RANDALL *v.* OFFICIAL ADMINISTRATOR

SUPREME COURT (Boston, Ag.J.): August 23rd, 1955
(Civil Case No. 234/54)

[1] **Succession—executors and administrators—appointment of administrator—court must appoint administrator in certain circumstances—choice of administrator at court's discretion:** The court must appoint an administrator in certain circumstances, for instance, where the person appointed executor dies before the testator, or where the executor dies before completing the administration of the estate; and in such instances the choice of administrator is left to the exercise of the court's discretion, according to its practice, no person having an enforceable legal right to preference (page 420, lines 28–35).

[2] **Succession—Official Administrator—grants of administration—jurisdiction confined strictly to statutory powers and duties—once grant obtained, must properly administer estate and preserve assets:** The jurisdiction and powers of the Official Administrator in performing his primary duties are limited by the terms of the Administration of Estates Ordinance (*cap.* 2); but once he has rightly assumed jurisdiction by obtaining a grant of letters of administration, he must do everything that is necessary for the proper administration of the estate and the preservation of its assets (page 418, line 37—page 419 line 11; page 419, lines 27–31).

[3] **Succession—probate and letters of administration—persons entitled to letters of administration—court to consider relative fitness of claimants if interests equal:** Where there are several claimants for a grant of letters of administration and their interests are the same, the court should consider the relative fitness of the claimants; and in exercising its discretion and making a selection it will be loath to entrust the administration of the estate into the hands of one who is not shown to be capable of carrying out the obligations involved, either through inefficiency or malevolence or both (page 421, lines 12–17; page 423, lines 3–10).

[4] **Succession—probate and letters of administration—persons entitled to letters of administration—residuary legatee and his legal representative equally entitled to administration with will annexed:** Where a residuary legatee survives the testator and has a beneficial interest in the estate, his legal representative has the same right to a grant of letters of administration with will annexed as the residuary legatee himself (page 421, lines 8–10).

[5] **Succession—probate and letters of administration—persons entitled to letters of administration—those entitled to distribution of estate in order of priority of interests—residuary legatee or devisee in trust normally preferred to testator's next-of-kin for grant with will annexed:** In exercising its discretion to choose whom to appoint as

administrator when an executor fails to represent the testator, the court will follow the principle that the right of administration should follow the right of interest in the estate; and therefore in ordinary practice the court will, in the absence of special circumstances, prefer to grant letters of administration with will annexed to a residuary legatee or devisee in trust rather than the testator's next-of-kin (page 420, line 37—page 421, line 6).

[6] **Succession—wills—construction—words denoting residuary gift—no particular mode of expression necessary to constitute residuary legatee—sufficient that testator's intention expressed plainly:** No particular mode of expression is necessary to constitute a person a residuary legatee: if the intention of the testator is plainly expressed in the will, that is sufficient for the surplus of the estate, after payment of debts and legacies, to be taken by the person there designated (page 415, lines 6–10).

The plaintiff applied for a grant of letters of administration with will annexed in respect of her father's estate.

The plaintiff's father died, and in his will named his wife and six children as residuary legatees. He also directed his executors to sell certain real properties and use the proceeds to pay certain expenses and legacies, the balance to be divided equally among the residuary legatees. He named his wife, a son and a daughter as executrices and executor. The wife and daughter were granted probate of the will, and power was reserved to the son to apply on attaining his majority. The executrices died without fully completing administration of the estate, and the executor did not obtain a grant of probate before his death. The plaintiff is the sole surviving residuary legatee. The present defendant, in his capacity as Official Administrator, applied for a grant of letters of administration with will annexed, and was opposed by the plaintiff. The Supreme Court (Boston, Ag.J.) held that the defendant had no statutory power to apply for such a grant as Official Administrator in the circumstances of the case, there being a next-of-kin (the present plaintiff) who could apply, though that would not preclude any claim he might have as legal representative of any of the residuary legatees. These proceedings are reported in 1950–56 ALR S.L. 351.

The plaintiff instituted the present proceedings on her own account as a residuary legatee and next-of-kin of the testator and as legal representative of her mother and one of her sisters. The defendant also claimed entitlement to a grant as legal representative of three other residuary legatees.

The Supreme Court considered to whom a grant of letters of

administration should be made, the plaintiff or the defendant, in the circumstances of the case.

