

1, 1969

1.

No. 33 of 1966.

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL

FOR SIERRA LEONE

B E T W E E N :

JOSEPH ALLEN SMITH
(Plaintiff) Appellant

UNIVERSITY OF LONDON
SCHOOL OF ADVANCED STUDIES
MAR 1970
2, 5, 8, 11 SQU
LONDON W.C.1

- and -

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1. FATULA CHRISTIANA WALKER
2. TAIWO VICTORIA EDWARDS
(Defendants) Respondents

CASE FOR THE APPELLANT

Record

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1. This is an appeal from a Judgment and Order of the Court of Appeal for Sierra Leone dated the 3rd June, 1966, allowing an appeal from and reversing a Judgment and Order of the Supreme Court of Sierra Leone, dated the 7th January, 1966, whereby it had been adjudged and ordered that a Deed of Gift, dated the 6th October, 1953, relating to certain real property in Freetown, should be set aside.

pp. 51-57
pp. 36-43
p. 83

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2. The principal question that arises for determination on this appeal is whether the donor of the Deed of Gift, one Ransolina Patience Cromanty (hereinafter called "Mrs. Cromanty") had a good title to the said property acquired by long possession thereof in her own right, under the provisions of the Limitation Act, 1961. (Relevant parts of the said Act are set out in the Annexure hereto).

3. The relevant facts, and material events prior to the execution of the Deed of Gift, are as follows :-

(i) The property the subject of the Deed is commonly known as No. 98 Fourah Bay Road, Freetown.

(ii) The said property formed a part of

- Record
- p. 61 certain larger premises at Fourah Bay Road which were acquired by purchase by one James Beresford Sawyerr (hereinafter called "the Mortgagor") under a Deed of Conveyance dated the 6th July, 1887.
- p. 67 (iii) On the 16th May, 1895, the whole of the said premises were mortgaged by the Mortgagor to a brother of his, namely Jacob Williamson Sawyerr (hereinafter called "the Testator"), a merchant then residing temporarily at Accra, Gold Coast, by a Deed of Mortgage of that date, redeemable on the 8th February, 1897. 10
- p. 26, 1.6.
p. 49, 1.21. (iv) The Mortgagor died intestate at Freetown Sierra Leone, on the 17th May, 1909, never having redeemed or obtained a re-conveyance of the mortgaged premises.
- p. 12, 11.2-3.
p. 75 (v) The Testator died on the 15th August, 1916, at Accra, Gold Coast, leaving a Will dated the 30th May, 1908, which contained after a number of devises and bequests of property in the Gold Coast, the following devise :- 20
- "I devise and bequeath my freehold land 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, James Beresford, my sister Ransolina Patience Cromanty and to my daughters Georgiana Lucretia and Jane Alice all in equal share and it is my express desire that these lands be not sold but they must descend from children to children." 30
- p. 53, 1.15. It is common ground that No. 98 Fourah Bay Road is part of the "freehold land" referred to and described in the said devise.
- p. 12, 1.15.
p. 42, 1.3. (vi) The Appellant (hereinafter called "the Plaintiff") is one of the sons of the said devisee Jane Alice who became on her marriage Jane Alice Smith; and as such he is a beneficiary under her Will. The Respondents (hereinafter called "the Defendants") are children of the said devisee Georgiana Lucretia, who married and became Georgiana 40
- p. 25, 1.19.
p. 27, 1.11.

Lucretia Rose.

