AUGUSTUS W. COOPER and MARY P. COOPER, for the heirs of Jesse R. Cooper, Deceased, and EDWARD COOPER, Appellants, *v.* C.F.A.O., Appellee

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

Argued February 7, 8, 9, 1972. Decided February 18, 1972.

1. Though an agreement, including a lease contrary to the statutes of the Republic, be illegal, a party, or one in privity with him, will be estopped from denying its validity when he is the maker of the instrument involved or has accepted benefits thereunder for a considerable time.
2. An estoppel is raised against the assertion of a right unreasonably slept on by a party when in such lapse of time another has unalterably changed his position in good faith.
3. When the agreed upon rent has been paid by lessee to lessor, profits derived by lessee as a result of the operation of the leased premises are irrelevant should lessor allege failure of consideration on the ground of inequity.
4. The devise by will of leased premises gives possession to the lessee and a right of future enjoyment thereof to the devisee upon termination of the lease.
5. Explicit lease agreements will not be reinterpreted because of ambiguous language in a will executed thirty years later, especially when the lease and will were drawn by the same person.
6. An inferior tribunal may not entertain a suit in equity or at law when the subject matter thereof is involved in an appeal arising from another proceeding, pending before the Supreme Court.
7. An action by or against an estate must be by or against the executor or administrator in his representative capacity, who is a necessary party to any action affecting the property rights of the estate.

In 1916, the testator leased real property to C.F.A.O., a French company, for twenty years with three options to the company to thereafter renew for the same number of years and for the same consideration. Until his death in 1949, the lessor received the agreed-upon rental. Under the terms of his will, testator's wife was to serve as trustee of the proceeds derived from the various leases on his property, including the ones at issue herein.

In 1968, nineteen years after their testator's death,

during which time the appellants, beneficiaries under the trust, continued to receive the rentals agreed upon under the leases, an action was instituted by the appellants in their individual capacities for cancellation of the leases, on the ground that they were illegal, since realty had been leased to a foreign concern for a length of time in excess of the legal limits permitted under the laws of the Republic applicable at the time the leases were executed. When the action for cancellation was begun in the circuit court, an application for certiorari was pending before the Supreme Court involving the estate and arising out of an order issued by a probate court to hold in escrow rents received under the leases herein. The cancellation action was dismissed in the lower court and an appeal was taken therefrom. The Supreme Court applied the doctrine of estoppel, for various reasons, though it recognized the illegality of the leases and, on procedural grounds as well, *affirmed* the judgment.

Joseph Findley for appellants. *R. F. D. Smallwood* for appellee.

MR. JUSTICE HENRIES delivered the opinion of the Court.

On October 31, 1916, the late Honorable James F. Cooper concluded lease agreements with C.F.A.O., in which he leased to the Company certain parcels of land for twenty years, "with the privilege of three renewals for periods of twenty years each upon the same terms and conditions," thus making a total of eighty years.

On August 14, 1946, James F. Cooper executed his will, of which clause 4, is set forth.

> "It is my desire, and I hereby direct that the Agreements of Lease entered into between the *Compagnie Francaises de L'Afrique Occidentals* (C.F.A.O.) Monrovia, and myself, *Messrs. A. Woermann,* and

myself, and the Cavalla River Company and myself with reference to certain properties situated on Water Street in the City of Monrovia, shall continue in force for the full term therein agreed upon, if possible and that the rents accruing therefrom, namely 250.0.0 pounds from the C.F.A.O., 250.0.0 pounds from A. Woermann, 250.0.0 pounds from C.R.C. be controlled and managed solely by my wife, Ellen in trust and as such special trustee, it is my wish, and I hereby so direct that from rents she shall make the following annual payments to the persons hereunder named, and or their lawful heirs by marriage. On the failure of issue by legatee hereunder, his share shall be divided pro rata by the others. Upon the termination of the lease above mentioned, and any renewals made if possible, the trust shall cease with respect thereto, and the fee simple title shall then vest in my sons, Jesse R. Cooper, Augustus Washington Cooper and Edward Cooper, and their lawful heirs by marriage. In case the above rents are reduced or increased the legatees shall get proportionally in accordance with such reduction or increase.

