when Exh. "Q" was written which appeared in Exh. "G" he vetted and approved it before it was sent to the Press.

Section 119 of the Freetown Municipality Ordinance (Cap. 65) reads:

> "No matter or thing done and no contract entered into by the Council, and no matter or thing done by any member or officer of the Council or other person whomsoever acting under the direction of the Council, shall, if the matter or thing were done or contract were entered into bona fide for the purpose of executing this Ordinance, subject any member or officer of the Council or any person acting under the direction of the Council personally to any action, liability, claim or demand whatsoever."

The section is wide and comprehensive and protects the Council and its staff acting within their sphere of influence. Exh. "Q" (letter written by defendant) was as already stated in evidence under the instruction of the then Mayor, head of the civic corporation.

In conclusion, plaintiff being unable to rebut the claim of justification, privilege, fair comment or the immunity under section 109 of Cap. 65 (Freetown Municipality Ordinance), the action fails and it is dismissed with costs.

[SUPREME COURT]

Freetown
Sept. 5, 1961
Luke Ag.J.

JACOB WILLIAMSON SAWYERR AND OTHERS . . . *Plaintiff*

v.

GEORGIANA LUCRETIA ROSE AND OTHERS, as Executors of the Estate of Ransolina P. Cromanty (decd.) . . . . *Defendants*

[C. C. 85B/58]

Real property—Will—Equity—Property dealt with by executrix as her own—Claim by persons beneficially interested—Rule against Perpetuities—Whether devise created estate tail—Statute of limitations—Status of property conveyed to third parties by executrix—Law Reform (Miscellaneous Provisions) Ordinance (Cap. 19 Laws of Sierra Leone, 1960) section 2 (3) (*b*).

Jacob Williamson Sawyerr, the testator, died in the Gold Coast (Ghana) in 1916. In his will, he left certain property in Freetown to his sister, Ransolina Patience Cromanty, two brothers and two daughters in equal shares. The will further provided: " . . . it is my express desire that these lands be not sold but that they must descend from children to children." Mrs. Cromanty, who was the only surviving executor, obtained probate of the will in the Gold Coast in 1916, but did not obtain probate in Sierra Leone. Returning to Sierra Leone, Mrs. Cromanty began to collect rents from the property, without accounting to anyone. In 1932, Mrs. Cromanty conveyed part of the property to one Joseph E. Metzger, and in 1953 she conveyed another part to two grand nieces.

Mrs. Cromanty died in 1957, leaving the remainder of the property to certain named persons. Her nephew and the grandchildren and great-grandchildren of the testator brought suit against the executors and trustees of her estate claiming a beneficial interest in the property.

Held, for the plaintiffs,

(1) Testator's will created an entailed estate.

(2) Mrs. Cromanty was a trustee, and, therefore, could not rely on the Statute of Limitations.

(3) As a trustee, Mrs. Cromanty was bound to account for the proceeds of the property devised by the testator.

(4) Plaintiffs are beneficially interested in the property devised by the testator, including the property which she purported to convey to her two grand-nieces and Joseph Metzger.

Case referred to: *In re Lord and Fullerton's Contract* [1896] 1 Ch. 228.

Melville C. Marke for the plaintiffs.
Edward J. McCormack for the defendants.

Note: This decision was affirmed by the Court of Appeal on March 9, 1962 (Civil Appeal 14/61).

LUKE AG. J. This is an action in which plaintiffs are claiming against the defendants as executors and trustees of the estate of Ransolina Patience Cromanty (decd.) for (a) A declaration that the plaintiffs are beneficially interested in the hereditaments and premises situate at Fourah Bay Road, Malta Street and Lucas Street, all in Freetown, in the Colony of Sierra Leone, and devised by the Will of Jacob Williamson Sawyerr decd. to his brothers Richard William Sawyerr, James Beresford Sawyerr, his sister, Ransolina Patience Cromanty, and his daughters, Georgiana Lucretia Sawyerr and Jane Alice Sawyerr, in equal shares, and (b) An account of mesne profits received by the late Ransolina Patience Cromanty in respect of the above premises.

Pleadings were delivered in which the plaintiffs described in detail the nature of their claim and how they became entitled to those properties in question and how defendants became liable.

The facts of the case in brief were that the testator, who was a native of Sierra Leone, went to the Gold Coast (now Ghana) to trade and died there. He made a Will, dated May 30, 1908, probate whereof was, on October 14, 1918, committed and granted by the Supreme Court of the former Gold Coast (now Ghana) to Ransolina Patience Cromanty, the then surviving executor and trustee under the said Will. On Mrs. Cromanty returning to Freetown, she registered the said Will with the Gold Coast grant in Freetown, Sierra Leone, but neither re-sealed the said Will nor took out Probate of it. She, however, started dealing with the properties as if they were her personal properties by collecting the rents and not accounting to anyone and disposing of some of them. Some unsuccessful attempts to protest were made by some of the beneficiaries, of whom first plaintiff is the only one surviving. Mrs. Cromanty died on March 7, 1957, leaving a Will, Probate whereof was, on August 13, 1957, granted to the defendants herein. By her said Will she, inter alia, devised properties at Malta Street, Sawyerr's Farm (comprising Nos. 18 and 20 York Street) and 98 Fourah Bay Road to different devisees, some of whom were first plaintiff and the mother of second, third and fourth plaintiffs.

