

37,1953

No. 7 of 1953.

# In the Privy Council.

## ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL  
(GOLD COAST SESSION).

33606

IN THE MATTER of JOHN INTSIFUL (deceased).

UNIVERSITY OF LONDON  
W.C.1.

9 - NOV 1956

BETWEEN

HENRY CHARLES CHRISTIAN, otherwise called  
KOFI AMPAH (Defendant)

INSTITUTE OF ADVANCED  
LEGAL STUDIES  
*Appellant*

10

AND

SAMUEL TAWIAH INTSIFUL (Plaintiff) . . . *Respondent.*

## Case

ON BEHALF OF THE RESPONDENT.

RECORD.

1. This is a Defendant's Appeal from a judgment of the West African Court of Appeal (Gold Coast Session), dated the 21st December, 1951, reversing a judgment of the Supreme Court of the Gold Coast, Central Judicial Division, Western Province, Divisional Court, holden at Cape Coast (given in its Probate jurisdiction and dated the 12th March, 1951) in favour of the above-named Defendant (the present Appellant), whereby the Will, propounded by the above-named Plaintiff (now Respondent), of John Intsiful, deceased, who died on the 18th day of June, 1950, was pronounced against and an intestacy was decreed and declaring that the Will in question was a valid one.

2. The Plaintiff claimed, as one of the Executors of the last Will, dated the 20th November, 1944, of the said John Intsiful, deceased, (hereinafter called "the deceased"), to have the said Will established, alleging its due execution on the 20th November, 1944, in the presence of the Reverend James Amissah Hammond and Joseph Brookman Amissah Arthur. The Defendant denied the Plaintiff's claim to have the said Will of the 20th November, 1944, established, averring that at the said date the deceased was totally blind and could not have executed the Will as alleged, and that the signature was not the true signature of the deceased.

3. At the trial no serious question of due execution of the said Will or of the deceased's testamentary capacity arose, but the dispute centred

CASE FOR THE RESPONDENT

around the question whether the deceased, whose eyesight was admittedly impaired, knew and approved the contents of the Will, a matter which it is submitted was not raised by the Defence.

4. The question to be decided upon this Appeal is whether the proper inference to be drawn from all the evidence given at the trial was that at the time when he executed the said Will the deceased, despite his impaired eyesight, knew and approved the contents of the said Will.

5. The action—No. 68/1950—brought by the Plaintiff (the present Respondent) against the Defendant (the present Appellant) in the Supreme Court of the Gold Coast, Divisional Court holden at Cape Coast (Probate jurisdiction) was begun by Writ of Summons dated the 20th December, 1950. In the said Writ, the Plaintiff claimed to be one of the Executors of the last Will, dated the 20th November, 1944, of John Intsiful, late of Cape Coast, Gentleman, deceased, who died on the 18th day of June, 1950, and to have the said Will established, the other Executor, namely the Defendant (now Appellant) having renounced all right to Probate of the said Will and to administration thereof, and the Plaintiff stated in the said Writ that the same was issued against the said Defendant for having entered a Caveat against the Probate of the said Will. Statements of Claim and Defence were delivered to the effect stated in paragraph 2 of this Case.

6. The trial of the action took place in the said Divisional Court at Cape Coast on the 12th March, 1951, before His Honour Mr. Justice T. A. Dennison.

7. The Plaintiff's case in evidence was as follows: At some time which the defence and the Appeal Court accepted as being in 1941, but which may possibly have been later, the deceased called in one John Michael Arthur, a law clerk whom he knew, and gave to the said John Michael Arthur detailed instructions for his Will. The said law clerk typed the Will according to the instructions and after so doing handed it to the deceased who kept it in his possession until the 20th November, 1944. At the time when the said Will was typed and handed to the deceased his eyesight was such that he could read. On the morning of the said 20th November, 1944, the Rev. James Amisshah Hammond (a Methodist minister then stationed at Cape Coast) and one Joseph Brookman Amisshah Arthur, both of whom knew the deceased, called on the deceased at his house at Cape Coast at the deceased's request. The deceased told them that he had made his Will, produced the Will (Exhibit "P.1") to them and asked them to witness his signature. At that date the deceased's eyesight was beginning to fail, though he could still see, and he asked the Rev. Mr. Hammond to help him to sign because, he said, his eyes were dim. With the assistance of the Rev. Mr. Hammond, who showed the deceased where to sign and held the deceased's hand whilst he signed, the deceased affixed his signature to the said Will. Joseph Brookman Amisshah Arthur was present with the deceased and the said Hammond and saw the deceased so sign the Will. The said Rev. Mr. Hammond and John Brookman Amisshah Arthur each signed the said Will after the deceased had signed and they did so in the

pp. 1-2.

