

SMITH v. WALKER and EDWARDS

SUPREME COURT (Cole, Ag. C.J.): January 7th, 1966
(Civil Case No. 176/64)

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- [1] **Civil Procedure—parties—breach of trust—beneficiary may sue personally—need not sue as representing other beneficiaries:** When a trustee has committed a breach of trust any beneficiary can bring an action in his personal capacity to question the validity of the trustee's acts and need not sue as representing the other beneficiaries (page 330, line 23—page 331, line 9).
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- [2] **Civil Procedure—parties—plaintiffs—breach of trust—beneficiary may sue personally and need not sue as representing other beneficiaries:** See [1] above.
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- [3] **Trusts—beneficiaries—remedies of beneficiary—may maintain proceedings in person and need not sue as representing other beneficiaries:** See [1] above.

The plaintiff brought an action to set aside a deed of gift of a house to the defendants.

20 A testator devised real estate which included the house to his two brothers, his sister and his two daughters. After his death, his sister, with full knowledge of the devise, entered into possession of the house and collected the rents and profits. After more than 30 years she conveyed the house to the defendants by deed of gift.

25 She continued to collect the rents and profits until her death.

One of the testator's daughters devised her interest in the house to her male children, of whom the plaintiff was one. He brought this action after her death and the death of the testator's sister and 11 years after the deed of gift.

30 The plaintiff contended that the testator's sister was an executrix *de son tort* and that her gift of the house to the defendants was a fraudulent breach of trust. The defendants pleaded the Limitation Act, 1961 and further contended that the plaintiff should have brought the action in a representative capacity on behalf of all the

35 beneficiaries and that suing alone he was not the proper plaintiff.

Statute construed:

40 Probates (British and Colonial) Recognition Ordinance, 1915 (No. 7 of 1915), s.4:

"Where a Court of Probate in the United Kingdom, or in a British possession . . . to which this Ordinance applies . . . has granted

Probate or Letters of Administration in respect of the estate of a deceased person, the Probate or Letters of Administration so granted may, on being produced to, and a copy thereof deposited with, the Supreme Court, be sealed with the seal of the Court, and thereupon shall be of the like force and effect, and have the same operation in the Colony and Protectorate as if granted by the Supreme Court of the Colony.”

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D. E. F. Luke for the plaintiff;
McCormack for the defendants.

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COLE, Ag. C.J.:

In this action the plaintiff claims that the deed of gift dated October 6th, 1953, and made between Ransolina Patience Cromanty, now deceased, late of 14 Crook Street, Freetown and executrix of the will of Jacob Williamson Sawyerr, and the defendants, registered at p. 15 in vol. 39 of the Books of Voluntary Conveyances, be set aside with all proper consequential directions, costs and such further or other relief as is just.

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The plaintiff's case is this: On October 6th, 1953 Ransolina Patience Cromanty, now deceased, conveyed to the defendants in fee simple under a registered deed of gift, Exhibit M, bearing that date, premises commonly known as No. 98 Fourah Bay Road, Freetown—

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“bounded on the north by Fourah Bay Road 53 ft. (fifty-three feet) on the south by property now or formerly in the possession or occupation of Joe Metzger 67 ft. (sixty-seven feet) on the east by property now or formerly in the possession or occupation of Austin Bowen deceased 78 ft. (seventy-eight feet) and on the west by Mercer Street 66 ft. (sixty-six feet).”

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I shall hereafter in this judgment refer to those premises as “No. 98 Fourah Bay Road.” In the recital portion of Exhibit M, Ransolina Patience Cromanty's title to No. 98 Fourah Bay Road is described in the following words:

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“Whereas the donor is seised of and otherwise well and sufficiently entitled to the property hereby conveyed for an estate in fee simple in possession free from incumbrances having been in sole continuous and undisturbed possession of the said property for a period of over 36 years.”

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It might perhaps be convenient at this stage to trace the history of this property No. 98 Fourah Bay Road as far as the evidence in this case goes.

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Number 98 Fourah Bay Road originally formed part of certain premises at Fourah Bay Road, Freetown which were acquired by purchase by James Beresford Sawyerr from one William Smith under a registered deed of conveyance dated July 6th, 1887. This deed of conveyance is Exhibit N.