"In the event of the death of my said wife, Ellen, my trustee herein or should she leave the country permanently, or become incapacitated, then said trust shall be held, controlled and operated by Jesse R. Cooper, my son, Martha-Sherman, my daughter, and Emma Cooper, my ward, and in the event of the death of either of them, the other two shall nominate a third from the legatees hereunder. Ellen G. Cooper, 100.0.0 pounds; Augustus Cooper, 90.0.0 pounds; Jesse R. Cooper, 90.0.0 pounds; Martha-Sherman, 90.0.0 pounds; Armena Cooper, 48.0.0 pounds; Cecelia Cooper, 48.0.0 pounds; Edward Cooper, 48.0.0 pounds; Elsie Cooper, 50.0.0 pounds; Francis L. Cooper, 50.0.0 pounds; William Cooper, 48.0.0

pounds; Emma Cooper, 50.0.0 pounds; Mary B. Hamilton, 48.0.0 pounds."

The testator died in 1949, having received and enjoyed the proceeds from the leases for thirty-three years. In 1968, appellants, who are heirs of the late James F. Cooper, instituted equity proceedings in the Civil Law Court, Sixth Judicial Circuit, Montserrado County, to cancel the lease agreements of 1916 on the ground that the leases are immoral and illegal because they violated the statutes of Liberia, which prohibited the leasing of realty to aliens by private citizens for a period of more than twenty-one years on the same terms and conditions and for the same consideration. Pleadings in the lower court went as far as the filing of a reply. Subsequently, appellees, then defendants, filed a motion to dismiss the complaint, which was granted by the trial judge. Appellants excepted to the ruling and appealed to this Court.

Article V, Section 12th, of the Constitution provides that: "No person shall be entitled to hold real estate in this Republic, unless he be a citizen of the same. Nevertheless this article shall not be construed to apply to colonization, missionary, educational, or other benevolent institutions, so long as the property or estate is applied to its legitimate purposes." However, the constitutional prohibition against the holding of real estate by aliens has been limited to ownership of land in fee simple and leaseholds for excessively long terms.

In order to support their contention that the leases are illegal, appellants cited the Property Law, 1956 Code, 29:20:

> "Leases to foreigners. A Liberian citizen shall not lease real estate to any foreign person or foreign concern for a term longer than twenty-one years; provided, however, that the provisions of this section shall not prevent a citizen from granting to a foreigner or foreign concern a lease of real estate for two op-

tional periods of twenty-one years each in addition to the twenty-one year period of a term certain, but for each additional term there shall be an increase of the rentals fixed for the term certain of not less than ten percent.

"A lease agreement between a citizen and a foreigner contrary to the provisions of this section shall be voidable, and the lessee shall lose all benefits of such agreement and the lessor shall forfeit to the Government his rights and title to such estate."

Counsel for appellants neglected to cite the law extant when the leases were made. Under the 1898 statute Liberian citizens could lease their land to foreigners for twenty years plus an option to renew for another twenty-year period.

The leases in the instant case provided for an eighty-year duration; the lessor had enjoyed the proceeds from the leases for thirty-three years before his death, and appellants, under the testamentary trust created in clause 4 of the will, had also enjoyed benefits from these leases for nineteen years prior to the institution of these proceedings. In other words, the leases had run for fifty-two years before the charge of their illegality was raised.

Can the appellants, privy to the lessor, in view of the number of years that have elapsed and the benefits received during these years, now raise the issue of illegality of the leases? We hold that they are estopped from doing so for the following reasons:

(1) Appellants, as heirs of the lessor, are in privity with the lessor. A party complaining of an instrument made by himself is estopped from denying the validity of his own act. *West* v. *Dunbar,* 1 LLR 313 (1897). The same rule applies when he is in privity with the maker. *Van Ee* v. *Gabbidon,* 11 LLR 159 (1952).