Cases referred to:

(1) *Atkinson* v. *Bernard* (1815), 2 Phillim. 316; 161 E.R. 1156.

(2) *Dampier* v. *Colson* (1812), 2 Phillim. 54; 161 E.R. 1076.

(3) *In re Ewing* (1881), 6 P.D. 19; 44 L.T. 278.

(4) *Mercer* v. *Morland* (1758), 2 Lee 499; 161 E.R. 418.

(5) *Official Admor.* v. *Randall*, 1950–56 ALR S.L. 351, *dicta* of Boston, Ag.J. considered.

(6) *R.* v. *Bettesworth* (1733), 2 Stra. 956; 93 E.R. 966.

(7) *Warwick* v. *Grevill* (1809), 1 Phillim. 125; 161 E.R. 934, applied.

(8) *Wetdrill* v. *Wright* (1814), 2 Phillim. 243; 161 E.R. 1132, applied.

(9) *Williams* v. *Wilkins* (1812), 2 Phillim. 100; 161 E.R. 1090.

Legislation construed:

Administration of Estates Ordinance (Laws of Sierra Leone, 1946, *cap.* 2), s.8(1):
The relevant terms of this sub-section are set out at page 419, lines 13–17.

s.15: The relevant terms of this section are set out at page 419, lines 19–22.

Courts Ordinance (Laws of Sierra Leone, 1946, *cap.* 50), s.38:
The relevant terms of this section are set out at page 420, lines 21–24.

R.W. Beoku-Betts for the plaintiff;
C.B. Rogers-Wright for the defendant.

BOSTON, Ag.J.:

In this action, the plaintiff, Marian Randall, is asking for a grant of letters of administration (with the will annexed) of the estate and effects of Jabez Benjamin Luke (deceased). She claims to be the only surviving daughter and one of the residuary legatees and devisees entitled to share in the said estate. She also claims to be a representative of the estates of Sarian Virginia Luke (deceased) and Jemima Lucretia Luke (deceased), both of whom were also residuary legatees and residuary devisees under the will of the said Jabez Benjamin Luke (hereinafter referred to as "the testator").

The testator died on April 9th, 1919, leaving a will dated March

21st, 1914 and a codicil dated January 11th, 1916, in which he appointed Sarian Virginia Luke (deceased), Sarah Ann Spaine (deceased) and Dr. Benjamin Fashole Luke (deceased) his executrices and executor. The plaintiff states that the will was proved by the said Sarian Virginia Luke and Sarah Ann Spaine but that both of them died before the estate was completely administered and there are residuary legacies and residuary devises left unadministered.

The defendant, the Official Administrator, states that he is the representative of the estates of Hannah Ransoline Benka-Coker (deceased), Jabez Benjamin Fashole Luke (deceased) and Josephine Beatrice Yomie Taylor (deceased), all devisees and legatees under the will of the testator. He states that there are no other surviving residuary legatees and devisees under the said will, and that as a matter of fact the estate of the testator has been fully administered. He states in the alternative that if administration *de bonis non* should be granted in the testator's estate, the grant should be made to him as representative of the estates named and not to the plaintiff, who, he states, is not a suitable person to receive such a grant. The plaintiff in her reply states that in a former action in the Supreme Court between the same parties (see *Official Admor.* v. *Randall* (6), 1950–56 ALR S.L. at 358) I held that the application of the Official Administrator to administer the estate of Jabez Benjamin Luke (deceased) "was improperly brought before the court. The Official Administrator, as such, cannot make such an application . . . ."

The defendant in his defence stated that the estate of the testator has been fully administered and there are no residuary legacies and devises under his will. This the plaintiff denies. If the defendant succeeds in his contention, that will be an end of the matter. I will therefore deal with this point first.

The testator was survived by his widow, Sarian Virginia Luke, who died on September 12th, 1949 intestate, and six children, namely, Sarah Anne Spaine (deceased), Jemima Lucretia Luke (deceased), Hannah Ransoline Benka-Coker (deceased), the plaintiff, Jabez Benjamin Fashole Luke (deceased) and Josephine Yomie Taylor (deceased).