pp. 21-23.

p. 2.

pp. 4-8.

p. 8, l. 13.  
p. 19, l. 20.  
p. 5, l. 10.  
p. 5, l. 3.p. 5, l. 14.  
p. 14, l. 30.

p. 5.

p. 6.

p. 5, l. 28.  
p. 6, l. 20.  
pp. 21-23.  
p. 5, l. 31.  
p. 6, l. 23.

presence of the deceased and in the presence of each other. After the deceased and the said attesting witnesses had signed the said Will as aforesaid, the Will was sealed up and the deceased requested the said Rev. Mr. Hammond to lodge the said Will in the said Divisional Court and this the said Hammond did on the same day.

8. Evidence in support of the Plaintiff's case was given at the trial by the said John Michael Arthur, the said Rev. James Amissah Hammond, the said Joseph Brookman Amissah Arthur, the Rev. Gaddiel Robert Acquaaah (the Chairman of the Methodist Church in the Gold Coast) and the Plaintiff.

9. It further appeared from the evidence for the Plaintiff that the Will had not been read over to the Testator by John Michael Arthur, the person who prepared it or by the attesting witnesses. It also appeared from such evidence that the deceased was 93 at the time of his death on the 18th June, 1950, that he had been the owner of a store, that his eyesight had started to fail in 1941, in which year he retired, that in April, 1948 (when he gave a power of attorney to the Plaintiff (Exhibit "P.2")) he had become nearly (if not totally) blind, that he had not signed any papers from 1945, executing the power of attorney by mark, but that in 1948 he was mentally alert and even then he might have been able to sign his name if someone had guided his hand.

10. No affidavits of scripts were made but it appeared from the evidence of the Plaintiff at the trial on the 12th March, 1951, that he did not know until after the death that his father had made a Will and that, being so ignorant, he had applied for Letters of Administration. This witness stated at the trial that he had had the custody of the deceased's papers, and he had not seen a draft of a Will but he had seen a typewritten copy of the Will he was propounding.

Upon the review of judgment hereinafter mentioned, on the 16th April, 1951, the Plaintiff produced a sealed envelope, which he had found among the deceased's papers, and this, upon being opened by the Court, was found to contain a copy of the Will, which copy was admitted in evidence as Exhibit "P.4." In answer to the Court, the said John Michael Arthur said that this document ("P.4") was the "earlier copy" he made of the Will ("P.1"). Thereafter Plaintiff's Counsel stated that both "P.1" and "P.4" were signed by the deceased and this statement was not disputed. "P.4" appears to be identical in wording with "P.1," save that "P.1" is not preceded by the words "In the name of God. Amen," that in paragraph 14, the legacy of £20 to Kofi Ampah (the Defendant) which appears in "P.1" does not appear in "P.4," that there are throughout a number of immaterial variations in spelling and that at the end, in "P.1" "1944" appears both in words and figures but in "P.4" only in words, and, after the signature of the witness Hammond in "P.1," the words "Methodist Church" appear but in "P.4," "Methodist Minister."

11. The Will (Exhibit "P.1"), produced at the trial, was the Will for which the deceased had given instructions to the said Law Clerk and which the latter had typed and handed to the deceased as aforesaid. The said Will was dated the 20th day of November, 1944, and bore the signatures

of the deceased and of the two aforesaid attesting witnesses. In these circumstances, having regard to the fact that the deceased himself gave instructions for the Will, that at the time when the Will was typed and handed to him the deceased could read, that after the Will had been typed in accordance with his instructions and handed to him the deceased retained it in his custody for a considerable period, during part of which at least there was no reason to suppose that the deceased had lost the power to read, and that at the time when the deceased executed the said Will he referred to it as "my Will," the only reasonable conclusion at which the Court could arrive was that at the time when the deceased executed the Will he knew and approved its contents and that, as the said Will was duly executed by the deceased, it ought to be admitted to Probate. 10

p. 8, ll. 7-8.

12. No witnesses were called on behalf of the Defendant and he himself did not give evidence. His Counsel submitted at the close of the evidence for the Plaintiff that the Plaintiff should be non-suited but eventually asked for an order that the deceased died intestate, which had not been claimed in the pleadings.

