HASTINGS A. CAULCRICK, Appellant, *v.* SANDY LEWIS, et al., Appellees.

APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, GRAND BASSA COUNTY.

Argued April 9, 10, 1973. Decided April 26, 1973.

1. An answer which both denies and avoids by an affirmative defense is deemed to be inconsistent and the defendant will be ruled to a general denial upon dismissal of such answer.
2. When such defendant has been placed on a general denial, he is precluded from propounding questions tending to elicit affirmative matter in confession and avoidance.
3. When owners of reality provide for division of their property between them, the instrument containing such provision is not a deed, for it is not a conveyance involving grantor and grantee.
4. A copy of the document upon which title is based should be filed with the complaint when a plaintiff claims title to real property.
5. A sale of real property can be made by an administrator of an estate only by authority of the probate court; if not so authorized the transaction is void.
6. Though an administrator of an estate cannot, of course, convey to himself as a purchaser of the real property of an estate, he may buy such property from an innocent purchaser to whom the administrator has conveyed on behalf of the estate.

In July, 1936, the administrators of the estate of Thomas N. Lewis conveyed the thirty acres of land at issue to James G. Smith and his wife. Twenty days thereafter Smith and his wife conveyed the property to appellant, who was one of the administrators of the estate. The appellees, heirs of Thomas N. Lewis, allegedly learned of the transaction some thirty years later and instituted an action for cancellation of the administrators' deed to the Smiths and the warranty deed from the Smiths to the appellant. The lower court decreed cancellation and an appeal was taken therefrom. The Supreme Court in its opinion commented on the inconclusive nature of the evidence presented and for that reason *remanded* the case to the lower court after the judg-

ment was *reversed,* ordering that the parties be permitted to replead.

Joseph Findley and *Philip J. L. Brumskine* for appellant. *N. Fahnbulleh Jones* for appellees.

MR. JUSTICE HENRIES delivered the opinion of the Court.

Several years ago Doctors James A. Dingwall and Thomas N. Lewis, since deceased, allegedly acquired jointly sixty acres of land bearing the numbers 47, 48, 49, 65, 66, and 67, in Central Buchanan, Grand Bassa County. Thereafter, in the year 1933, they apportioned this property between them, each receiving thirty acres.

Dr. Lewis died intestate in 1935, and the Probate Court of the county appointed administrators of Dr. Lewis' estate, among them Dr. Hasting A. Caulcrick, the appellant. On July 7, 1936, the administrators sold the thirty-acre tract of land belonging to Dr. Lewis to James S. Smith and his wife at a public auction. On July 27, 1936, the appellant bought the same property from the Smiths.

The appellees, who are heirs of Dr. Lewis, allegedly did not know of these transactions until some time between 1967 and 1969, when only one of the administrators, the appellant, was alive. They then instituted this action in equity to cancel the administrators' deed to James B. Smith and his wife, and the warranty deed from the Smiths to the appellant, on the ground that the administrators acted fraudulently by selling the property without any authority from the Probate Court and, therefore, the appellant was illegally in possession of this tract of land. We might add here that the estate is not yet closed, and that new administrators had been appointed prior to the death of the appellant. This action has come here on appeal from the Second Judicial Circuit Court of Grand

Bassa County which decreed that the deeds be cancelled.

The first issue raised is whether the trial judge erred in dismissing the appellant's answer for being inconsistent and evasive in that it denied the truthfulness of the complaint, and yet raised the pleas of statute of limitations, fraud, estoppel, and illegitimacy of the appellees. These are all affirmative defenses constituting an avoidance which are required to be specially pleaded under the Civil Procedure Law.

> "2. Denials. A party shall deny those averments of an adverse party which are known or believed by him to be untrue. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this shall have the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he shall make his denials as specific denials of designated averments or paragraphs, or he shall generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, if he does so intend to controvert all its averments, he may do so by a general denial.
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> "5. Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, duress, estoppel, failure of consideration, fraud, illegality, injury by a fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." Rev. Code 1:9.8(2), (4).