On May 16th, 1895 James Beresford Sawyerr by deed of mortgage dated May 16th, 1895, Exhibit J, mortgaged the whole of the premises contained in Exhibit N, which included No. 98 Fourah Bay Road, to Jacob Williamson Sawyerr, a merchant then residing at Accra in the then Gold Coast, now Ghana. The mortgage was redeemable on February 8th, 1897. This mortgage was registered as No. 259/201510/65 at p. 205 of vol. 14 of the Record Book of Mortgages at the Registrar General's office in Freetown. It should be noted that on the date of the mortgage, the mortgagor James Beresford Sawyerr was residing in Sierra Leone and according to para. 4 of the defence James Beresford Sawyerr died in Freetown in the year 1909. There is no evidence that James Beresford Sawyerr or any one on his behalf redeemed the mortgage or obtained a reconveyance of the mortgaged premises. In the circumstances I find that the mortgage in question was never redeemed. That being the case I also find that the right of redemption on the part of James Beresford Sawyerr of the premises mortgaged has been lost by lapse of time.

Jacob Williamson Sawyerr died on August 15th, 1916 at Accra, Gold Coast, now Ghana, leaving his last will and testament dated May 30th, 1908. I am satisfied on the evidence that on the date of his death the mortgaged premises at Fourah Bay Road belonged to and formed part of the estate of Jacob Williamson Sawyerr. In that will, part of Exhibit K, Jacob Williamson Sawyerr devised his real properties in Sierra Leone in these words:

"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 Williams, James Beresford, my sister Ransolina Patience Cromanty and to my daughters Georgiana Lucretia 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."

On October 14th, 1916, probate of the said will dated May 30th, 1908 of Jacob Williamson Sawyerr was granted by the Supreme Court of the then Gold Coast Colony, now Ghana, to Ransolina Patience Cromanty, according to the evidence the only surviving

of the three executors named in the said will: Exhibit K refers. Exhibit K was not resealed in Sierra Leone as should have been done under the provisions of the Probates (British and Colonial) Recognition Ordinance, 1915. The effect of such resealing would have been that the probate would have been of like force and effect and would have had the same operation in Sierra Leone as if it had been granted by the Supreme Court of Sierra Leone.

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According to the evidence, only the will, part of Exhibit K, was registered in Sierra Leone on July 11th, 1918. The result is that though No. 98 Fourah Bay Road formed part of the estate of Jacob Williamson Sawyerr at the time of his death it did not pass under the probate, Exhibit K. No probate or letters of administration with the will annexed was taken out in Sierra Leone.

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There is no evidence as to when Ransolina Patience Cromanty came to Sierra Leone but the evidence is that as far back as 1910, only six years before she took out probate, she had been dealing with No. 98 Fourah Bay Road, renting it and collecting the rents and profits. After she took out probate and with full knowledge of the contents of the will she continued to collect the rents of No. 98 Fourah Bay Road. She also, in 1932, sold part of premises adjacent to No. 98 Fourah Bay Road which also formed part of the estate of Jacob Williamson Sawyerr, deceased. She collected the rents and profits and paid the rates and taxes for No. 98 Fourah Bay Road up to October 6th, 1953, when she conveyed the property to the defendants by Exhibit M, and in spite of that conveyance she continued according to the evidence to collect the rents of No. 98 Fourah Bay Road up to her death in 1957. This is the title on which she relied when she conveyed No. 98 Fourah Bay Road to the defendants by virtue of Exhibit M. It would appear from the defence and the evidence led that the defendants rely on these facts as their title to No. 98 Fourah Bay Road and they therefore plead the Limitation Act.

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Two questions therefore arise, namely:

(i) What was the effect in law of the dealings and disposal by Ransolina Patience Cromanty of the property No. 98 Fourah Bay Road?

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(ii) Does the Statute of Limitations apply to such a case?