Record

- (vii) Probate of the Testator's Will was granted in the Gold Coast to Mrs. Cromanty, the only survivor of three persons named therein as executors, whereby the estate situated in the Gold Coast became lawfully vested in her, but the grant was not resealed in Sierra Leone, and no probate, or letters of administration with the Will annexed, were obtained in Sierra Leone.
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- (viii) After the death of the Mortgagor, Mrs. Cromanty collected the rents and paid the rates of No. 98, Fourah Bay Road. She collected rents as far back as 1910. She paid the rates from 1909 until her death in 1957; and from 1913 her name appeared in the Rates Register as the owner.
- (ix) By a Deed of Conveyance, dated 16th November, 1932, Mrs. Cromanty, acting or purporting to act as executor of the Will of the Testator, sold and conveyed to one Joseph Christopher Metzger a portion of land which appears to have been part of the land referred to and described in the devise set out above in sub-paragraph (v).
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4. On the 6th October, 1953, Mrs. Cromanty executed the Deed of Gift, whereby she purported to convey, as beneficial owner, No. 98 Fourah Bay Road to the Defendants. The description of the said property contained in the Deed indicates that it adjoins the portion of land that was conveyed to Metzger in 1932.
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5. On the 8th June, 1964, the present suit was commenced, by a Writ in the Supreme Court of Sierra Leone, the claim being that the Deed of Gift should be set aside, and for other consequential relief.
6. The Statement of Claim, dated the 8th October, 1964, set out the salient facts relative to the history of No. 98 Fourah Bay Road, and alleged that Mrs. Cromanty by her dealings with the said property, without having obtained probate in Sierra Leone or resealing the grant obtained by her in the Gold Coast, intermeddled therewith.
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p. 74

p. 75, 1.6.

p. 12, 1.24.

p. 39, 1.31.

p. 39, 1.36.

p. 26, 1.12.

p. 28, 1.27.

p. 29, 1.2.

p. 29, 1.6.

p. 79

p. 83

p. 52, 1.15.

p. 83, 1.41-

p. 84, 1.2.

p. 1

p. 2

p. 3

p. 5, 1.34-

p. 6, 1.14.

- Record
p. 7
7. By their Defence, dated the 14th November, 1964, the Defendants alleged as follows :-
- p. 7, 1.13. (i) That by virtue of the Deed of Gift they are the owners in fee simple of No. 98 Fourah Bay Road.
- p. 7, 1.22. (ii) That Mrs. Cromanty was possessed of the said property and otherwise well entitled to make the grant to them.
- p. 7, 1.28. (iii) That the Mortgagor was owner in fee simple in possession of the said property. 10
- p. 8, 1.1. (iv) That the Mortgagor died in Freetown in 1909 seized and possessed of the said property.
- p. 8, 1.6. (v) That the Testator left Sierra Leone in 1872 for the Gold Coast, and resided there permanently until his death.
- p. 8, 1.12. (vi) That on the death of the Mortgagor, Mrs. Cromanty "went into possession, full, free and undisturbed" of the said property "and solely enjoyed the rents and profits thereof, on her own right". 20
- p. 8, 1.20. (vii) That the Defendants plead the Limitation Act.
8. The Suit was heard in the Supreme Court (cor: Cole J., Ag.C.J.) on various dates between the 7th October, 1965, and the 7th January, 1966. Oral evidence was given on both sides.
- pp. 11-15.
p. 12, 1.28. 9. The Plaintiff gave evidence, in the course of which (in examination in chief) he said that after the death of the Testator Mrs. Cromanty went into possession of No. 98 Fourah Bay Road "in her capacity as executrix and trustee", and referred to the Deed of Conveyance dated the 16th November, 1932, in favour of Metzger. Asked about this point in cross-examination he said as follows :- 30
- p. 14, 1.6. "Q. Why do you say that (Mrs. Cromanty) went into possession of 98 Fourah Bay Road as Executrix and Trustee.
- "A. She said so. She also stated so in the document I have already referred to.

He also said that there were no foreclosure proceedings.

Record
p.14, 1.16.

10. The first-named Defendant in her evidence said that she had lived with Mrs. Cromanty from the time of her birth until her marriage, at 14, Crook Street, Freetown, and stated:-

p. 25,
p. 25, 1.22.

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"No. 98 Fourah Bay Road was under rentage - I used to go and collect rents from these premises - I was sent by Mrs. Cromanty - No. 98 Fourah Bay Road was being used as a Vicarage for St. Philips Church - St. Philips Church was tenant - They have been tenants for over 30 years now - They are still tenants - Mrs. Cromanty to my knowledge never shared the rents from these premises with anyone Mrs. Cromanty herself paid the rates for those premises up to her death"

p. 26, 1.12.