In *Van Ee,* Mr. Justice Shannon, speaking for the Court, said at page 161: "It is true that this Court has always looked with disfavor upon lease agreements which

have been executed to cover periods of longer than twenty years, and has declared them to be against the organic law of the land. *Bingham* v. *Oliver,* 1 LLR 47 (1870); *Couwenhoven* v. *Green,* 2 LLR 301 (1918); 2 LLR 350 (1919). However, this has not been true where parties who were in *pari delicto* have attempted to take advantage of their own wrong."

As a general rule, in cases in which the parties are in *pari delicto,* the court will refuse to enforce rights arising out of an executory illegal agreement, and even where the agreement has been executed in whole or in part by one of the parties the court will refuse to give relief. 17 AM. JUR. 2d., *Contracts,* §§ 221,223. Appellants argued that their sole aim is to cancel the agreements because they were illegal, but this is not quite correct, since their prayer for relief shows that they also are requesting "due compensation." Indeed, the effect of their objective would be to defeat the trust created for not only them but other beneficiaries, some of whom are heirs of the testator. Equity will not, as a rule, aid either party to an illegal transaction if they are in *pari delicto,* but will leave them where it finds them to settle their disputes without the aid of the court. The principle will be invoked not only against a party to the illegal or inequitable transaction, but also against the heir of a party or anyone claiming under or through a party. 19 AM. JUR., *Equity,* § 478.

Appellants urged that the controlling cases cited above be overruled, but gave no reason to justify the demand. These cases being similar to and having settled the point which was raised in the case at bar, we are constrained to reaffirm this Court's holdings in these cases under the doctrine of *stare decisis.*

(2) The appellants waited for nineteen years after the death of their father before raising the issue of illegality of the lease agreements. There is no indication that it was raised when the will was offered for probate, or that

appellants were suffering from any disability which would have made them incompetent to attack the agreements before 1968, or that they had no knowledge of the facts or had not the means at hand of knowing all the facts. Instead, they have contended that statutes of limitation do not apply in equity. While it is true that a court of equity is not bound by a statute of limitations, it will give effect thereto in situations where the court finds laches. Equity follows the law. When one knowing his rights takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, the delay becomes inequitable were the right to be enforced, and so the law raises an estoppel against the assertion of the right. *Smith* v. *Faulkner,* 9 LLR 161 (1946). The lease agreements having run for a total of fifty-two years before being challenged, during which time the appellee, by appellants' own admission, had undergone great expenses and considerably improved the property, appellants are estopped from raising this contention. A court of equity has always refused its aid to stale demands where the party slept upon his rights and acquiesced for a great length of time. Reasonable diligence is essential to call into action the powers of a court of equity. 19 AM. JUR., *Equity*, § 490.

(3) As to the question of benefits received from these leases, appellants contend that they have received no benefits, yet, in counts 3 and 4 of their complaint they state otherwise.

> "3. That by virtue of defendant's illegal and wrongful possession it has erected and constructed a number of storerooms from which plaintiffs understand defendant earns an annual income of about $55,000.00 per annum, as compared with the incompatible and meagre sum of two hundred fifty pounds or six hundred five dollars, by present exchange standards, annual rental consideration for lease "B," a

profit of something like $54,395.00, less a total of $9,075.00, totaling $815,925.00 for 15 years, less a total of $9,075.00, which represents 15 years rent at $605 per annum. *This leaves a profit balance of $806,850, which defendant has fraudulently deprived plaintiffs of* when one considers the vast and glaring disparity between the consideration of Exhibit "B" and the stated sublease profits in this count.

"4. Plaintiffs further submit and showeth unto this court that from the time they came into possession of said property in 1949 by virtue of Exhibit "A," (the will) they, as devisees, have not enjoyed any benefit from this property *in terms of the excessive consideration* complained of herein from said leases or what accrues from them to defendants, who have thereby defrauded and cheated them out of $806,850.00, in keeping with count three of his complaint."

