CASES ADJU DGED

IN THE

SU P REME COURT O F TH E REP UB LIC O F LIBERIA

# OCTOBER TERM, 1962

CLARENCE O. TUNN ING, Nominated Executor of an Instrument Offered for Probate as the Last Will and Testament of S. J. C. DAVIES, Deceased, c. FRANCES GREENE, by her Husband, T. C. GREENE, JERUSHA YANCY, by her Husband, ALLEN YANCY, CH ELNICIA WILLIAMS, by her Hus- band, J. BOLTON WILLIAMS, LETTITIA DAVIES, CHARLES DAVIES and OLIVE

DAVIES, Heirs of said S. J. C. DAVIES.

APPEAL FROM THE CIRC U TT CO URT OF THE THIRD J UDICIA L CIRC U IT,

SINOE CO U NTY.

Argued January 14, 15, 1963. Decided February 8, 196J.

1. In proceedings on objections to the probation of a will, a count of the amended answer which unites several defenses which are mutually inconsistent and untenable in law may be dismissed.
2. Mistakes in pleading as to date or term are not grounds for dismissal, and may be corrected during trial.
3. There is no legal limit on the number of counsel a litigant may retain.
4. A motion in arrest of judgment cannot properly be made in a civil case.
5. Where revenue receipts were afhxed to legal papers in lieu of revenue stamps, which were unavailable, such papers were not thereby invalidated.
6. A witness may properly be subpoenaed during the trial of a case when no extraordinary delay is occasioned thereby.
7. A duly accredited medical doctor is qualified to testify as an expert with respect to mental competence.
8. A testamentary instrument which does riot dispose of property may be ad- mitted to probate as a will.
9. Where one of the two subscribing witnesses to an instrument offered for probate as a will has died, and the other witness testifies that, at the time he subscribed, the testator had not signed the instrument, and that the surviving witness did not know that the instrument was a will, probate will be denied.

On appeal, a judgment denying probate to a purported will was *affrmed.*

*Glaren ce 0. Tun ning,* appellant, Pro *se. Daniel Dra pet*

and *Richard Dr ggs* for appellees.

MR. JUSTICE ARDSWORTH d elivered the opinion of

the Court.

According to the records certified to this Court in the above-entitled cause, the late S. J. C. Davies, a well- known educator and outstanding citizen of Greenville City, Sinoe County, Repu blic of Liberia, departed this life on August i I, ig6 i, leaving as heirs to his estate Frances Greene, Chelnicia Williams, *et* n/., appellees- objectants to the purported last will and testament of the aforesaid late S. J. C. Davies.

During the August, i p6 i , term of the Circuit Court of the Third Judicial Circuit, Sinoe County, Counsellor James Greene of the City of Greenville offered for pro- bate and registration an instrument purporting to be the last will and testament of the said late S. J. C. Davies. By order of Judge D. W. B. Morris, presiding by assignment, the said instrument was read in court. Ob- jectants having filed objections to the probate and registra- tion of said instrument, appellant filed his answer to said

objections on September 7. 1 6 I.

It would seem that the objectants were cognizant of

some legal blunders in their objections which they With- drew and subsequently refiled in amended form, where- upon appellant filed an amended answer, and subsequent pleadings progressed as far as the rejoinder.

# Judge Weeks disposed of the law issues on April , 9°\* Appellant, being dissatisfied with said ruling,

entered exceptions thereto. The law issues having been disposed of, the matter was transferred to the law division of the court for jury trial.

In passing on the law issues, the amended answer and rejoinder of the respondent-appellant were dismissed by the trial judge for duplicity and departure in pleadings, as alleged in Counts I and 6 of the reply under review, which read as follows:

“i. Because Count I of respondent’s amended answer is tainted with duplicity, in that more than one defense has been united therein ; that is to say respondent contends: (a) that, before amending their objections, the objectants should have notified respondent in writing of their intention to do so ;

(b) that the objectants should have served a copy of said written notice on respondent ; and (c) that the objectants should have first paid respondent his entire refund cost so far incurred. This man- ner of duplicitous pleading is not permissible under our code of pleading ; and therefore said **amended answer** of respondent should be dis- **missed.**

“6.

And also because said amended answer of re- spondent is a fit subject for dismissal, inasmuch as it is laid in the ‘August term for the November

term, '9\* I’ Of the Circuit Court of the Third Judicial Circuit, Sinoe County, whereas the amended objections which it purports to answer

are venued in the November, 19° I, term, of which objectants respectfully request this court to take judicial notice.”