The statute of limitations being an affirmative plea, which, when specially pleaded and proved bars an action, the defendant must admit that the allegations sought to be avoided are true, and then state other facts sufficient, if true, to defeat the action. *Bryant* v. *Harmon,* 12 LLR 330 (1956). An answer which in its several counts both denies and avoids cannot be taken to be sufficiently distinct or intelligible to constitute a proper answer to specific allegations of fact contained in a complaint, since the two positions are contradictory and inconsistent. Such an answer is subject to dismissal, whereupon the defendant will be ruled to a general denial of the allegations set forth in the complaint. *Shaheen* v. *Compagnie Francaise de l'Afrique Occidentale (C.F.A.O.),* 13 LLR 278 (1958); *Butchers' Association of Monrovia* v. *Turay,* 13 LLR 365 (1959).

In view of the law cited herein regarding denial and pleas in confession and avoidance, we find that the judge did not err in dismissing appellant's answer and placing him on a bare denial.

With the answer dismissed and the appellant ruled to trial on a general denial, the next issue is whether affirmative issues such as those contained in the answer can be raised or introduced by witnesses. It is settled that in a trial where the defendant has been placed on bare denial of the facts stated in the complaint, he is precluded from propounding questions tending to elicit affirmative matter in confession and avoidance. *Butchers' Association* v. *Turay, supra; Saleeby* v. *Haikal,* 14 LLR 537 (1961). To hold otherwise would be circumvention of the rule and statutory requirement that affirmative matter must be specially pleaded in order to give the opposing party notice of what is intended to be proved and time in which to respond.

The most important issue in this case is appellant's contention that the appellees have no title to the thirty acres of land and, hence, no right to question his owner-

ship. The appellees base their claim to the property on a document obtained from the State Department.

> "KNOW ALL MEN BY THESE PRESENTS that we Thomas N. Lewis and James A. Dingwall of Lower Buchanan, Grand Bassa County, Republic of Liberia, are co-equal owners, purchasers of sixty (60) acres of land, bearing on the authentic plot of Central Buchanan the numbers 47, 48, 49, 65, 66, 67. Commencing at the North West angle of lot No. 47 and running South along McClain Street to a Street dividing lots 65 and 82, thence along said Street to lot 68; thence North along lots 68 and 50 to dividing lots 49 and 31; thence West along said Street to place of commencement and containing 60 acres of land intersected by two Streets. For ourselves, our heirs, executors, administrators and assigns we agree to divide, and do hereby mutually divide the said 60 acres of land as follows: To Thomas N. Lewis all that portion of the above described land lying East of a line commencing at the middle point of the Northern side of lot 48, and running through the middle of lots 48 and 66 to the middle point of the Southern side of lot 66, 30 acres of land. To James A. Dingwall all the portion of the 60 acres described lying West of the middle line above mentioned and containing 30 acres of land."

The instrument was signed in the presence of witnesses on November 7, 1933, and set forth the volume in which it was registered on March 7, 1934, as authorized for probate. Exhibit A, annexed to the instrument, certified it to be a true copy.

Upon careful inspection of the document referred to, we find that it does not have the requisites of a deed. In the ordinary acceptance of the word, a deed is an instrument which conveys real property. It must indicate who is granting the property, to whom it is granted, and what the property is, and it is usual for the conveyance to set forth what the deed is intended to express in some formal

manner. 16 AM. JUR., *Deeds,* § 47. The usual and essential parts of a deed are set forth in section 48 following.

> "(a) The premises, including the names of the parties and their places of residence, a recital of the considerations and acknowledgment of its receipt, words of grant or other words expressive of an intent to convey and transfer the property, the description of the land conveyed by the instrument, by metes and bounds;
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> "(b) Immediately after the premises follows the habendum clause, 'to have and to hold,' etc., the purpose of which is to define the estate which the grantee is to take and hold, the reddendum or reservation if any, the warranty and other covenants of title and the covenants relating to the use and enjoyment of the land, the testimonium, the date of the deed, the attestation clause and the signature and seal of the grantor."

