the donor " created an escrow and that, since the testatrix revoked the gift in the deed of January 11, 1950, in her will of May 20, 1955, it follows that on her death she possessed real property lying between Regent Road and Horton Street, Freetown, and that the executors should have included that in their declaration of her estate.

The learned trial judge had before him the deed of January 11, 1950, the deed of gift, as also the will of the testatrix, the declaration of the estate of the testatrix and affidavits by her executor and executrix. After hearing arguments for both the applicants and the respondents, the learned judge found that the words used did not create an escrow. He found that the deed creating the gift had no revocation clause and as it was sealed and delivered it could only be revoked or set aside in case of fraud, coercion or undue influence. As a result, the application by way of an originating summons was dismissed, and against the dismissal this appeal is lodged.

There are five grounds of appeal, of which the first two are:

> " (1) That the learned trial judge misdirected himself in holding that the deed of January 11, 1950, passed the properties situate at 77 and 77A, Regent Road (angle of Regent Road and Horton Street), Freetown, to Cleopatra Aribaut, one of the respondents herein, and another.

"(2) That the learned trial judge misdirected himself in holding that the said deed was not an 'escrow'."

I agree with the finding of the learned trial judge that the words used did not create an escrow. From all the circumstances in the case it is clear that when the deed was executed, registered and delivered by the donor to one of the donees herself she intended that the properties should pass at the time. When she made her will in 1955, she did not do anything with respect to the properties, which she knew were in the possession of the donees, who were receiving all the rents from the property and enjoying it as their own.

I think the case of *Governors and Guardians of the Foundling Hospital* v. *Crane and another* [1911] 2 K.B. 367 in point—

> "A document purporting to be a deed of conveyance by a person of his own property, which is delivered by him on a condition that it shall only become operative upon his death, is a testamentatory document and therefore cannot take effect as an escrow."

Grounds 3, 4 and 5 are matters of fact and the learned trial judge was right in his findings.

I think that the testatrix could not have revoked the gift in the deed of January 11, 1950, by her subsequent will. In the case of *Boughton* v. *Boughton* (1739) 26 E.R. 393, it is stated thus: "A voluntary deed kept by a person and never cancelled will not be set aside by a subsequent will." The present case is even stronger. The voluntary deed was registered and delivered.

In the circumstances, the conclusion of the learned trial judge being right, the answers to the questions in the summons should be: (a) that the deed of January 11, 1950, was properly executed and was enforceable. It was not void or voidable and it could not be revoked by the subsequent will of the testatrix; (b) that the executors acted properly in not declaring the properties in the deed of January 11, 1950, as part of the estate of the testatrix.

The other questions do not arise.

The appeal is dismissed.

AMES AG.P. I agree. I do not think that the deed of January 11 was an escrow. If it was meant to be a deed of gift and conveyance of the property to take effect only upon the death of the donor, it would have been an attempted testamentary disposition of property, which did not accord with the Wills Act, and so invalid for the same reasons as in the case of *Governors and Guardians of the Foundling Hospital* v. *Crane and another* [1911] 2 K.B. 367. I do not think that it was meant to be that. I think that, notwithstanding the last recital in the deed, the unambiguous language of its operative clause, its execution and delivery to the donees, its registration, and the entry into possession of the donees by the receipt of the rents from the property (all of the rents apparently: there is no evidence that the donor received any) from the time of the deed until the death of the donor seven years later, indicate that the deed was meant to be, and was, an effective conveyance of the donor's interest in the property to the donees.

BANKOLE JONES P.J. I also agree. I have nothing to add.