13. Delivering judgment, Mr. Justice Dennison said :—

p. 8, ll. 17-29.

"The witnesses for the Plaintiff all struck me as completely  
 "honest. It is established by the evidence that the Testator 20  
 "started to go blind in 1941 and that his malady increased with  
 "each succeeding year. I have no doubt that in 1944 the  
 "Testator's eye-sight was so bad that he could not read also that  
 "his health was so feeble as to require help when he signed  
 "Exhibit 'P.1.' In these circumstances Order 49 rule 29 applies  
 "(see also page 29 of the 18th edition of Tristram and Cootes  
 "Probate Practice); the evidence in this case is that the Will  
 "was not read over to the Testator prior to execution, nor is there  
 "any evidence before me except that of J. M. Arthur that the  
 "Testator had full knowledge of its contents; it is indeed curious 30  
 "that this lawyer's clerk did not read over to the Testator the  
 "result of his labours. In the circumstances the Plaintiff's claim  
 "must fail and as a result the Testator is held to have died  
 "intestate."

14. Order 41 of the Rules of Civil Procedure in the Third Schedule of the Courts Ordinance gives a power to any Judge to review any judgment or decision upon prescribed conditions and, upon such review, to rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary, or confirm his previous judgment or decision, or to order a non-suit.

pp. 9 *et seq.*

The Plaintiff accordingly in due time applied for review of judgment 40  
 in order that the witness John Michael Arthur might be further examined, the learned Judge before delivering his judgment having intimated that he desired this when the evidence showed that the attesting witnesses had not read over the Will "P.1" to the deceased, and the Plaintiff himself desiring to bring to the notice of the Court an alleged proof of this witness's evidence, which had been sent to the office of Plaintiff's Counsel (acting as Solicitor) but which did not wholly accord with his actual evidence.

The learned Judge decided to recall this witness to answer the question he had originally intended to ask. The witness, on being recalled on the 16th April, 1951, by the Court and questioned by the Judge, deposed that he had not read over the Will but had left deceased as soon as he had given the deceased the Will and that at the time the deceased could see.

p. 14, ll. 9-14.

p. 14, ll. 28-30.

Counsel for the parties were then permitted to question the witness as to the alleged proof, when he deposed that the Plaintiff had asked him to make a statement, that he typed one out (Exhibit " P.3 " dated 25th October, 1950), and then found it not correct and told Plaintiff so.

p. 14, ll. 31-37.

p. 15, ll. 8-11.

10 He refused to give it to Plaintiff's Solicitor and Counsel, but the Plaintiff took it to him nevertheless.

15. There are certain discrepancies between the Statement (Exhibit " P.3 ") and the evidence which John Michael Arthur gave at the trial, such, for instance, as the averment in the Statement, on the one hand, that the deceased " dictated " his instructions for the Will to John Michael Arthur, whereas, on the other hand, the latter in his oral testimony said that the deceased gave his said instructions by handing " the paper " to him.

p. 29.

p. 29, l. 14.

p. 5, l. 3.

16. On the 21st April, 1951, Mr. Justice Dennison delivered his ruling on the motion for review, whereby he declined to review his judgment. He gave as his reasons :—

pp. 15-16.

p. 16, ll. 14-15.

(1) That on both occasions, when the witness John Michael Arthur was in the witness box, his evidence had made it clear that he did not read over " P.1 " to the deceased ;

p. 16, ll. 3-4.

(2) That in the case of *Garnett-Botfield v. Garnett-Botfield* (1901) P. 335 it was held that, if the Court was not satisfied with the way in which the Will was read over to the Testator, intestacy must result ;

p. 16, ll. 4-7.

30 (3) That in the present case the Testator was very old when he made his Will and his eyesight " was beginning to fail " and that in those circumstances he (the learned Judge) " failed to see how the " Court could presume that the Testator himself read the Will and " understood its contents " ;

p. 16, ll. 8-11.

(4) That upon all the facts of the case he was far from satisfied that it had been proved before him that the deceased was fully aware and understood the contents of " P.1 " when he executed the same.

p. 16, ll. 12-14.

17. On the 30th April, 1951, the Plaintiff (the present Respondent) gave notice of appeal to the West African Court of Appeal from the said Judgment dated the 12th March, 1951, and " confirmed on review on the " 21st April, 1951."

pp. 16-17.

p. 16, l. 33.