The document which exhibit A refers to is clearly not a deed, but rather appears to be an instrument partitioning the property between the alleged owners. A transaction involving the transfer of title to real estate presupposes the participation of two or more parties, a grantor and a grantee, and in order that an instrument may operate as a deed conveying land there must be a grantor and a grantee. 16 AM. JUR., *Deeds,* § 66. This document does not meet even this basic requirement.

It is our opinion that in order for the appellees to have maintained this action, they should have shown first the title under which they claim ownership to the property by putting into evidence the source from which their alleged title or that of their late father under which they claim originated. And they should have done this by filing with their petition a copy of the warranty deed to which the certificate referred. *Pelham* v. *Pelham,* 4 LLR 54 (1934).

Of equal importance is the issue in which each party

contends that the other party fraudulently acquired the real estate which is the subject of this action. Briefly, the appellees allege that the appellant and his co-administrators sold the property without a court order to James S. Smith and his wife; that this sale was illegal, hence, fraudulent, and that since the Smiths' acquisition was fraudulent the subsequent purchase twenty days later from the Smiths by appellant, who was one of those who sold the property illegally, was also fraudulent. The appellant countered this contention by alleging that the absence of a deed shows that appellees' father never legally acquired title to the property and, hence, their claim is also based on fraud. Since we have dealt with the question of the absence of a deed, we shall address ourselves to the appellees' contention.

In the administration of a decedent's estate, a sale of real property can only be legally made by virtue of an express order of the Probate Court when it has been shown to the satisfaction of the court that the personal property of the estate is insufficient to discharge the lawful debts against the estate. If it cannot be shown that the sale of the land in question was duly authorized by the Probate Court, then the sale by the administrators is void. *Brown* v. *Allen,* 2 LLR 115 (1913); *Tee* v. *Chea,* 12 LLR 205 (1955); *Tetteh* v. *Stubblefield,* 15 LLR 3 (1962). It was also encumbent upon the grantees to examine the administrators' right to convey. *Tetteh* v. *Stubblefield, supra.*

With respect to the purchase by appellant of the land which he and the other administrators had sold to James S. Smith and his wife, we must admit that this fact, as well as the short span of time, twenty days, between the sale to the Smiths and the purchase from them by appellant, does tend to arouse suspicion. Be that as it may, while the administrator of an estate cannot purchase for himself property forming part of the estate, as

it is he who must execute the administrator's deed, yet there is authority that he may purchase from a third party. *Ross* v. *Roberts,* 3 LLR 266, 270 (1931). According to text writers, "the rule against executors and administrators purchasing at their own sales cannot be avoided by the mere interposition of a third person, who either becomes a purchaser for the benefit of the executor or administrator or, after such purchase, reconveys to him. . . . However this rule does not apply where a third person has in good faith purchased for himself but, after his purchase has been completed, entered into a contract of sale with the executor or administrator." 21 AM. JUR., *Executors & Administrators,* §§ 622, 623. Executors and administrators must not promote their personal interests as against those of an heir at law; they are obliged to exercise good faith and conduct the affairs of the estate with the same measure of care and diligence which an ordinary prudent man would exercise under like circumstances in his own affairs; and any fraud upon their part, which tends to defeat the end of the trust reposed in them, will justify the court in declaring their acts void, wherever this can be done without prejudice to the rights of innocent third persons. *Sharpe* v. *Urey,* 11 LLR 251 (1952); 21 AM. JUR., *Executors & Administrators,* §§ 224, 250, 251.

Since the estate is not yet closed, we wonder why the alleged irregularities were never brought to the attention of the court. In any event, where fraud is alleged in cancellation proceedings it must be proven by positive or circumstantial evidence, bearing in mind, of course, that he who comes into equity must come with clean hands, and he who seeks equity must do equity. While we would like to put an end to this matter now, we are prevented from doing so because, as we have indicated herein, there are some important issues on the question of fraud which need to be looked into further by the lower court. Under the circumstances, the decree of the