We shall now revert to the amended answer, subject of attack in these proceedings, to get a clear picture of

the grounds o-f objectants’ contentions in respect of

“duplicity” and “departure in pleading.” Count i of

appellant’s amended answer reads as follows:

“i. Because there are mandatory legal requisites inci-

dent to withdrawals and amendments of actions, which the said objectants have not complied with, in that they should have: (a) filed a notice, ex- pressing their intention to amend their pre- viously filed objections ; (b) served a copy of said notice on respondent pursuant to the rules governing the service of copies of all pleadings on the opposite party ; and (c) first paid re- spondent or refunded to him the entire cost so far incurred by him. For these incurable legal blunders on the part of the said objectants, re- spondent prays that the entire proceedings be ruled out, that the said last will and testament be admitted to probate, and that the said ob- jectants be ruled to pay all costs.”

Our statute under “General Rules of Pleading” pro- vides, tafer rifle, as follows:

“Whenever a party has several claims or several defenses which may appropriately be made or raised in the same action, he may state them all, listing them in separate counts or paragraphs.” iq 6 Code, tit. 6,

2jI.

We also have the following quotation of common law

authority:

“One of the common law rules of pleading which tend to produce singleness or unity in the issue is that pleading must not be double. This rule applies to both the declaration and the subsequent pleadings, and its meaning with respect to declarations is that a declaration must not, in support of a single demand, allege several distinct matters by any one of which that demand is sufficiently supported. A declaration is dou ble within this rule where it joins in one and the same count different grounds of action of different natures or of the same nature, to enforce a single right to recovery; or where it is based on different theories of the defendant’s liability; or where the

matters alleged are otherwise inconsistent or repug- nant. Since a plea on this ground goes merely to the form, and not to the substance, of the former pleadings, it is not encouraged, even under the harsh rules of the common law, a special demurrer being necessary for its introduction.” a i R.C.L. 4$4 *Pleading* i 9

From the foregoing, it is obvious that the three defenses

set forth in Count i of the amended answer are not only inconsistent or repugnant, but are untenable in law.

Counts 7 and 8 of objectant’s reply read as follows: “7- And also because said amended answer of re- spondent is laid before His Honor, Judge D. W.

B. Morris, presiding by assignment, whereas the amended objections which it is intended to answer is venued ‘before His Honor, Roderick N. Lewis, Resident Circuit Judge.’ Objectants strenuously contend that this mode of pleading on the part of respondent is in deliberate violation of the statutory code of pleading in this jurisdiction.

“8. And also because a party in a given suit has the right, under our rule of pleading, to lay and venue his cause in any pending term of court; and if this act does not prejudice the rights of the party defendant, no rule or statute of pleading is violated.”

Whilst it is true that the appellant did venue his answer in a term of the court different from the venue laid in the objections, in addition to inserting a date on the face of the amended answer different from the date of the objections, yet this is not sufficient in law to sustain objectants’ position.

This Court has held:

“A mistake in the date or term is not legal ground for dismissing the case. The mistake may be corrected at any stage of the trial. ***Ernest* v. *McFoy,*** 2 **L.L.R.** 29f ( 9' ) , Syllabus 4.

**After** a careful consideration of the attack made by

objectants in their reply with respect to duplicity, we are fully in accord with the trial judge’s ruling dismissing the amended answer and rejoinder of respondent-appellant, thereby placing him on bare denial. The question of the mistake in the date, term, etc., is not well taken in view of the decision of this Court quoted *su pra.* Therefore, the trial judge erred in sustaining the attack of objectants against the amended answer of respondent-appellant in respect of “departure in pleading.”

Immediately after rendition of this ruling on the issues of law, upon ap plication of objectants’ counsel, acquiesced in by counsel for respondent, a jury was selected and empanelled to try the issues of f act. The trial by jury was commenced on the day f ollowing the selection and empanelling of the jury; and witnesses testified for both parties. The jury, having heard evidence in the said cause, tendered a verdict in f avor of objectants ; where- upon a motion for new trial was submitted for the con- sideration of the trial judge, which motion, in due course, was denied. A motion in arrest of judgment was then tendered by ap pellant, which motion was also denied. Thereupon, final judgment was rendered conforming to the verdict of the petty jury, to which judgment ap pellant entered exceptions and prayed an appeal to this Court of last resort for review.