In para. 15 of the will of the testator he directed his trustees to sell certain real properties therein named "and all other real and personal property not herein devised and bequeathed by me" and from the proceeds arising therefrom to pay his funeral and testamentary expenses, just debts and some legacies, and to give the balance, if any, to his wife and all his children to be divided

between them equally. Apart from the properties named in the will there are, in fact, some other properties not named which passed under that devise. It is admitted on both sides that all these properties have not been sold. Under the will all these properties should be sold, certain payments made and the balance distributed among the testator's widow and children. No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator be plainly expressed in the will, that the surplus of his estate, after payment of debts and legacies, shall be taken by a person there designated. I hold that the surplus of the proceeds of sale of the real and personal properties directed to be sold in the will to be distributed among the testator's widow and children is a residuary bequest, and that each of them is a residuary legatee. As the sale has not yet taken place and no distribution made, the estate has not been wholly administered with reference at least to the residuary bequests.

By para. 6 of the will, two properties, one in Regent Road and the other in Circular Road, were directed to be sold by the trustees after the death of the testator's widow and the proceeds divided equally between his six children. The widow died in 1949 and the properties have not yet been sold. To that extent also, the estate has not yet been fully administered.

From the ordinary interpretation of the devises and bequests, it is clear that there are residuary bequests in the will, and from the evidence the estate has not been completely administered. In addition the defendant, by his conduct, is virtually precluded from raising this point. In an originating summons which the defendant took out in 1953 (Civil Case No. 486/53) for a determination of the question whether he as Official Administrator should administer the estate of the testator or whether the plaintiff should do so, he stated in para. 4 of the affidavit filed in support of the summons as follows:

> "I am also informed by the said Salako Amborsius Benka-Coker, and I verily believe, that the said Jabez Benjamin Fashole Lawrence Luke, the executor for whom powers were reserved to make a like grant, died at Freetown, testate, without sealing a grant to the estate of the said Jabez Benjamin Luke, deceased, and that the estate of the said Jabez Benjamin Luke, deceased (hereinafter referred to as the 'parent estate') has not been completely administered."

Before this action commenced the defendant entered a *caveat*

in the Master's office in the estate of Jabez Benjamin Luke (deceased). The plaintiff, through the Registrar, warned the defendant to enter an appearance to the *caveat* and to set forth his interest. In his appearance entered on June 2nd, 1954, the defendant, by his solicitor, stated that he was the representative of the estates of Hannah Ransoline Benka-Coker and Jabez Benjamin Fashole Lawrence Luke (both deceased) who were legatees and devisees and *residuary legatees and devisees under the will of Jabez Benjamin Luke (deceased)*. The defendant has not attempted to explain these declarations which are quite the opposite to the position he now takes up.

One of the witnesses for the defendant, Mr. S.A. Benka-Coker, said in evidence that there was a family arrangement between the mother and children, that the properties directed in the will to be sold should not be sold, but should be rented and enjoyed by all of them as tenants in common. If there was such an arrangement at all, there is no evidence that it was in writing. In fact Mr. Benka-Coker said he only heard about it—it was a matter of hearsay. I do not attach much importance to this piece of evidence which is sought to render nugatory the express direction of the testator as to the manner of distribution of his property. It is true the houses have not been sold since the death of the testator, but who were the trustees responsible for the sale? They were the widow and one of the children, Sarah Anne Spaine. As these properties were yielding rent, they might have thought that such rents could conveniently pay for the education and maintenance of the children. The widow had real properties devised to her separately which were also yielding rent. The court cannot assume that the widow and children deliberately decided to flout the express direction of the testator. Delaying the sale does not mean deciding against it. Apart from all that, the plaintiff, who is one of the children and one of the parties to the supposed agreement has said in evidence that no such agreement was made and no such understanding was arrived at. In fact, at the time when this supposed agreement is alleged to have been made she was then an infant and there is no evidence that she ever ratified it. She says the trustees did not carry out the directions of the testator as to the sale of the properties under para. 15 of the will, and, as regards the properties devised under para. 6, there was no trustee capable of carrying out the directions of the testator as to the sale of the properties for, as they were to have been sold after the death of the widow, on her death in 1949 there was no proving executor and trustee to effect the sale as the other

proving executor and trustee, Sarah Ann Spaine, had predeceased her.

Taking all these facts into consideration, I am clearly of the opinion that there are residuary bequests in the will of the testator, that the plaintiff and those whose estates she represents are residuary legatees, that those whose estates the defendant represents were also residuary legatees, and that the estate of the testator has not been completely administered.

