MARY ELLEN SMITH, **HANNAH J. LEWIS**, **SUSANNAH L. KENNEDY** and **T. NIMLEY BOTOE**, Appellants, v. **JOSEPH W. S. BARBOUR**, Appellee.

APPEAL FROM THE MONTHLY AND PROBATE COURT FOR MONTSERRADO COUNTY.

Argued January 19, 1944. Decided February 4, 1944.

1. Where a document is the basis of the proceedings between the parties it should not be ignored or disregarded.

2. Coparcenary estates are created only by descent and never by purchase.

3. An incumbrance, within the terms of the covenant against them, is every right to or interest in the land granted, to the dimunition of the value of the land, though consistent with the passing of the fee by the deed of conveyance.

4. An admission, whether of law or of fact, which has been acted upon by another is conclusive against the party making it in all cases between him and the person whose conduct he has thus influenced. It is immaterial whether the thing admitted was true or false.

On appeal from decision of Probate Court denying probate of warranty deed, *judgment affirmed.*

H. Lafayette Harmon for appellants. *A. B. Ricks* for appellee.

MR. CHIEF JUSTICE GRIMES delivered the opinion of the Court.

Had the appellants in this case taken the time to study carefully the opinion handed down by His Honor the Commissioner of Probate on July 6, 1942, our docket would not have been encumbered by this unmeritorious appeal nor would such heavy drafts been drawn upon the valuable time of the members of this Court, for the hearing of an appeal, even the simplest, demands time.

The facts and the law are so admirably stated in the opinion that we have deemed it necessary only to reproduce said opinion in its entirety, and to make a few comments in amplification of and elucidation of the points therein brought out in the opinion of His Honor N. H. Gibson, Commissioner of Probate for Montserrado County,

which now follows, to wit:

"On the 1st of September A.D. 1939, one Mary Ellen Smith of the settlement of New Georgia, leased to Joseph W. S. Barbour of Monrovia, a parcel of five (5) acres of land in said settlement for a term of ten (10) years certain, to be paid for at the rate of $12.00 a year, but before the expiration of the lease, on the 14th day of April A.D. 194.2, the Lessor executed a deed of conveyance in favour of T. Nimley Botoe of Krutown, Monrovia, for said five (5) acres of land she had previously leased by agreement to the said Joseph W. S. Barbour. It is this deed of conveyance when offered for probation that was objected to by objector, who predicated his objections upon the terms of the Agreement between Mary Ellen Smith and himself, particularly the 5th and 6th clauses thereof, hence arose the litigation. Written pleadings were filed extending as far as the Rejoinder, and it is these pleadings that we have come to discuss and give our ruling on.

"In his contention Counsellor Dukuly, for respondents, suggested that the court should disregard the Agreement made profert of by objector, because he said the document before the court for consideration, is the deed of conveyance and not the Agreement. While that is true, it is also true that the objector's objections are based upon the Agreement between him and Mary Ellen Smith, and which he alleges, she had violated, that is, the 5th and 6th clauses thereof. To disregard the Agreement proferted, would mean disregarding the issue joined between the parties, and to disregard the issue, would necessitate the court's deciding the contention in an *ex parte* way, which evidently could not be done without prejudice to objector's case. So then, it is obvious that the court will have to take into account the Agreement since it constitutes the basis of the objections.

"To begin with count i of the objections, and count 2 of the Answer, we will observe that while it is true a party may generally convey premises held under leasehold by another, to a third party, and which should be conveyed subject only to the terms of the lease, yet in particular instances, as in this, we do not hesitate to say that in agreements a party is bound by his own acts and the consequences thereof. Clause 6th of the Agreement reads thus :

`It is further agreed that this Agreement shall be binding on both parties thereto, their heirs, administrators and assigns.'

Mary Ellen Smith well knowing that she had executed an Agreement between herself and Barbour for said five (5) acres of land, and that the 5th clause of which placed

her under certain obligations which she cannot disregard with impunity, and without prejudice to Barbour, could not thereafter legally convey said land to a third party unless she had previously given Barbour the option of the purchase, and which he in turn had failed or refused to accept and avail himself of. Mary Ellen Smith's tact therefore in this respect shows a fraudulent intention on her part. In view of the foregoing, count r of the Answer is overruled. As to count 3 of the Answer, the court says, that the question of coparcenary has not been made clear to its mind, that is, as to how and when it was created. An estate in coparcenary arises by descent to two or more persons.

