

B. J. K. ANDERSON, III, Executor of the Estate of the Late B. J. K. ANDERSON, Petitioner, v. **ALFRED B. ANDERSON**, a Legatee of the Late B. J. K. ANDERSON, II, His Honor **J. AUZZELL GITTENS**, Commissioner of Probate, Montserrado County, and **L. R. GITTENS**, Deputy Sheriff, Montserrado County, Respondents.

CERTIORARI TO THE MONTHLY AND PROBATE COURT OF
MONTSERRADO COUNTY.

Argued November 9, 15, 1950. Decided February 2, 1951.

Where a legacy in real estate cannot be given because it was sold by the executor to sundry persons years before, the court in order to avoid a disruption of the existing property rights acquired by innocent persons will permit a substitution of other property in lieu thereof with the consent of the legatee or, upon his failure to consent, the payment of its value in cash.

Alfred B. Anderson, respondent herein, successfully petitioned the Probate Court to recover a legacy. On appeal by B. J. K. Anderson, III, executor, this Court granted the motion to dismiss the appeal on the ground that there was no approved appeal bond and ordered the Probate Court to enforce its judgment. *Anderson v. Anderson*, 10 L.L.R. 108 (1949). On enforcement in the Probate Court, B. J. K. Anderson, III, petitioner herein, petitioned the court to permit a substitution of property for the legacy. This was denied by the Probate Court which also fined petitioner for contempt. On petition for writ of certiorari, *writ of certiorari granted and judgment reversed*.

B. J. K. Anderson for himself. *Carney Johnson* for respondents.

MR. JUSTICE SHANNON delivered the opinion of the Court.

This is a certiorari proceeding instituted by Benjamin J. K. Anderson, III, petitioner, against the probate judge and Alfred B. Anderson. The following are the facts leading up to its institution :

Benjamin J. K. Anderson, II, during his lifetime executed his last will and testament which was after his death admitted to proof and probate. His wife, Adeline Anderson, and his son, Benjamin J. K. Anderson, III, were nominated executrix and executor respectively. In this will Alfred B. Anderson, a foster son of the said Benjamin J. K. Anderson, was bequeathed four acres of land near the vicinity of the Baptist

Hospital of Monrovia, but this legacy was never given him either by the executrix, who functioned independently when the executor was at the time of his father's death in America and had not yet returned, or by the said executor after his return to Liberia either jointly with his mother or independently after his said mother's death.

Because of the delay in handing over his legacy and the apparent determination not to do so, Alfred B. Anderson, one of the respondents, instituted proceedings "to recover legacy" which terminated in his favor. On appeal to this Court a motion to dismiss on the ground that there was no approved appeal bond was sustained with a mandate to the Probate Court to resume jurisdiction and *enforce* its judgment. *Anderson v. Anderson*, 10 L.L.R. 108 (1949). As a result of the effort of the judge of the Probate Court to enforce said judgment, petitioner filed a petition requesting leave of the Probate Court to substitute other property for the legacy since the property so bequeathed to respondent Alfred B. Anderson no longer existed, having been sold in sundry parts and to sundry persons.

The probate judge took the position that it was contemptuous on the part of the petitioner to make such a submission before him, and to have yielded to it and granted the substitution would be , against the judgment and decree of this Court sent down for enforcement. The petition embodied in the submission was denied with an order for the enforcement of this Court's judgment. In addition, the petitioner was fined the sum of twentyfive dollars for contempt of court. To this the petitioner excepted and has brought the matter up again for review by this Court. In the bill of exceptions and brief of petitioner before us, it is not clear which phase of the probate judge's ruling he is asking us to review, the one denying the petition to "substitute legacy," or the one fining him twenty-five dollars, or both. However, since the former seems to be the one primarily stressed, we propose to dispose of it, and under our right in certiorari proceedings to open up and review the entire record certified to us, we will say later whether or not we uphold the fine then imposed.

According to clause 8 of the said last will and testament of Benjamin J. K. Anderson, II, Alfred Anderson, respondent, was bequeathed four acres of land. It has been submitted by petitioner and has not been contested by respondent Anderson that during the life of the testator, but subsequent to the execution of said will, the said testator had disposed of one acre of said four acres, and because of this respondent indicated his willingness to waive demanding it and only stressed the recovery of the remaining three acres. The petitioner countered that respondent had waived or quitclaimed his right to the said legacy because he had bargained with the widow, Adeline Anderson, during her lifetime for an exchange wherein respondent accepted

other land in lieu thereof. As proof of this, profert was made of a deed from the said Adeline Anderson personally, not as executrix, to Alfred Anderson. Alfred Anderson claimed that this was a separate and distinct deal, independent of, and unrelated to, his legacy; this contention seems to be supported by the same deed which carries a purchase price as consideration and is signed by the said Adeline Anderson as an individual. Furthermore, there is no written document executed by the respondent to support this.

To say the least, the entire matter, with its surrounding facts and circumstances, simply depicts a concerted determination by selfishly bent minds to deprive a legatee of his just legacy for reasons which are apparent and which can never be legally justified.

We would be left with no alternative but to insist on the enforcement of our former decree for the "recovery of the legacy," except that it has been clearly shown that the entire residue of the four acres of land has been disposed of to sundry persons. Therefore to order said enforcement would be like Shylock's demand of a pound of flesh and would also create a disruption of sundry existing conditions in property rights previously acquired. Words are insufficient to condemn this undue advantage that has been taken of respondent Anderson by the executor and executrix of the will under which the respondent claims.

Under the circumstances and in fairness to other interested but innocent parties, we are decreeing that the petition for substitution of legacy be granted and the petitioner be permitted to substitute other property in lieu of the legacy; but this must be done with the express consent and acceptance of the respondent. In the event of failure in this respect, it is also decreed that petitioner will pay unto respondent the sum of two thousand two hundred dollars for the remainder of the land unduly withheld from the said respondent. Because of this conclusion we have refrained from passing upon the intervener filed by Mr. Justice Barclay in his individual capacity. Mr. Justice Barclay filed this intervener with respect to one town lot, a portion of the legacy to Alfred Anderson involving the land now in litigation, which was sold to Mr. Justice Barclay by the executor and executrix by order of the Probate Court. The facts in this connection were conceded by the said Alfred Anderson, respondent-in-certiorari, and hence this parcel of land sold to Mr. Justice Barclay is considered not to be involved in these proceedings and is not covered by this opinion and judgment thereon.

We have unanimously decided to rescind the fine of twenty-five dollars imposed upon petitioner by the lower court.

The property right of respondent Anderson in and to the said remainder of the four acres of land given him under the will of Benjamin J. K. Anderson, II, will not be prejudiced or precluded until this decree is satisfied. The entire costs of the certiorari proceedings are ruled against the petitioner. And it is hereby so ordered.

Reversed.