The next point I would refer to is the contention by the plaintiff's solicitor that the defendant should not be granted administration *cum testamento annexo*, as he is debarred from so applying for such a grant by the ruling in the previous action (*Official Admor.* v. *Randall* (6)), in which he as plaintiff applied for such a grant and the court refused his application.

In November 1953, the defendant as Official Administrator applied to the court by originating summons for the determination of the question whether he or the present plaintiff should be granted administration of the estate of the testator. In his affidavit in support of the application he stated that he was informed by S.A. Benka-Coker that the testator made a will, that the executors who took probate had all died without completing the administration of the estate, and he was asking the court to say whether he, as Official Administrator merely, or the plaintiff here, as residuary legatee and devisee and next-of-kin of the testator, should complete the administration of the estate. The court then held that the defendant here, as Official Administrator, could not apply for a grant when there was a next-of-kin of the testator. In the course of my judgment I said (1950–56 ALR S.L. at 355):

> "The plaintiff took out this summons as Official Administrator, and in his argument before this court he stated that he had no interest in the matter one way or the other except as the Official Administrator who has been moved to apply for the grant of administration with the will annexed, as from information at his disposal that course would serve the ends of justice."

Later on (*ibid.*, at 356) I stated:

> "I hold that the plaintiff has no right under the Ordinance to make this application, nor will the court grant him an order to administer the parent estate in his capacity as Official Administrator."

Further on I continued (*ibid.*, at 356):

> "Ordinarily in probate practice, when the chain of executors

has been broken, as in this case, administration with the will annexed is given to a residuary legatee or devisee where there is land in the estate. If the plaintiff takes up administration of these two estates, he could apply, as legal representative of the two deceased *and not merely as Official Administrator*, for a grant of letters with the will annexed of the parent estate; and if he shows good reason, a grant may be made to him in preference to the residuary legatee who is alive, that is, the defendant. If the defendant applies for a grant in the same way and as legal representative of the estates of the two other residuary legatees, whose estates he would then be administering, the plaintiff could oppose her application and pray the court for a grant to him. But as I have said he cannot apply for a grant simply as Official Administrator." [Emphasis supplied.]

That is what that case decided, that the defendant here could not apply for a grant merely as Official Administrator.

What is the case here? The defendant is opposing the application of the plaintiff for a grant of letters and is applying for one for himself, not as Official Administrator merely but as the representative of the estates of three persons who were residuary legatees, *i.e.*, Hannah Benka-Coker, Dr. J.F.B. Luke and Josephine Yomie Taylor, and in so doing he is following the directive in the judgment referred to. In my opinion therefore the decision referred to by the plaintiff's counsel does not preclude the defendant from applying for a grant of letters with the will annexed.

There is another point taken by the plaintiff's counsel, that the defendant as Official Administrator cannot administer the estate of a deceased person where a will exists, except in certain circumstances which are enumerated in the Ordinance creating his office, and that his powers of administration of any estate in this country must be found within the four corners of the Ordinance. The law relating to the powers of the Official Administrator in Sierra Leone is set out in the Administration of Estates Ordinance (*cap.* 2), which came into operation on January 1st, 1946, and the Intestate Estates Ordinance (*cap.* 104 of the 1925 Laws), which affects the estates of those dying before January 1st, 1946.

So far as the present case is concerned, it is settled law that the Official Administrator (or the Curator of Intestate Estates as the case may be) cannot apply as such for a grant of letters to administer the estates. That was the decision given in the case already referred to. His jurisdiction and powers in performing his primary duties are

limited by those Ordinances. But when he has rightly assumed jurisdiction, by obtaining letters for any estate, in carrying out the administration of that estate he must do everything that is necessary for the proper administration of that estate; and if there are any assets outstanding which should come into the estate, he must do what is necessary to bring those assets in. If there is a choice between himself and another as to who should get the assets in, and in the interest of the estate he is administering he is of the opinion that he is the better person, then it is not only expedient but it would be his duty to get himself in that position to do what is necessary to get the assets in. Section 8(1) of the Administration of Estates Ordinance (*cap.* 2) states:

> "All probates and letters of administration granted to the Official Administrator shall be granted to him by that name, and shall authorise the Official Administrator and his successors in office to act as executor or administrator, as the case may be, of the estate to which such probate or letter relates."