This writ was issued on February 18, 1958, after the death of Mrs. Cromanty.

The defendants in their defence, inter alia, admitted that the testator, Jacob Williamson Sawyerr (decd.), died on August 15, 1916, and that whilst Mrs. Cromanty was alive she received the rents and profits of the properties at

Fourah Bay Road, Malta Street, Lucas Street and farm land at Fourah Bay Road. They said that she (R. P. Cromanty) did not obtain in Sierra Leone any grant of Probate of the Will of the testator or any grant of Letters of Administration of the estate of J. W. Sawyerr decd. They alleged that Jacob Williamson Sawyerr was entitled at no time to any freehold property in Lucas Street, Freetown, or to any farm land at Fourah Bay Road and also pleaded the Statute of Limitation and the Court Procedure Act.

They did not elect to give any evidence in support of their defence but relied on legal submissions put forward by their counsel which were grouped under three main heads. (1) Void in law as it is uncertain, and infringes the Rules against Inalienability and Perpetuity; (2) lapse of time; (3) plaintiffs have failed to prove facts stated in statement of claim.

Developing his argument counsel said the gifts are void because they are uncertain. This is not quite correct, for the evidence which plaintiffs led showed that these properties were still existing and, as their counsel rightly pointed out, the late Ransolina P. Cromanty, until the date of her death, was in receipt of the rents and profits of these properties, as stated in paragraph 4 of their statement of defence, and also acknowledged that the testator had properties in Freetown by Exh. " G."

In order to be able to appreciate the other defences of inalienability and perpetuity which defendants' counsel has so strenuously argued, it will be necessary to consider the devise which was contained in paragraph 3 of the statement of claim which reads:

> " I devise and bequeath my freehold lands with the buildings thereon situate at Fourah Bay Road, Malta Street, Lucas Street and Farm land at Fourah Bay Road all in Freetown Sierra Leone to my brothers Richard William, Beresford and my sister Ransolina Patience Cromanty, and to my daughters Georgiana and Jane Alice all in equal shares and it is my express desire that these lands be not sold but that they must descend from children to children."

Defendants' counsel argued that by the use of the words " it is my express desire that these lands be not sold but that they must descend from children to children " the testator created a perpetual trust and so contravened the Rule against Inalienability and incidentally the Rule against Perpetuities. Counsel for the plaintiffs said the devise is governed by *Wild's* case and should be read as a devise to the devisees in equal shares and their children in which case the devise will create an estate tail. It will be necessary to bear in mind that the two devisees, Richard William and James Beresford, had pre-deceased the testator as disclosed in paragraph 4 of the statement of claim; whereas Richard William had no issue or children, James Beresford had two sons, one of whom is the first plaintiff. The daughters, Georgiana Lucretia and Jane Alice, also survived the testator and at the time of the testator's death had children surviving.

On page 243 of Hawkins on Wills (3rd ed.) appears an illustration which reads: " A devise to A and ' his children forever ' or to A and ' his children in succession ' will create an estate tail." Regarding the Rule against Perpetuities, it is stated in Topham's New Law of Property (4th ed.), " That you cannot at this moment tie up property for longer than the lives of persons now living and 21 years after their deaths."

The date on which the gift takes effect, if in a Will as in this case, is the date of the death of the testator. We have been told that testator died on August 15, 1916, and since, on that date, two of the devisees, Jane Alice and Georgiana Rose (one of the defendants in this case), were alive and have children who in turn have children on whom property could vest, the possibility of the gift failing will not arise. If, as I hold, the property is entailed, despite the direction that the property should not be sold, the beneficiaries could by barring the entail sell it. Having shown that the beneficiaries can by barring the entail sell the properties, inalienability will not arise, as such an occasion only arises when the devise is to trustees on trusts, which we call perpetual trusts. As a matter of fact the property was devised to the devisees without creating a trust.

The defendants' counsel raised the plea of lapse of time in support of their defence of Statute of Limitation and quoted, inter alia, Vol. 1, Cap. 19, section 2 (3) of the Laws of Sierra Leone 1960. He argued that the claim is one in tort and not, as plaintiffs in their statement of claim have alleged, one for breach of trust and for an accounting. At the time of the hearing, counsel for the defendants overlooked the fact that, even if, as he has stated, this is a claim in tort, lapse of time will not avail him, as the legislature, on March 8, this year, by Ordinance No. 33, s. 11 (*b*), amended that section on which he relies from six months to read three years from the date of death. R. P. Cromanty died on March 7, 1957, and the writ of summons was issued on February 18, 1958.

