JOHN R. H. BRIGHT, Administrator of the Intestate Estate of the late MARY McCRITTY FISKE,

Appellant, v. **ISAAC VAN FISKE**, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: April 9, 1986. Decided: May 30, 1986.

1 A party may make mention of an article in his pleading without proferting it, especially when the article is in the possession of his adversary. He need not give notice that it will be produced at the trial. All he needs to do is to apply for the article by a writ of subpoena duces tecum during the trial in order to have it brought into court.

2 By having the original deed of a grantor exhibited in court does not in any way prove or disprove the state of mind of the grantor on the day and date said grantor executed a warranty deed.

3 The fact that an administrator of an intestate estate, under leave of court, has authority to sell real property and execute a valid administrative deed for said property to raise funds to prosecute and defend actions involving the estate is indicative that said administrator has standing to sue on matters regarding said estate.

In May 1985, appellant, co-administrator of the intestate estate of his late mother, instituted an action for cancellation of a warranty deed executed by the latter in favor of his brother, the appellee, on June 1, 1972, about one year prior to her death. Appellant wanted the property returned to the estate of their late mother since, he alleged, she was not of a sound mind at the time and, therefore, incapable of executing a valid deed.

Appellee/respondent, for his part, contended that during the trial in the lower court the appellant/petitioner had raised the following points: (1) that the appellant did not

proffer the deed he sought to cancel, nor the original title deed of the grantor; (2) that the appellant had proffered medical reports which were not attested to by doctors in the United States and England who had treated Mrs. Fiske, the grantor; and (3) that the appellant did not have standing to sue. The trial court sustained all of the grounds advanced by the respondent/appellee and dismissed the action.

The trial court noted especially that the petitioner had no capacity to sue as he had no title to the property in question.

On appeal to the Supreme Court, the Court disagreed with the trial court. The Court observed that while the trial court had erred in its decision regarding the contentions raised by the respondent/ appellee, noting particularly that as there was no dispute regarding the fact that Mary McCritty Fiske originally owned the property in question, and hence there was no need for the petitioner to make profert of the deed of Mary McCritty Fiske. The Court observe further that as the petitioner was one of the administrators of the estate of Mary McCritty Fiske, and had sworn to protect the estate, he had every right and standing to bring the action where the property of the deceased was involved. The Court accordingly opined that the entire case hinged on one question: Whether or not Mrs. Mary McCritty-Fiske had the mental capacity on June 1, 1972 to execute a valid warranty deed? The Court held that because the lower court had not made a determination on the issue of the mental capacity of the deceased, the judgment could not be upheld. It therefore *reversed* the judgment of the lower court and *remanded* the case to the said court to establish the mental condition of the grantor on the day she signed and delivered the deed which the petitioner sought to cancel.

Moses K Yangbe appeared for appellant. *Elijah Garnett* of J. Emmanuel Wureh Law office appeared for appellee

MR. JUSTICE TULAY delivered the opinion of the Court.

Mrs. Mary McCritty Fiske, decedent, over whose intestate estate these proceedings

have arisen, married twice and each marriage was blessed with two sons. Prior to her death on September 22, 1973, she executed a warranty deed in favor of her son, Mr. Isaac Van Fiske, Jr., respondent in these proceedings.

Although their mother departed this life on September 22, 1973, the sons, parties to this suit, who had already gained their majority, made no attempt to preserve their mother's intestate estate until 1982 when they belatedly filed a petition for letters of administration. Although the letters of administration were immediately issued to both of them after the petition was filed, to act as administrator of their mother's intestate estate, this action was not filed until May 31, 1985.

Petitioner, John Bright, maintained that at the time their mother executed the warranty deed to his half brother and coadministrator, she was not of sober mind and was, therefore, incapable of executing a valid deed. He resorted to peaceful means to have the deed cancelled, the land alienated and reverted to the estate, but to no avail.

He then instituted this action for the cancellation of the said deed executed in favor of Isaac Van Fiske. We incorporate hereunder count five (5) of his petition for the benefit of this decision:

"However, during the illness of the late Mary McCritty Fiske, one of her sons, Isaac Van Fiske and the respondent in this case, surreptitiously and unduly influenced his mother, decedent, and caused her to sign a warranty deed in favor of respondent on the 1st of June, A. D. 1972. Petitioner says that during the time of the execution of the warranty deed from the decedent, Mary McCritty Fiske, to respondent, Isaac Van Fiske, the decedent had deteriorated mentally and, consequently, she was incapable of intelligently understanding the nature and effect of the document she signed, transferring title to the respondent, and as a result of the fraudulent transfer of the property described in the aforesaid deed, said parcel of land is exclusively owned by the respondent and not part of the estate of the late Mary McCritty Fiske,"

The petitioner made profert of a warranty deed by the late Mary McCritty Fiske in favor of one Maye Howell. He also made profert of two medical certificates.

Respondent took petitioner's petition as an outrageous allegation when he said Mary McCritty Fiske was mentally disabled at the time she executed his deed. In his returns he attacked the petition for not exhibiting copy of the warranty deed sought to be cancelled. He also challenged the fact that the medical certificate proferted by the petitioner had not been attested to by the attending physicians who treated Mrs. Fiske. Finally, he challenged petitioner's capacity to sue and recover, as petitioner had shown no title deed of Mary McCritty Fiske to the property he claimed. On his part respondent made profert of the warranty deed executed in his favor by Mary McCritty Fiske.