18. The appeal was heard on the 17th December, 1951, by the West African Court of Appeal (Gold Coast Session) sitting at Accra and consisting of His Honour Sir S. Foster Sutton, President, His Honour Mr. Justice J. Henley Coussey (as he then was) and His Honour Mr. Justice K. A. Korsah. Judgment was reserved.

p. 18.

pp. 19-20.

19. On the 21st day of December, 1951, the West African Court of Appeal unanimously allowed the appeal.

20. In the course of his Judgment the learned President said :—

p. 19, l. 19 *et seq.*  
p. 20, ll. 1-15.

“ The Testator gave his instructions regarding the preparation of the Will in dispute, Exhibit P.1, sometime in 1941, and the document was typed in that year. After it had been typed it was handed to the Testator who appears to have kept it in his custody up to the 20th of November, 1944, when he told James Amisah Hammond, a Methodist Minister, and Joseph Brookman Amisah Arthur, both of whom gave evidence at the hearing in the Court below, that he had made his Will and asked them to witness his signature. 10

“ There was evidence that in November, 1944, the Testator was in a feeble state of health and that his eyesight was poor. Both of the witnesses I have already referred to gave evidence that the Testator’s hand had to be guided when he made his signature to the Will.

“ The learned trial Judge, in effect, held that the Testator was not competent on 20th November, 1944, owing to his feeble state of health and bad eyesight to make a Will, and he accordingly held that John Intsiful died intestate, and gave Judgment for the Defendant. 20

“ It was argued on behalf of the Appellant that the evidence clearly shows that the Testator knew what he was doing when he executed the testamentary document in question and, in my opinion, the preponderance of evidence is in favour of that contention.

“ The Testator gave detailed instructions for the preparation of Exhibit P.1, he kept it in his possession for several years and eventually told two responsible persons that he had made his Will and wished them to witness his signature to it. After the Will had been signed and witnessed he asked Mr. Hammond, the Methodist Minister, whose evidence I have already referred to, to deposit it in the Divisional Court, Cape Coast, which he did. 30

“ Another witness Gaddiel Robert Acquaaah, Chairman of the Methodist Church in the Gold Coast, gave evidence that in 1948 the deceased ‘ was nearly blind but mentally alert.’

“ In my opinion the better view of the facts in this case is that the Testator was fully aware of the contents of Exhibit P.1 when he executed it on the 20th November, 1944, that he knew what he was doing and wished to make his last Will and Testament. To hold otherwise would defeat the Testator’s wishes which he has clearly expressed and wished to be carried out. 40

“ It follows, therefore, that in my opinion this Appeal should be allowed and that there should be a declaration that the Will in question is a valid one.”

p. 20, ll. 19, 20.

With this Judgment the other members of the Bench concurred.

21. On the 26th day of June, 1952, final leave to appeal to the Privy Council was granted by the West African Court of Appeal to the present Appellant. p. 20, l. 34.

22. The present Respondent respectfully submits that the appeal should be dismissed with costs for the following, among other

### REASONS.

- (1) BECAUSE the West African Court of Appeal rightly reversed the Judgment of the learned Trial Judge.
- 10 (2) BECAUSE the learned Trial Judge was wrong in failing to be satisfied upon the evidence before him that the deceased was fully aware of, understood and approved the contents of his Will.
- (3) BECAUSE the learned Trial Judge was wrong in law in considering that, upon the facts proved, he was bound either by Order 49, Rule 29, of the said Rules of Civil Procedure, or by authority, to hold that the Will "P.1" ought not to be admitted to probate or that the deceased died intestate.
- 20 (4) BECAUSE the West African Court of Appeal rightly held that the better view of the facts was that the deceased was fully aware of the contents of the Will (Exhibit "P.1") when he executed the same on the 20th November, 1944, that he knew what he was doing and wished to make his last Will and Testament.
- (5) BECAUSE the Judgment of the West African Court of Appeal was right and ought to be affirmed.

JAMES A. PETRIE.

In the Privy Council.

---

---

ON APPEAL

*from the West African Court of Appeal  
(Gold Coast Session).*

---

---

IN THE MATTER of JOHN INTSIFUL  
(deceased).

BETWEEN

HENRY CHARLES  
CHRISTIAN, otherwise  
called Kofi Ampah  
(Defendant) . . . . *Appellant*

AND

SAMUEL TAWIAH  
INTSIFUL (Plaintiff) . *Respondent.*

---

---

Case

ON BEHALF OF THE RESPONDENT.

---

---

A. L. BRYDEN & WILLIAMS,  
53 Victoria Street,  
London, S.W.1,  
*Respondent's Solicitors and Agents.*