Ransolina P. Cromanty, having taken out Probate of the Will of this estate in Accra, Gold Coast (now Ghana), and on returning to Sierra Leone, having registered the Will with the grant in Ghana, as produced in evidence, cannot divest herself of being a trustee as created in the Will of the testator. The authority for that is the case of *In re Lord and Fullerton's Contract* [1896] 1 Ch. 228, 233. I shall read a short passage from the judgment of A. L. Smith L.J.:

> " Mr. Lord's disclaimer shows that it was his intention, even if he had not done so already, to inter-meddle as trustee in the testator's affairs in America, though it was not his intention to inter-meddle in the English affairs. Can a trustee do that? The authorities which have been cited are all on one side. A trustee cannot accept a portion of the trust and disclaim the other portion. He must disclaim in toto, or he remains a trustee as to all. Upon the true construction of this disclaimer, Mr. Lord did not disclaim the whole of the trust, which was left to him in conjunction with the four other trustees."

In this case the late Ransolina P. Cromanty was the only executor and trustee who took Probate of the Will in Accra, Ghana, and dealt with testator's properties at Ghana and when she came to Freetown she registered the Will and started dealing with them as her property. She was a trustee and, therefore, liable as a trustee under section 8 (1) of the Trustee Act, 1888 (51 & 52 Vict. c. 59), to account for the proceeds of the said properties, and the Statute of Limitations will not avail her. It will be necessary for me to examine, some of the points raised during the legal arguments, e.g., whether the property at 98 Fourah Bay Road which was mortgaged became the testator's so as to enable him to devise it as such, and, if so, whether the plaintiffs can recover it from the devisees to whom Ransolina P. Cromanty, during her lifetime,

conveyed it by a Deed of Gift which she confirmed in paragraph 20 of her Will.

Exh. "H," the mortgage deed of the property at 98 Fourah Bay Road, was produced but no other deed was produced to show whether the property was foreclosed or sold. Exh. "A" (the Will) mentioned this property as being one of testator's properties, and counsel for plaintiffs argued that, reading the mortgage deed, it will be discovered that the legal estate was conveyed to the mortgagee subject to the mortgagor's right to redeem and that, when once the mortgagee has exercised his power of sale, the mortgagor's equity of redemption is destroyed and lost, and the mortgagee takes the property in fee simple. His authority for that proposition is found in Halsbury's Laws of England (1st ed.), Vol. 21, p. 156, para. 229. I may also say that a mortgagor's right of redemption may be lost by lapse of time.

Ransolina P. Cromanty, as the only surviving sister and executor and trustee of the testator, took it upon herself to deal with all the properties in Freetown which the testator had devised as if they were her own, and, when she made Exh. "C" (Deed of Gift to the donees) for, apart from other considerations, the sum of £2, she did not hand over possession to them as she continued to receive the rents and profits accruing from the said property, as was shown by her devising of the said property to two devisees. Counsel for the defendants has argued that the property cannot be touched by the plaintiffs as the deed was for valuable consideration. What are the real facts relating to this property? The first plaintiff gave evidence that, as a result of some pressure, Ransolina P. Cromanty allowed him to collect the rents of 98 Fourah Bay Road, and by paragraph 20 of Mrs. Cromanty's Will she devised it to two of her nieces. Is the consideration shown in Exh. "C," the Deed of Gift which was supposed to have been made in 1953 for valuable consideration sufficient, thereby making it unassailable?

Plaintiffs' counsel has submitted that it is not and cites in support of his contention Norton on Deeds (2nd ed.), p. 220, where the following appears:

> "Where the consideration expressed in the conveyance was 'five shillings and other valuable considerations' the court was not bound to hold it, at all events, to be a valuable consideration, but could at most only let the defendant into proof that there were other valuable considerations: *Walker* v. *Burrows* (1745) 1 Atk. 93."

In the case before the court the consideration is £2 with other valuable considerations. The donees have not elected to give evidence on the issue, nor, as a matter of fact, have the defendants given any evidence to show why, if this property had passed on the date stated therein, Ransolina P. Cromanty should have continued to draw the rents and should have included it in her Will dated October 5, 1953. The only answer is that, in spite of the deed, the donor continued to exercise all the former rights which she had been exercising. Evidence has been given that 98 Fourah Bay Road was part of properties belonging to the testator and I so declare.

Having found that the testator Jacob Williamson Sawyerr died seised of properties in Freetown in Sierra Leone and that he made a Will in which he appointed Ransolina P. Cromanty one of his executors and trustees and that she dealt with the properties in Freetown, I make the declaration which the plaintiffs have asked for and order that plaintiffs do have the costs of this action.