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11. An issue of estoppel was raised on behalf of the Plaintiff, at first by way of preliminary objection, and subsequently by a Reply dated November, 1965, to which a Rejoinder dated 13th November, 1965, was filed. The Plaintiff's case, upon this point, rested upon Judgments in the Supreme Court of Sierra Leone and in the Sierra Leone Court of Appeal in an earlier action, C.C.85/58B. and Appeal 14 of 1961, in which the Plaintiff in the present suit was one of the Plaintiffs, and the executors of Mrs. Cromanty were the Defendants.

p. 9, 1.22.
p. 17
p. 18

Supp.Record

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The Claim in the earlier action was for (inter alia) a declaration that the Plaintiff (and his co-Plaintiffs in that action) were beneficially entitled to the property at Fourah Bay Road, Malta Street and Lucas Street, referred to in the devise set out above, in paragraph 3 hereof.

Supp.Record,
p.8.

Amongst the issues in the action were (a) the question whether Mrs. Cromanty was in possession of the said property as executrix of or trustee under the Will of the Testator, and (b) whether No. 98 Fourah Bay Road was part of the estate of the Testator. Those issues arose upon the pleadings, viz. the Statement of Claim, paragraph 13, and the Defence, paragraphs 6, 8 and 9.

Supp.Record,
pp. 6 & 10.

In the Supreme Court, the learned trial Judge

Supp.Record:-

Record
pp. 14 & 18.

(Luke Ag.J.), by a Judgment dated 5th September, 1961, held (inter alia) (a) that although after the death of the Testator Mrs. Cromanty started dealing with the property as if it were her own, she was in truth a trustee, and (b) that No. 98 Fourah Bay Road was part of the estate of the Testator. He made the declaration asked for.

Supp.Record,
pp. 24-32.

The Court of Appeal (Ames Ag.P., Dove-Edwin J.A. and Marcus-Jones Ag.J.) upheld the Judgment of the Supreme Court.

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As the declaration sought and granted in that action related to land which included No. 98 Fourah Bay Road, it was, of course, necessary for the learned trial Judge to consider the effect of the Deed of Gift which is the subject-matter of the present suit, although the Defendants in the present suit were not parties to that action, and while doing so he made the following observations, viz.:-

Supp.Record
p.20, l.1.

"The donees (i.e. the Defendants in the present suit) have not elected to give evidence on the issue"

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Record:

In the present suit, the evidence of the first-named Defendant included the following:-

p. 26, l.29.

".....2nd Defendant and I have received no rents since death of my grand-aunt, Mrs. Cromanty. I am not happy about that - No action taken against the Church Committee - The estate matter was in Court."

Xxd. ...The Plaintiff and others have brought the estate of Mrs. Cromanty several times to Court"

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pp. 36-42

12. In his Judgment, dated the 17th January, 1966, the learned trial Judge first dealt with the question whether at the date of the death of the Testator on the 15th August, 1915, the premises the subject of the Deed of Mortgage formed part of his estate, and decided that they did :-

p. 38, l.16.

"There is no evidence that the Mortgagor or any one on his behalf redeemed the mortgage or obtained reconveyance of the mortgage premises. In the circumstances I find that the mortgage in question was never redeemed.

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That being the case I also find that the right of redemption on the part of the Mortgagor of the premises mortgaged has been lost by lapse of time.

Record

The Testator died on the 15th August, 1915, at Accra Gold Coast now Ghana leaving his last Will and Testament dated the 30th day of May, 1908. I am satisfied on the evidence that on the date of his death the mortgage premises at Fourah Bay Road belonged to and formed part of the estate of the Testator."

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Upon the basis of that conclusion, the learned Judge held that No. 98 Fourah Bay Road formed part of the Testator's estate, and was included in the devise of freehold lands in Freetown which is set out above in paragraph 3(v) hereof.

p. 39, 1.28.

13. The learned Judge then pointed out, however, that although the said property was part of the Testator's estate, it did not pass to Mrs. Cromanty as the Executrix, under the probate granted to her in the Gold Coast, because of the failure to re-seal the grant in Sierra Leone.