With regard to the first question, I am satisfied on the evidence as a whole that her dealings with the estate of Jacob Williamson Sawyerr, deceased, in Sierra Leone, of which No. 98 Fourah Bay Road forms a part, constitute her in law an executrix *de son tort*

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of that part of the estate of Jacob Williamson Sawyerr in Sierra Leone. With full knowledge of the devises contained in the will of Jacob Williamson Sawyerr as regards the properties in Sierra Leone including No. 98 Fourah Bay Road, she entered into possession of No. 98 Fourah Bay Road and remained in possession until her death. In my view Ransolina Patience Cromanty must at the time she made Exhibit M be regarded as an executrix *de son tort* with notice of the trust relating to No. 98 Fourah Bay Road. I find that in disposing of No. 98 Fourah Bay Road she did so in her capacity as constructive trustee of the estate of Jacob Williamson Sawyerr, deceased, as regards his estate in Sierra Leone and that this disposal of the property in the circumstances was a fraudulent breach of trust. It is true that she is a beneficiary as regards that property, but from the nature of the devise her interest is one and indivisible with those of the other beneficiaries. In any case it is settled law that the assignee of an equity is bound by all the equities affecting it.

In view of my findings on the first question I hold that in law the Limitation Act does not apply. This disposes of the second question. In these circumstances it is my view that the deed of gift Exhibit M cannot stand.

The question now arises whether I can properly set aside the deed of gift Exhibit M. Mr. McCormack, learned counsel for the defendants, in his final address submitted, *inter alia*, that since the plaintiff has sued alone and not in a representative capacity the action should be dismissed. The evidence is that the plaintiff is one of the lawful sons of Jane Alice Smith (née Sawyerr). The plaintiff deposed as follows on this point—

“My mother died on December 24th, 1957, testate, leaving a will dated December 11th, 1957 probated by the executors named therein, Jacob Williamson Sawyerr, Jr., and my brother Ernest Onesimus Smith. No. 98 Fourah Bay Road was dealt with in my mother’s will. Mother devised her interest in No. 98 Fourah Bay Road to all her male children. I am one. Not specifically named. I am a lawful child.”

It is not disputed that Jane Alice Smith is one and the same person as Jane Alice referred to in the paragraph of the will of Jacob Williamson Sawyerr, deceased, already quoted above and I so find. She was a beneficiary under that will at least as regards No. 98 Fourah Bay Road the subject-matter of this action. Under her will the plaintiff is one of those also beneficially interested in No. 98

Fourah Bay Road. In my view, where a trustee has committed a breach of trust, fraudulent or otherwise, any beneficiary can bring an action to question the validity of the acts of the trustee. As I have already found, Ransolina Patience Cromanty was not only an executrix *de son tort* of the estate of Jacob Williamson Sawyerr as regards that part of his estate in Sierra Leone but also a trustee who in the manner in which she disposed of No. 98 Fourah Bay Road committed a fraudulent breach of her trust. In those circumstances I think the plaintiff has properly brought this action.

Taking all the circumstances of this case into consideration, I would grant the plaintiff's claim. I order that the deed of gift Exhibit M be set aside and I also order that the property in question No. 98 Fourah Bay Road be dealt with in the manner laid down in the will of the said Jacob Williamson Sawyerr, deceased.

The plaintiff will have the costs of this action, such costs to be taxed.

Order accordingly.

SAWYER and FOUR OTHERS v. OLUWOLE and OLUWOLE

SUPREME COURT (Cole, Ag. C.J.): January 7th, 1966
(Mag. App. No. 42/64)

- [1] Courts — magistrates' courts—procedure—record—reading of charge not recorded—*omnia praesumuntur rite esse acta* applies if plea taken: Where, in a trial in a magistrate's court, the magistrate records that the accused has pleaded to the charge but does not record that he read the charge to the accused, the presumption *omnia praesumuntur rite esse acta* applies in the absence of positive evidence that the charge was not read (page 332, line 37—page 333, line 10).
- [2] Criminal Procedure—record—contents—reading of charge not recorded—*omnia praesumuntur rite esse acta* applies if plea taken in magistrate's court: See [1] above.
- [3] Evidence—presumptions—presumption of law—*omnia praesumuntur rite esse acta*—presumption applies where reading of charge not recorded but taking of plea recorded in magistrate's court: See [1] above.

The appellants were charged in a magistrate's court with assaulting the respondents.