"Respondents have argued that the case not being one of ejectment they have not, and they are not required to make profert of the deed under which they claim title. While that may be true, yet it should not be lost sight of that coparcenary estates are not created except by descent, and never by purchase, and as respondents claim that their estate is one of coparcenary, it is incumbent upon them to produce some evidence to court upon which said estate was created, and the court expected them to have done so. Since indeed they have not placed before the court evidence that would lead the court's mind to regard three female respondents as coparceners, it is left open to the court, in the absence of such material requirements of the law, to make its own deduction and conclusion. As it is now, the court is not in a position to agree with respondents that said estate is one of coparcenary.

"It would be useful to pleaders for us to advance this suggestion that a party pleading should set out in clear and certain terms, such things that he would like the court to take judicial notice of, and not to indulge in mystifying, uncertain and indefinite averments. In view therefore of the foregoing, the court cannot agree with the contention raised in count 3 of the Answer, and therefore overrules said count.

"Count 4 of the Answer sets forth that Mary Ellen Smith is an illiterate woman who can neither read nor write, and that said lease contract was 'shoved under her nose by objector for her signature, without her understanding what she was signing etc.' Be that as it may, it might however be urged incidentally here, that although she cannot read nor write as alleged, that condition of hers should furnish no excuse for her, for she could easily have had the agreement read to her by one of the witnesses to her signature, or her lawyer whose professional duty it was.

"In count 5 of the Answer the court repeats here with emphasis, that there being nothing before it as evidence that the estate was one of coparcenary, it is compelled to accept Mary Ellen Smith as sole owner of the estate, and that she had the full right

and authority to make said lease. A mere statement of the existence of an estate in coparcenary is not conclusive evidence to the court, for it is possible for any two, three or more females to collaborate and, for fraudulent purposes, style themselves coparceners, when in fact such relation may have never existed.

"In count 5 of the Answer it is intimated that Mary Ellen Smith and objector could make no contract to bind the interest of Hannah J. Lewis and Susannah L. Kennedy, in property which they owned in connection with the said Mary Ellen Smith, without their knowledge and consent, and without them and each of them joining in said contract. The court regrets its inability to agree with respondents' contention and we repeat that Hannah J. Lewis and Susannah L. Kennedy have not satisfied the mind of this court of their relation to the premises conveyed by Mary Ellen Smith to Joseph W. S. Barbour by lease. Count 5 of the Answer is not supported, nor is the contention taken therein upheld by this court. Count 6 of the Answer is overruled upon the view taken in section 2 of this Ruling. Count 1 of Reply sustained. The Agreement of Lease executed by and between Mary Ellen Smith and Joseph W. S. Barbour, on the 1st September A.D. 1939, probated and registered in June 1941, was notice to all concerned of its existence. A party should take advantage of his rights at the proper time. Counts 2, 3 and 4 of Reply sustained.

"Having carefully surveyed the case submitted in all its aspects, traversing the several counts of the pleadings and taking into account the contentions raised in the discussion between the parties, the court therefore rules, that the probation of the deed of conveyance from Hannah J. Lewis, et al., to T. Nimley Botoe, for five acres of land in the settlement of New Georgia, submitted in this case, is hereby denied, and the respondents ruled to pay all cost of this action forthwith : AND IT IS SO ORDERED.

"Given officially this 6th day of July, A.D. 1942.
[Sgd.] N. H. GIBSON,
Commissioner of Probate, Montserrado County, RL."

It is to be observed that the deed from Mary Ellen Smith, Hannah J. Lewis and Susannah L. Kennedy to T. Nimley Botoe, to which the Commissioner of Probate made reference in his opinion, covenants, *inter alia,* that the premises "are free from all incumbrances," which the record proves was not factually correct. The premises were incumbered by a deed of lease for ten years, and a covenant therein stated that:

"[T]he said Lessee paying the rents and performing the covenants and agreements

aforesaid shall and may at all times during the continuance of this agreement quietly and peaceably have, hold and enjoy the said piece and parcel of land containing five (5) acres of land without any manner of let, suit, trouble or hindrance of or from the said Lessor or any persons whomsoever until after the expiration of this Lease Agreement or any part thereof."

This was a voluntary limitation by the owner in fee upon herself of the right to convey and pass an immediate right of possession to anyone so long as lessee performed his covenant to regularly and punctually pay for his lease for the period of ten years. Moreover, he, the lessee, in consideration of his building a house upon the premises which would pass with the land upon the expiration of the term of lease, secured the sole option to purchase same in the event the lessor ever desired to sell.