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p. 39, 11.6-33

p. 39, 1.28

14. Next the learned Judge dealt with the important matter of Mrs. Cromanty's dealings with No. 98 Fourah Bay Road, and stated his view of the relevant facts in the following terms:-

"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 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, Freetown, which formed part of the estate of the Testator. She collected the rents and profits, paid the rates and taxes for No. 98 Fourah Bay Road up to the 6th October, 1953 when she conveyed the property to the Defendants by the Deed of Gift and in spite of that Conveyance she continued according to the evidence to collect

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p. 39, 1.34.

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Record

the rents of No. 98 Fourah Bay Road up to her death in 1957. This is the title on which she relies when she conveyed No. 98, Fourah Bay Road to the Defendants by virtue of the Deed of Gift.

- p. 40, l.24. 15. The conclusion reached by the learned Judge was that Mrs. Cromanty's dealings with the estate of the Testator in Sierra Leone, including No. 98, Fourah Bay Road, constituted her in law an executor de son tort of that part of the estate which was situated in Sierra Leone. He also found that in disposing of No. 98 Fourah Bay Road she did so in her capacity as a constructive trustee and that her disposal thereof was a fraudulent breach of trust. In those circumstances, he held that the Limitation Act did not apply. 10
- p. 41, l.1.
- p. 41, l.13.
- pp. 41-42 16. Finally, it was held that the Plaintiff was entitled to bring the claim, by virtue of his interest as a beneficiary under the Will of his mother, Jane Alice Smith, and the order made was that the Deed of Gift be set aside and that the property No. 98 Fourah Bay Road be dealt with in the manner laid down in the Will of the Testator. The Plaintiff was awarded costs. 20
- p. 41, l.24.
- p. 45 17. The Defendants' grounds of appeal included the following :-
1. The learned trial Judge was wrong in law and in fact by his finding that at the date of the death of the Testator, the mortgaged premises No. 98, Fourah Bay Road belonged to him and passed under the devise in his Will. 30
 2. The learned trial Judge misapplied the law of mortgages to the facts herein when he held that the right of redemption on the part of the Mortgagor of the premises mortgaged had been lost by lapse of time.
 3. The learned trial Judge wrongly received in evidence the Deed of Conveyance from Mrs. Cromanty to Metzger. 40
18. In the Court of Appeal (Jones P., Dove-Edwin J.A. and Marcus-Jones P.J.) the principal Judgment

was delivered by the learned President, the other two members of the Court concurring. The learned President dealt only with the first two grounds of appeal.

Record

p. 55, 1.9.

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18. On the question whether No. 98 Fourah Bay Road formed part of the Testator's estate, the learned President held that the Testator's right as a mortgagee to foreclosure or sale was extinguished after a period of 12 years had run out as from the 8th February, 1897 (the date on which the premises the subject of the mortgage were redeemable) and that the effect of this was to bar the Testator's title and vest the legal estate in the Mortgagor. The learned President stated his conclusion in the following terms:-

p. 55, 1.29.

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"On the evidence it was quite clear that the mortgagee (i.e. the Testator) was never in possession of the property and it is a reasonable and fair inference from all the surrounding circumstances that from the date of execution of the mortgage deed, the mortgagor was in possession and was so in possession up to the date of his death. It follows then in my opinion, that the answer to the first question is, that the property, with respect to the learned judge did not in law form part of the estate of the Testator, and he therefore had no right to have devised it in his will as he did."

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20. The learned President then dealt with the question whether Mrs. Cromanty had acquired a title to the property, which she could convey to the Defendants by the Deed of Gift. Upon that question, he held as follows :-

p. 56

(i) That on the death intestate of the Mortgagor in 1909 the property became vested in the Curator of Intestate Estates, under the Intestates Estates Ordinance, 1887;

p. 56, 1.12.

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(ii) That there was no evidence that the Curator ever took possession of the property, and therefore his right became barred by lapse of time;

p. 56, 1.14.

(iii) That Mrs. Cromanty, having been in possession since the death of the Mortgagor,

p. 56, 1.2.