By s.15 of the same Ordinance:

> "The Official Administrator and every administrator appointed under this Ordinance shall be deemed a trustee within the meaning of any Imperial Statute or local Ordinance, now or hereafter to be in force, relating to trusts and trustees."

Hannah Benka-Coker, Dr. J.F.B. Luke and Josephine Yomie Taylor, whose estates the defendant is representing in this action, all died after January 1st, 1946. The Administration of Estates Ordinance (*cap.* 2) therefore applies in the administration of their estates. When once administration of each of these estates has been granted to the defendant as Official Administrator, he assumes the role of an ordinary administrator or executor as the case may be. He becomes also a trustee in relation to the estate and the assets; he should therefore do his best to preserve the assets. In this case, the estate of each of the three children whom the defendant is representing has assets to be derived from the estate of their father, the testator. The defendant, in the position of an administrator of two of the estates and as executor of one, for Dr. J.F.B. Luke made a will, should do his best to bring in the assets to the respective estates. If he is apprehensive that if the administration of the testator's estate is granted to the plaintiff it would be difficult for him to get the shares of the respective estates or not get them in full, it is his duty as such administrator and executor, and also as trustee, to apply to complete the administration of the testator's

estate to be sure that he would realise the shares due to the estates he is administering in full.

The Official Administrator therefore is entitled in respect of the estates which he is administering to apply for a grant to complete the administration of the estate of the testator and to oppose the application of the plaintiff.

Having decided that the estate of the testator has not been completely administered, that there are residuary legacies still unpaid, that the defendant is not precluded from applying for a grant by reason of the judgment in the former case, and also that the defendant, although Official Administrator, could apply for a grant as representative of the estates of the children of the testator, whom I have named, the next and most important point to be decided is to whom should the grant be made, the plaintiff or the defendant?

There is no provision in our local law for probate matters in regard to the appointment of administrator *cum testamento annexo*, except what is contained in the Intestate Estates Ordinance (*cap.* 104 of the 1925 Laws) and the Administration of Estates Ordinance (*cap.* 2) which do not apply here; recourse is therefore to be had to English law. Section 38 of the Courts Ordinance (*cap.* 50) states: "Subject to the provisions of this and any other Ordinance, the common law, the doctrines of equity and the statutes of general application in force in England on the 1st day of January, 1880, shall be in force in Sierra Leone." By s.3 of the Probate and Administration Act, 1529, provision is made as to the grant of letters of administration of the estates of a person who died intestate or who made a will but the executors named therein refuse to prove it. There are other instances which do not come under the Statute and for which the court must appoint an administrator, *e.g.*, where the person appointed executor dies before the testator, or where the executor has not completely administered the estates and dies, as in this case. In such instances the court is left to the exercise of its discretion in the choice of an administrator, according to its own practice; and no person has such a legal right to preference as can be enforced by application to the common law courts: see *R.* v. *Bettesworth* (6) and *In re Ewing* (3).

The rule of practice in the ecclesiastical courts was to consider which of the claimants had the greatest interest in the effects of the deceased, and decree administration accordingly if there were no peculiar circumstances. The ordinary practice where an executor fails to represent a testator is, in the absence of special circumstances,

to grant administration with will annexed to the residuary legatee or devisee in trust, if any. This follows the principle that the right of administration should follow the right of property so that the residuary legatee would be preferred to the testator's next-of-kin, for where there is a residue and a residuary legatee the next-of-kin takes nothing: see *Mercer* v. *Morland* (4), *Williams* v. *Wilkins* (9), *Dampier* v. *Colson* (2) and *Atkinson* v. *Bernard* (1).

Where a residuary legatee survives the testator and has a beneficial interest, his representative has the same right to administration *cum testamento annexo* as the residuary legatee himself: *Wetdrill* v. *Wright* (8).

Where there are several claimants whose interests are the same, *e.g.*, two residuary legatees or a residuary legatee and the representative of a residuary legatee, the court is called upon to exercise its discretion and make a selection from among the applicants for administration. In such a case the relative fitness of the respective claimants should be considered: see *Warwick* v. *Greville* (7).