We find that the bill of exceptions tendered by re- spondent-appellant contains 27 counts. Considering the several counts laid in said bill of exceptions, with the exception of those already passed upon in this opinion, and of those which we deem unworthy of consideration, we shall pass on Counts i , 3, i i, 12, 16, 23, and 24.

Count i of the bill of exceptions contends, in substance, that the trial judge erred in overruling appellant’s objec- tion to the announcement of Counsellor Daniel Draper as one of counsel for objectants because his name did not appear as such on the records, and no notice of new or additional counsel had been served on appellant giving

notice in keeping with rules governing pleadings. It is the usual practice in the courts of Liberia that a party litigant may employ as many legal representatives as he possibly can to defend his legal rights in any matter pend- ing before a tribunal at any stage of the case without notice to the opposing party. This is the inherent right of a party litigant, and is not subject to review. Count i of appellant’s bill of exceptions not being well founded, it is hereby overruled.

In Count 3 Of the bill, appellant complains of the trial judge condoning the conduct of objectants-appellees with respect to the validity of revenue receipts placed on

documents or pleadings in these proceedings. It is our considered opinion that the principal object of a revenue stamp in this respect has been legally met. We recall that the revenue receipts had been in use for a period of

several years up to March 2 i, 9\*' when, by Executive Order Number 8, the use of revenue receipts was dis- pensed with. The question as to whether or not the revenue officer at the time was in possession of revenue

stamps was not made definitely clear; but we opine that revenue stamps were not available at the time, and that the stamp fee was accepted to conserve the Government’s interest, and a revenue receipt issued in lieu of a regular

revenue stamp. In view of the foregoing, Count 3 \* the bill of exceptions is hereby overruled.

We shall consider Counts i i and i 2 Of the bill jointly, as said counts are practically the same in substance, which goes to show that the trial judge erred in overruling appellants’ objections to objectants’ witnesses, Dr. Gunther Kelding, ef ml., for the reason that these witnesses were summoned, as evidenced by the sheriff’s returns, during

the hearing of the cause. Circuit Court Rule '7 '• self- explanatory. Aside from the practice in vogue, the spirit and intent of this rule is to guard against unreasonable

and unusual delays in the hearing or trial of causes. Where a party litigant does not conform to the letter of

the rule of court under consideration, that is to say, Ia ils to have his witnesses summoned, and shown duly sum- moned by the sheriff’s returns before the case is ready for hearing, but does so af ter the case is called for hearing or during the trial thereof, without causing an unusual delay, said rule is not violated. The ruling of the trial judge in overruling appellants’ objections set forth in Counts i i and I z Of the bill of exceptions is therefore sustained, and said counts are hereby overruled.

Count i6 of appellant’s bill of exceptions would seem to have no legal foundation. I n that count, the appellant contends: “Only a psychiatrist possessing a diploma as such is competent to declare or pronounce one incompe- tent to testify, and not a layman or a physician or medical doctor.” In considering this count of appellant’s bill of exceptions, we observe that he submitted no citations in support of the contentions presented therein. However, we quote the following:

“In a trial upon an indictment for murder it was held that the plea of insanity is a good plea in bar, and when entered by prisoner it becomes imperative upon the State to prove the sanity of the prisoner to warrant conviction. I t was also held that expert testimony of a duly qualified physician is evidence of a high grade and when based upon diagnosis of the particular case should be received with great weight.” *Eedlow v. Re p ublic,* i L.L.R. 3y6 ( iqoi ) , Syllabus i. “To qual if y a person to give expert medical testi- mony, he must show that he holds a diploma or certifi- cate from a medical college that he is a physician.” *D unn* v. *R e*# *ublic,* I L.L.R. Koi ( i 031 , Syllabus i.

I n the present case, answering a question on cross-

examination, Dr. Kelding stated:

“I am a full-degree doctor. I have shown all my diplomas to the Medical Director of the National Public Health Service.”

There is no record of any evidence in these proceedings

contradicting the statements of Dr. Kelding to the effect

that he is a full-degree doctor and that he had shown his d iplomas to the Director of the National Public Health Service. A medical doctor holding a diploma or certifi- cate is qualified to testify as an expert with respect to mental competence. Therefore Count 16 of the bill of exceptions is hereby overruled.

Finally, we come to Counts 23 and 24 of the bill of exceptions, which counts we shall consider together, as both bear on appellant’s contentions concerning the denial

of his motion in arrest of judgment. e **statute cont**

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**étntce.** There is no provision in said statute for a motion in arrest of judgment in civil matters ; nor have we been able to find any law in support of such a proposition.