Record
p. 56, 1.31.

had acquired an indefeasable possessory title, and had the legal right to part with the property by whatever means she chose and to whomsoever she pleased.

pp. 56, 57

21. There was no finding on the issue of estoppel.

22. The appeal was allowed, with costs.

23. Final leave to appeal to Her Majesty in Council was granted on the 26th September, 1966.

24. The Plaintiff respectfully submits that this appeal should be allowed with costs here and in the Courts below, and that the Judgment and Order of the Supreme Court should be restored, for the following, amongst other,

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R E A S O N S

(1) BECAUSE the Judgment of the Supreme Court is right for the reasons therein appearing.

(2) BECAUSE there is no evidence that the Mortgagor was in possession at and from the date of the mortgage deed, and the Judgment of the Supreme Court rightly proceeded upon that footing.

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(3) BECAUSE the Court of Appeal erred in inferring that the Mortgagor was in possession at and from the date of the mortgage deed, and in (impliedly) reversing the Judgment of the Supreme Court upon that point.

(4) BECAUSE even if the Court of Appeal were right in holding that the property No. 98 Fourah Bay Road did not form part of the Testator's estate, they were wrong in holding that Mrs. Cromanty acquired any right or title in her own right to the said property.

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(5) BECAUSE the Defendants failed to prove, and the Court of Appeal ought not to have held or assumed, that Mrs. Cromanty's possession (if any) of the said property was in her own right.

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- (6) BECAUSE on the evidence Mrs. Cromanty never had possession of the said property in her own right.
- 10 (7) BECAUSE the Court of Appeal erred in inferring that Mrs. Cromanty was in possession from 1909 and ought not to have inferred that her possession (if any) commenced prior to 1917; alternatively because, in any event, the evidence shows that her possession (if any), as from the date of the death of the Testator, was as executrix and trustee under the Will of the Testator.
- 20 (8) BECAUSE even if the Court of Appeal were right in holding that the said property vested in the Curator of Intestate Estates and that his title became barred by lapse of time, the title in that event vested in the estate and the beneficiaries under the Will of the Testator.
- (9) BECAUSE even if the title to the said property vested in Mrs. Cromanty she held the same as a trustee on behalf of the said estate and the said beneficiaries.
- 30 (10) BECAUSE if Mrs. Cromanty was in possession of the said property, her possession thereof was as and in the capacity of executor and trustee under the Will of the Testator, and it was not competent to her to set up an adverse title as against the estate, or allege that the Testator had no title to the said property.
- (11) BECAUSE it was not open to Mrs. Cromanty, and therefore not open to the Defendants, to found a claim under the Limitation Act upon the contention that the Testator had no title to the said property.
- 40 (12) BECAUSE the Court of Appeal ought to have decided the issue of estoppel.

12.

(13) BECAUSE the Defendants are estopped by the findings in the Supreme Court and the Court of Appeal in Suit C.C. 85/58B, and Appeal 14 of 1961, and their conduct, from contending in the present suit (a) that the property No. 98 Fourah Bay Road did not form part of the estate of the Testator, (b) that Mrs. Cromanty was entitled to the said property in her own right.

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RALPH MILLNER

DESMOND LUKE

ANNEXURE

LIMITATION ACT, 1961

Section 1. (Provides inter alia that the Act shall come into operation on the 1st day of January, 1962).

Section 2. Interpretation

.....

(4) References in this Act to a right of action to recover land shall include references to a right to enter into possession of land

Section 5. Limitation of actions to recover land.

.....

(3) No action shall be brought by any other person (i.e. by any person other than the Crown or a spiritual or eleemosynary corporation sole) to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims to that person

Section 11. Right of action not to accrue or continue unless there is adverse possession

(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as "adverse possession") and where under the foregoing provisions of this Act any right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

Section 16. Extinction of title after expiration period

Subject to the provisions of section 8 of this Act at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.

Section 18. Limitation of actions to recover money secured by a mortgage or charge or to recover the proceeds of the sale of land.

.....

(4) Nothing in this section shall apply to a foreclosure action in respect of mortgaged land but the provisions of this Act relating to actions to recover land shall apply to such an action.

.....

Section 19. Limitation of actions in respect of trust property.

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action -

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

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No. 33 of 1966.

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JOSEPH ALLEN SMITH
(Plaintiff) Appellant

- and -

1. FATULA CHRISTIANA WALKER
2. TAIWO VICTORIA EDWARDS
(Defendants) Respondents

C A S E

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