Having stated the law on the point I will now deal with the facts. The plaintiff claims that she is a residuary legatee under the will of the testator and that she is representing two other residuary legatees, *i.e.*, her mother Sarian Virginia Luke (deceased) and her sister Jemima Lucretia Luke (deceased). The plaintiff and Jemima Lucretia Luke, apart from being residuary legatees under para. 15 of the will, are also entitled under para. 6 of the will to shares in the proceeds of sale of two properties which should have been sold on the death of the mother. The defendant claims as representative of the estates of three children *viz*: Hannah Benka-Coker, Dr. J.F.B. Luke and Josephine Yomie Taylor. All three are entitled to their shares in the residue under para. 15 of the will and also to their shares out of the proceeds of sale of the two properties under para. 6 of the will. The plaintiff and defendant therefore each represents three interests in the unadministered portion of the estate of the testator; but whereas one of the interests which the plaintiff represents has nothing in the proceeds of the sale of the two houses under para. 6 of the will, all three interests the defendant represents share in the proceeds of sale of those properties. In the aggregate therefore the interest of the defendant in the unadministered portion of the estate of the testator is greater than that of the plaintiff, and on the authorities already referred to the defendant should be preferred in the grant of administration *cum*

testamento annexo de bonis non. As has been stated, although the plaintiff claims her own interests direct or personal to her, and the other two as a representative, *i.e.*, derivative interests, and the defendant claims his three derivative interests as representative only, yet both of them stand in the same degree—the representative of the residuary legatee is entitled in the same degree as the direct residuary legatee.

Counsel for the defendant in his address submitted that Dr. J.F.B. Luke (deceased) was one of the executors appointed by the testator in his will. He did not take out probate but he made a will. After his death in 1953 his executor requested the defendant to get a grant of administration of the late doctor's estate with the will annexed, which he has done. Counsel therefore submitted that as the defendant is now the representative of the late Dr. Luke, who was an executor under the will of the testator, he now stands in the position of Dr. Luke, representing him as an executor, and that as such he has a prior claim to administration to the plaintiff, who is only a residuary legatee.

I am afraid I cannot accept that argument. The late Dr. Luke never took out probate up to the time of his death. On the death of the last of the proving executors, Sarian Virginia Luke in September 1949, the chain of executors came to an end. On the death of Dr. Luke, there was no-one who could represent him as an executor as he did not take probate. The position then was as if he was never appointed an executor. The defendant, therefore, by taking a grant of his estate with the will annexed would not represent him as executor but only as residuary legatee.

As has been stated, the court in the exercise of its discretion, where there are several claimants to a grant of administration with the will annexed, the court will give the grant to the claimant having the majority of interests, if there is no special circumstance to prevent this. If the interests are equally divided, then the grant will be made to the one who has a point of peculiar aptitude on his side; and in this connection consideration would be given to objections taken by one claimant against another to see whether they are established.

In para. 7 of the defendant's statement of defence, he says that if administration *de bonis non* should be granted in the testator's estate at all, the plaintiff is not a suitable person to whom such administration should be granted. Several facts came out in evidence from which the defendant says the plaintiff is not a suitable person

to whom the administration of the balance of the estate should be entrusted. [The learned judge reviewed the evidence on this point and continued:] The court will be loath to entrust the administration of an estate into the hands of one who is shown not to be capable of carrying out the obligations involved either through inefficiency, malevolence or both. Nothing has been said against the defendant, in his official capacity, as to his fitness to take up administration of the estate, and he has the advantage of permanency, although that would not necessarily make him preferable to another who had better claims on the merits to a grant.

I have viewed the position most carefully in relation to the evidence and the exhibits. In the interests of the estate as a whole and of those who derive benefit under it, I have come to the conclusion that justice will be better served if a grant is made to the defendant in preference to the plaintiff. I hold that the estate of J.B. Luke (deceased) has not been completely administered; the bequests under para. 15 of the will to the testator's widow and children are residuary bequests, and they have not yet been paid; and the property at No. 4 Back Street, Freetown, was the property of the testator at the time of his death and falls, under para. 15 of the will, into the residue.

It is decreed that a grant of administration with the will annexed *de bonis non* of the estate of J.B. Luke (deceased) be made to the Official Administrator. The costs of both parties are to be taxed and paid out of the estate of the testator.

Order accordingly.