When the said appeal was called for review before this Court and questions from the Bench were propounded to counsel for appellants, it became clear to our minds in less than five minutes that counsel for appellants had not realized that the above-mentioned covenants in the lease had created an incumbrance upon the property that would have to be reckoned with and disclosed in the event of any subsequent transfer; consequently he had omitted to cite anything in his brief on the law of incumbrances. His omission this Court has to supply now hereunder: "An incumbrance, within the terms of the covenant against them, is said to be 'every right to, or interest in, the land, to the dimunition of the value of the land, but consistent with the passage of the fee by the conveyance.' An inchoate right of dower is an incumbrance within the meaning of the covenant against these." 3 Washburn, Real Property § 2385, at 440 (6th ed. 1902).

Bouvier defines an incumbrance as :

"Any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee.

" 'Every right to or interest in the land which may subsist in third persons to the diminution of the land, but consistent with the passing of the fee by the conveyance.

". . . The following are incumbrances: An ordinary lease; an attachment; the lien of a judgment; taxes and municipal claims; an execution sale subject to redemption ; a restriction on the use of land for a brewery or blacksmith shop . . . an inchoate right of dower; a private right of way; a railroad right of way. . . .

[A]n outstanding mortgage . . . an attachment resting upon land; a condition, the non-performance of which by the grantee may work a forfeiture of the estate. . . .

"The vendor of real estate is bound in England to disclose incumbrances, and to deliver to the purchaser the instruments by which they are created, or on which the defects arise; and the neglect of this is to be considered fraud." 2 Bouvier, Law Dictionary *Incumbrance* 1530-31 (Rawle's 3d rev. 1914)

Greenleaf deals with the subject as follows :

"The covenant of *freedom from incumbrances* is proved to have been broken, by any evidence, showing that a third person has a right to, or an interest in, the land granted, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance. Therefore a public highway over the land . . . a lien by judgment, or by mortgage, made by the grantor to the grantee, or any mortgagee, unless it be one which the covenantee is bound to pay; or any other outstanding elder and better title, —is an incumbrance, the existence of which is a breach of this covenant. In these and the like cases, it is the existence of the incumbrance which constitutes the right of action; irrespective of any knowledge on the part of the grantee, or of any eviction of him, or of any actual injury it has occasioned to him. If he has not paid it off, nor bought it in, he will still be entitled to nominal damages, but to nothing more; unless it has ripened into an indefeasible estate ; in which case he may recover full damages. It is not competent for the plaintiff to enhance the damages by proof of the diminished value of the estate, in consequence of the existence of the incumbrance, as, for example, a prior lease of the premises, unless he purchased the estate for the purpose of a resale, and this was known to the grantor at the time of the purchase." 2 Greenleaf, Evidence § 242, at 227-28 (16th ed. 1899).

In addition to the foregoing the record shows that the lessee, Joseph W. S. Barbour, now appellee at this bar, had built a house on the premises which, when the lease expired, would have become the property of the lessor, the remainderman, upon the conclusion of the term. This in itself appears to us to have been a valuable consideration for the option of the sole right to purchase in the event the lessor ever desired to sell; this option constituted the incumbrance which gripped the attention of the trial judge.

Besides, when the information reached the lessee, now appellee, that the lessor desired to sell said premises he immediately tendered unto said lessor a sum of fifty

dollars as purchase money for the fee simple which, incomprehensible as it seems to us to be, in view of the option secured, the lessor refused to receive; and the lessor sold the premises to T. Nimley Botoe.

The submission of the lessor that she was illiterate and did not understand what she had demised is not only without merit but also wholly absurd, since one does not have to be able to read and to write in order to see a building being erected upon one's property. Furthermore, her alleged illiteracy did not interfere with her receiving without demurrer rent for two and one-half years on the property so leased.

Having by her conduct represented to the world when alone she executed the lease that she was owner in severalty of the premises demised, the lessor will not be allowed to aver that she was but one of several joint owners. For the law of estoppel provides *inter alia:*

"Admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself, or implied from the open and general conduct of the party. For, in the latter case, the implied declaration may be considered as addressed to everyone in particular, who may have occasion to act upon it. In such cases the party is estopped, on grounds of public policy and good faith, from repudiating his own representations.

"It makes no difference in the operation of this rule, whether the thing admitted was true or false : it being the fact that it has been acted upon that renders it conclusive. . . ." 1 *Id. §§ 207,* 208, at 340, 342.

In view of the foregoing the only logical conclusion we can reach is that the judgment of the court below should be affirmed with costs against appellants; and it is hereby so ordered.
Affirmed.