

*Privy Council Appeal No. 33 of 1966*

Joseph Allen Smith - - - - - *Appellant*  
v.  
Fatula Christiana Walker and another - - - - - *Respondents*

FROM  
**THE SUPREME COURT OF SIERRA LEONE**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 14TH JANUARY 1969

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*Present at the Hearing :*

LORD GUEST  
LORD UPJOHN  
SIR THADDEUS MCCARTHY  
[*Delivered by* LORD UPJOHN]

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This is an appeal from the Judgment dated 3rd June 1966 of the Court of Appeal of Sierra Leone reversing the Judgment dated 7th January 1966 of Cole, Ag. C.J. sitting in the Supreme Court of Sierra Leone who ordered that a Deed of Gift dated 6th October 1953 made between Ransolina Patience Cromanty (to whom their Lordships will refer as Mrs. Cromanty) and the respondents should be set aside. By this deed Mrs. Cromanty purported to convey to the respondents (who were her nieces and to whom she had been in *loco parentis*) by way of gift the fee simple of the premises situate at and known as No. 98 Fourah Bay Road, Freetown, in the Western area of Sierra Leone (to which property their Lordships will refer as No. 98).

As the appeal is concerned solely with questions of real property and mortgages thereon in Sierra Leone it is necessary to state that the relevant law is the statutory, common law and equity doctrines in force in England on 1st January 1880 together with most of the subsequent statutory enactments relating to real property and trustees up to the year 1911 save that the Land Transfer Act 1897 does not apply to Sierra Leone.

The history of the matter begins with a conveyance on 6th July 1887 by a vendor to one James Beresford Sawyerr (to whom their Lordships will refer as the mortgagor) of some freehold property which, it is common ground, included No. 98. The mortgagor was a brother of Mrs. Cromanty. On 16th May 1895 the mortgagor mortgaged the property to his brother Jacob Williamson Sawyerr (to whom their Lordships will refer as the mortgagee) to secure repayment of the sum of £328 1s. 10d. with interest thereon at 5 per cent per annum. The date for redemption at law was expressed to be 8th February 1897 and the mortgage contained the usual common clauses providing that if the mortgage was not redeemed upon that date interest thereafter should be paid at the rate of 5 per cent per annum and if unpaid for a period of three months or upon three months' notice the mortgagee should have the right to sell the premises and of course he had the right as a legal mortgagee to enter into possession of the mortgaged properties or of its rents and profits. On 17th May 1909 the mortgagor died intestate. On 15th August 1916 the mortgagee died having on 30th May 1908 made a will which appointed a number of executors of whom the only one surviving at his death was his sister Mrs. Cromanty. The mortgagee died in the Gold Coast, as it was then called, and his will was duly proved there. It was never re-sealed in Sierra Leone but in their Lordships' opinion this is of no importance. By his will the mortgagee made a number of devises of his properties. The relevant devise (to which their Lordships will refer to as the mortgagee's devise) was in these terms:

" 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."

He concluded his will by appointing Mrs. Cromanty to be his residuary legatee.

The appellant (plaintiff in the action) claims to be interested in the mortgagee's devise as one of the children of Jane Alice therein mentioned and he alleges that Mrs. Cromanty held No. 98 as from the death of the mortgagee as his sole surviving executrix and trustee as part of the mortgagee's devise and that as such she had no right or title to convey that property by way of gift to donees.

In their Lordships' opinion the real difficulty in this case arises because, owing to the passage of time there is no evidence as to the conduct of the mortgagee and his brother the mortgagor with regard to the mortgage, nor of the conduct of their sister Mrs. Cromanty. This is not surprising in an essentially family transaction of, even in those days, small proportions.

There is no evidence that the mortgagor ever repaid the loan or any part thereof during his lifetime. It seems clear that he never formally redeemed the mortgage. Equally it seems clear that the mortgagee never foreclosed. There is no evidence whether the mortgagor in his lifetime ever did (or did not) pay any interest or did (or did not) acknowledge his indebtedness to his brother for the purpose of the relevant Limitation Acts. On the other hand there is no evidence that the mortgagee ever entered into possession of the rents and profits of the mortgaged property or any part thereof or otherwise exercised any of his powers as a legal mortgagee. The only matter that was cogently established by entirely independent evidence was that from the year after the death of her mortgagor brother in 1909, Mrs. Cromanty in fact collected and received the rents of No. 98, but there was no positive evidence that down to the death of the mortgagee these rents were received either on behalf of the lately deceased mortgagor's estate or on her own behalf or as agent for her then living mortgagee brother. It has however been agreed for the purpose of the action that since 1909 until her death Mrs. Cromanty paid the rates on No. 98 and that since 1913 her name has appeared in the Rates Register as the owner of No. 98.