At the call of the case for disposition of issues of law and trial, the judge ruled thus:

(a) " the court is of the opinion that copy of the document which allegedly transferred her title ... undue influence of the respondent should have been annexed to petitioners' petition to give notice to the respondent as required by law; but because the petitioner has failed so to do, count five of the returns must be sustained. Count five of the petition is overruled.

(b) The court further observes that exhibit "B" is not attested to by any of the doctors who allegedly treated decedent in England and the United States of America; yet the petitioner has proferted them in support of his claim that decedent was incapable of understanding whatsoever she did, including the execution of the warranty deed.... the court is of the opinion that the contention as contained in count three of the returns is well taken in law and therefore count three is sustained. Count three of the petition is therefore overruled.

(c) The court is of the opinion that in order to institute an action, one must have standing in a court. Petitioner claims that he is the administrator of the intestate estate of the late Mary McCritty Fiske, and that property of the proceedings is part

of the intestate estate; yet the petitioner has failed to make profert of the original title of the late Mary McCritty Fiske. Because of this omission, count six of the returns is sustained and count six of the petition overruled.

…and the petition of the petitioner being baseless in law the same is hereby overruled and dismissed." From the judge's ruling dismissing the petition, petitioner excepted and appealed.

From this ruling we have culled out three facts which we consider important, as they formed the basis upon which the petition was dismissed:

(a) Petitioner did not make profert of the deed sought to be cancelled, as the fundamental principle of pleading is to give notice to one's adversary.

(b) The medical certificates proferted with the petition are not attested to by the doctors in England and the United States who treated Mary McCritty Fiske.

(c) Petitioner failed to make profert of Mary McCritty Fiske's original title deed.

We do not take petitioner's failure to make profert of the warranty deed he seeks to cancel as an issue over which to develop high blood pressure. Since the instrument was in the possession of his adversary, he could not have filed it at the time he filed the petition. All that was required of petitioner was to make mention of the deed in his petition and this he did and, even more, he gave the names of the grantor, the grantee and the date of its execution. A party may make mention of an article in his pleading without proffering it, especially when the article is in the possession of his adversary. He need not even give notice that it will be produced at the trial. All he needs to do is to apply for it by a writ of *subpoena duces tecum* during trial for it to be produced.

In the case under review petitioner pleaded that Mary McCritty Fiske executed the deed in point on the first day of June, A. D. 1972, in favor of respondent Isaac Van

Fiske. We take it that petitioner had given respondent the notice required by law as respondent admits having the deed executed in his favor by Mary McCritty Fiske.

We also disagree with the judge in passing upon the credibility of written documents proferted to be testified to during trial.

We hold that in as much as respondent had admitted that the plot of land alienated to him had been, at one time, part of Mary McCritty Fiske's real property, it was not incumbent on petitioner to make profert of her original title deed. Profert of Mary McCritty Fiske's original title deed in no way tended to prove or disprove petitioner's allegation that respondent Isaac Van Fiske procured title deed from decedent under undue influence.

The trial judge's conclusion that petitioner had no capacity to sue as he has no title to the property is farfetched.

In the administration of intestate estate, the question "by what authority?," is settled by the letters of administration. Petitioner herein is one of the administrators of the intestate estate of their mother, Mary McCritty Fiske. By virtue of his appointment as administrator, he must preserve, protect and save from waste any and all of the estate placed in his charge. He has the legal right to retrieve any part/portion of the estate that had gone astray, both before and after the demise of the decedent. Surely the decedent would herself have exercised the property right to retrieve any part of her estate alienated illegally.

To effectively administer the intestate estate an administrator, under leave of court, can sell the property by executing a valid administrator's deed therefor, for the purpose of raising funds to prosecute and defend actions involving the estate. If he can alienate any portion of the estate, should not an administrator maintain an action against those whom he believes are illegally detracting from the intestate estate? The answer is obvious.

These cancellation proceedings hinge on one and only one question: was Mary McCritty Fiske mentally incapacitated on June 1, 1972 and thereabout? Petitioner asserted in no uncertain terms that Mary McCritty Fiske was mentally unbalanced and unfit at the time she granted respondent the warranty deed, subject of these proceedings. He introduces two medical certificates to buttress his assertion.

Respondent regards this assertion to be unfounded allegation, contending that Mary McCritty Fiske was in her full sobriety at the time she signed onto his deed.

In cancellation proceedings, where mental incapacitation is the ground given, a few areas such as feeble mindedness due to senility, insanity - period of lucidity being absent - intoxication must be explored. Under such circumstances, the court must guide itself against precipitation as truth is only established by investigation and delay. The petitioner emphatically asserts that Mary McCritty Fiske was mentally unbalanced when she granted respondent's deed but respondent consistently and convincingly denies the allegation. The sure and only way to get at the truth of Mary McCritty Fiske's mental condition at the time she signed respondent's deed is to admit evidence from witnesses.

Having explored the three bases, petitioner's failure to profert copy of the warranty deed sought to be cancelled, petitioner's negligence to profert copy of McCritty Fiske's original deed for the property, and petitioner's omission to profert copy of his title right to the property on which the petition was dismissed below, we conclude that each of the issues singularly, or all of them collectively, do not constitute sufficient legal ground for dismissal of the petition. The judge below should have admitted evidence in a regular trial.

His judgment appealed from is hereby reversed and the case remanded for the sole purpose of establishing the truth about the mental condition of Mary McCritty Fiske on the 1st day of June A. D. 1972 and thereabout, the day on which she signed and delivered the warranty deed to respondent Isaac Van Fiske. Costs to abide final determination. And it is so ordered.

Judgment reversed