For the benefit of this opinion, we quote hereunder the statute hereinabove referred to, which reads as follows: “A motion in arrest of judgment based on failure of

the indictment to show jurisdiction in the court or to charge an offense may be made before the rendition of final judgment, whether or not a defense or objec- tion on such ground was previously raised.” \*9s6

Code, tit. 8, $ 310.

In view of the foregoing, Counts 23 and 24 are hereby

overruled.

Reverting to the evidence, we shall proceed to consider questions propounded and answers given by one of the two attesting witnesses to the purported will:

“Q. Please explain the circumstances under which you signed this instrument.

“A. One morning while I was getting ready to go to school, the late S. J. C. Davies sent his son, Char lie, to call me, and I went, and he asked me to sign the will, which I did and left.

“Q. Say if you can, who else was present when you signed the wills

“A. Only the testator and myself.

“Q. Tell us if you can, whethe r or not the will was written in your presence, read to you, or what 7

“A. It was not written in my presence, read to me, nor was I told it was a will.

*“Th e to urt.*

“Q. At the time when you signed said document, had it any other signature thereon ; if so, whose signa- ture, if you know 7

“A. At the time I signed the document, I observed the name of John Judutu appearing thereon, and I signed under his signature, but the testator had not signed.”

Marvin Duncan, one of the attesting witnesses to the will in question, was the only attesting witness who de- posed as to the signature appearing on the said instrument. The other witness, John Judutu, who is alleged to have signed the will, was not brought to the stand to testify as a subscribing witness, he having been reported dead.

In passing, we would like to observe that objectants, in Count z of their amended objections in these proceedings, contend:

“z. And also because a written instrument like unto a last will and testament such as the one at bar, must of legal necessity, both in form and sub stance, make a dlsposition of property, whether personal or real or both ; that is to say, any written testa- mentary document designed and intended as a last will and testament which contains no gifts, be- quests or devices, and which in no way, manner, form or substance makes any disposition of any property whatsoever, cannot be regarded as a last will and testament in the sight of the law.”

On this point raised by objectants, we refer to the following aut hority:

“... while wills usually dispose of property, this is not necessarily true; for example a duly executed in- strument which merely appoints a person to have

charge of the property after the death is a will, although it contain no direction as to whom the decedent’s property passes. Again a will may simply appoint a guardian for the maker’s child ren, or merely revoke former wills. Instruments which have been intended to have testamentary effect have been con- sidered to be wills though they make no effective disposition of property.” ATKINSON, WILLS, °‘3 ( zd

ed. I 9s4) -

In the light of the above, the absence of gifts, devises or

bequests in an instrument does not have any legal bearing on the issue of whether it is a valid will. Therefore, the contention of objectants above referred to has no founda- tion in law.

We gather f rom the foregoing that the surviving attest- ing witness made it clear that, at the time he signed the purported will, the testator had not signed same, nor was he present when Judutu is alleged to have affixed his signature thereto ; moreover, the said document was not prepared in his presence, nor was he made to understand that it was the last will and testament of the testator. This Court has held as follows:

“Where testator did not declare to attesting witnesses that the document was his will, where said witnesses did not sign in testator's presence, where one witness’ name was signed by someone else, and where the said witnesses were not permitted to scan the document they signed, said will was not properly executed and should not be admitted into probate.” *Raile y* v.

*Hark e,* Io L.L.R. 33o ( 19 O) , Syllabus 6.

“If one or all of the witnesses sign before the

testator affixes his signature, the will is void.” *id.,*

Syllabus 4.

Buttressing the above, we quote the following:

“Under the statute of frauds, it was held unnecessary for the testator to sign the will in the presence of the subscribing witnesses, but any acknowledgment before

them either of the will or the signature satisfied the requirements of the statute. But by the provisions of a later enactment, if the will is not signed in the p resence of the witnesses, an acknowledgment of the ‘signature’ is necessary.” 68 C.J. 6qq *lWills é* 3s4-

It is obvious f rom the testimony of the attesting witness,

Marvin Duncan, that the legal requisites of a valid will as

outlined, *su pra,* are lacking.

Therefore, in view of the foregoing and the law con- trolling, we are of the considered op in ion that the trial judge did not err in his judgment in these proceedings, which judgment we affirm with costs against ap pellant. And it is hereby so ordered.

*A ffrm ed.*