It is not disputed that in fact since the mortgagee brother's death in 1916 Mrs. Cromanty received the rents of No. 98 and used them for her own benefit until the Deed of Gift in 1953 and thereafter she continued to receive the rents until her death in 1957, though dividing them among the respondent donees.

The appellant alleges that down to the mortgagee's death Mrs. Cromanty received the rents on the mortgagee's behalf; thereafter she received them as executrix and trustee of his estate and wrongfully and in breach of trust converted them to her own use.

From about 1958 when certain proceedings (to which their Lordships will refer as the 1958 proceedings) were instituted by the appellant and others against the personal representatives of Mrs. Cromanty claiming relief against her estate in respect of alleged breaches of trust by her as executrix and trustee of the mortgagee's estate, the tenants of No. 98 have not paid any rent, but solely because, as was said in evidence on their behalf, there was no person to whom the rent could safely be paid: apparently the rents have since then and are now being paid into Barclay's Bank "Rent Fund Account".

In these circumstances it seems clear to their Lordships that the respondents set up a strong title to No. 98 supported by long and undisputed possession thereof by receipt of its rents and profits by themselves and their predecessor Mrs. Cromanty for many years and recognised by a paper title granting them the fee simple based on such possession.

There is a heavy onus upon the appellant to displace such ownership and possession which he must establish by proving a legal and enforceable title superior to that of Mrs. Cromanty and her donees.

It seems to their Lordships clear that the appellant can only establish such title either by proving that in his lifetime the mortgagee went into possession of the rents and profits of No. 98 or that Mrs. Cromanty after the mortgagee's death in 1916 received the rents and profits thereof in her capacity as executrix and trustee or must be deemed to have done so because she cannot plead her own wrong; she was an executrix *de sa tort*. In addition it is clear that in order to succeed in his claim the appellant must prove not merely that Mrs. Cromanty received or must be treated as having received the rents in a fiduciary capacity as executrix and trustee but that as such it was her duty to account for such rents to the devisees under the terms of the mortgagee's devise.

It will be convenient now to consider the position as at the date of the mortgagee's death.

Cole Ag. C. J. in the Supreme Court found as a fact that the mortgagor never redeemed the mortgage and he was clearly justified on the evidence in doing so. But he then found that the mortgagor's right of redemption had been lost by lapse of time. With all respect to the Acting Chief Justice this finding cannot be supported in law. The relevant Statute of Limitations at this time was the Real Property Limitation Act 1874. Section 7 makes it plain that before time starts to run to bar the mortgagor's equitable right of redemption the mortgagee must enter into receipt of the rents and profits of the mortgaged property and as their Lordships have pointed out there is no evidence that the mortgagee ever did so, for Mrs. Cromanty's receipt thereof during his life was not established to be upon his behalf. So in their Lordships' opinion, upon the evidence, it must be assumed that the mortgagor's right of redemption may have been subsisting at the time of the mortgagee's death.

On the other hand in the Court of Appeal Sir Samuel Bankole Jones P. (with whom the other members of the Court agreed) held that the mortgagee's right of foreclosure was extinguished because the period of 12 years laid down by the 1874 Act (above mentioned) had elapsed by 1909. With all respect to the learned President's judgment the relevant section of that Act is section 8.

In their Lordships' opinion this finding is equally insupportable in law for the right to enforce the mortgage by sale or foreclosure could only be lost if it could be shown that in the preceding 12 years there had been no part repayment of capital, no payment of interest nor any acknowledgment of the mortgagee's title by the mortgagor and there is no such evidence.

In their Lordships' judgment upon the death of the mortgagee the position was either that the mortgagee's right of foreclosure had been barred though not proved or that he remained mortgagee so that he and his estate continued to have rights as such over No. 98, though not as mortgagee in possession.

This conclusion is fatal to the appellant's case for the mortgagee's mortgage on No. 98 could not as a matter of construction pass under the mortgagee's devise of freehold land at any rate unless he could prove that at the date of his death he was a mortgagee in possession which as already pointed out the appellant failed to do. See Theobald on Wills, 12th edition, paragraph 650.

During the hearing in the Court of Appeal while No. 98 was not specifically mentioned in the will the parties all agreed that the property formed part of the "freehold land with the buildings thereon situate at Fourah Bay Road . . ." in the mortgagee's devise. But in their Lordships' view that meant no more than that the words freehold land, etc., would include No. 98 if it was a freehold interest owned by the Testator; but that agreement could not in their Lordships' opinion operate to pass a mortgage upon No. 98 by virtue of the mortgagee's devise. So the appellant fails to establish any right to No. 98 under the terms of the mortgagee's devise. Though it is not necessary to decide the point it may be that as a mortgage is only a secured debt it passed to

Mrs. Cromanty as the mortgagee's residuary legatee though the terms of the Deed of Gift of 1953 would lead to the inference that she or her advisers did not appreciate this.

That is sufficient to dispose of this appeal but in view of some further arguments that were addressed to their Lordships they think it right to express some views upon them, though they propose to do so very shortly.

It was sought to establish that Mrs. Cromanty assumed the role of executrix and trustee of the mortgagee's will and of the mortgagee's devise.

Their Lordships do not doubt that Mrs. Cromanty assumed that role (subject to their observations on the Land Transfer Act 1897 below) for in 1932 she conveyed part of the devised lands to a purchaser who had purchased part of the lands included in that devise from the mortgagee in his lifetime; thus converting that part of the mortgagee's devise into personalty during his life and *pro tanto* adeeming the devise so that Mrs. Cromanty quite properly sold as executrix and confirmed the sale as residuary legatee. That deed is otherwise irrelevant for it was not established that the lands thereby sold included any part of the mortgaged property it being common ground that much of the mortgagee's devise had no connection with the mortgaged property but was acquired from an ancestor. But this has no bearing on the receipt of the rents of No. 98 which admittedly (as was recited in the 1953 deed) she received for her own use and benefit. It may be in law that Mrs. Cromanty should have paid interest on the mortgage debt to herself as executrix and subject to the expenses of administration retained as residuary legatee but the balance of the rents should have been held not on behalf of the mortgagee but of the mortgagor. But the mortgagor's title as against Mrs. Cromanty has been barred for a great many years, as she was not shown to be in any fiduciary capacity to him.

Finally it was suggested that the respondents were estopped from defending this case by reason of the fact that they stood by and did not intervene in the 1958 proceedings against Mrs. Cromanty's executors. Those proceedings went to the Court of Appeal where it was made quite plain by the Court that there could not be any estoppel by *res judicata* against the respondents. That was obviously right. But it was argued before their Lordships that by "standing by" and their Lordships suppose this means by not coming forward and asking to be added as defendants they have lost their rights and reliance was placed on the case of *Nana Ofori Atta II v. Nana Abu Bonsra II* [1958] A.C. 95.

In their Lordships' opinion the circumstances of that case were very different from those of this case.

A person in possession under a *bona fide* title is entitled to remain there until someone seeks to eject him, by legal process.

As Ames Ag. P. said in the Court of Appeal in the 1958 proceedings the respondents ought to have been joined as defendants which plainly meant that the plaintiffs ought to have joined them as defendants. There can be no possible obligation upon persons who ought to be sued as defendants as persons in possession themselves to apply to be added as such.

With all respect to this argument their Lordships regard it as misconceived.

A further point which seems to their Lordships of some substance though rejected by the Court of Appeal in the 1958 proceedings depended upon the fact that as the Land Transfer Act 1897 did not apply to Sierra Leone Mrs. Cromanty had no fiduciary duties in relation to the mortgagee's devise which passed directly to the devisees but as this point was not argued at length before their Lordships they do not propose to deal with it save to say that they must not be taken as agreeing with the reasoning of the Court of Appeal upon this point in the 1958 proceedings.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

The appellant must pay the respondents' costs of the appeal.



In the Privy Council

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JOSEPH ALLEN SMITH

v.

FATULA CHRISTIANA WALKER  
AND ANOTHER

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DELIVERED BY  
LORD UPJOHN