A careful reading of these two paragraphs has left us with the impression that out of the total amount of $815,925.00, the appellants have not received anything from the net balance of $806,850.00, which they regard as excessive consideration. Appellants' attempts to show that they had received no benefits at all, in the face of their admissions in counts 3 and 4 above, failed to change our impression that they had benefited by the $9,075.00 paid under the leases. It would have been convincing had appellants stated that they had received nothing from the full amount of $815,925.00 derived by appellee from the property operated by it. Under the circumstances, a beneficiary of a will who has accepted benefits under the will is estopped to contest the will. *Williams* v. *Finch,* 10 LLR 249 (1949). Even if appellants had not enjoyed benefits from the leases, they have neither alleged that this was due to appellee's failure to pay rent, nor shown any legal authority holding that a lack of benefits not attributable to the lessee is sufficient to cancel a lease agreement.

Appellants have contended that according to the will of their father, they became immediately seized of and had the right of possession to the leased premises without the intervention of any party whomsoever. It is our opinion that the language of clause 4 cited before, created a vested remainder. *Robert* v. *Howard,* 2 LLR 226, 229 (1916).

> "Where an otherwise effective conveyance of either land or a thing other than land creates one or more prior interests, the maximum of which is measured by lives or by years or by a combination of lives and years, and then provides, in substance, that upon the expiration of such prior limited interests, the ownership in fee simple absolute of the land, or the corresponding interest in the thing other than land, shall belong to a person who is presently identifiable such person has an indefeasibly vested remainder." *Restatement of Property Law,* § 157 (1926).

Accordingly, appellants are remaindermen to whom title will pass only upon the termination of the leases. There is a difference between possession and seizin. A lessee for years, as in the instant case, has possession, but seizen is in the remainderman. Thus, it is clear that all that appellants have is a right of future enjoyment of the leased premises. *Roberts* v. *Howard, supra.*

Much stress was placed by appellants on the words "if possible" found in clause 4 of the will. They argued that these words show that the testator intended the leases to continue "only if possible," and he himself was dubious of their being continued. The record certified to this Court does not show that this issue was passed upon by the court below since, in fact, the complaint was dismissed. Moreover, the judge did not approve count 2 of the bill of exceptions which deals with the issue. This Court has always held that the bill of exceptions must conform to the record in the trial, and that exceptions

must be supported by the record. *Elliott* v. *Dent,* 3 LLR 111 (1929); *Richard* v. *Coleman,* 5 LLR 56 (1935).

In passing, we must declare that it is difficult to imagine how appellants expected this Court to interpret a lease agreement by words found in a will executed thirty years after the making of the lease, especially so since the words are not in the lease agreements. Moreover, appellants did not state the reasons for testator's alleged doubt or what exactly is the contingency that the testator was contemplating. The lease agreements contain no ambiguity, and the words "if possible" in the will cannot invalidate the lease agreements. Even if the testator did have any doubts as to the lease agreements such doubt would not operate in his favor since it appears that the same persons prepared both the leases and the will.

> "A written agreement should, in case of doubt, be interpreted most strongly against the party who has drawn it. Sometimes the rule is stated to be that where doubt exists as to the interpretation of an instrument prepared by one party thereto, upon the faith of which the other has incurred an obligation, that interpretation will be adopted which will be favorable to the latter." *Rached* v. *Knowlden,* 13 LLR 68, 74 (1957).

In counts 3 and 7 of the bill of exceptions, appellants contend that the trial judge erred in sustaining count 4 of the motion to dismiss, which stated that the lower court was barred from hearing this suit because there was already an action involving the same estate pending before the Supreme Court. Appellants, in their brief, admit that there is an application for certiorari pending before the Supreme Court involving this estate and growing out of an order of the Probate Court to keep in escrow rents accruing from the property leased to C.F.A.O., but contend that the relief sought is different. While it may be true that the relief sought is different, it is also true that

both suits involve the same leased premises and the rents accruing therefrom. In *Weeks* v. *Johns,* 13 LLR 498 (1960), the Magistrate attempted to dispose of the case of summary ejectment instituted by plaintiff despite the pendency of an appeal in the Supreme Court involving the same property. Mr. Justice Wardsworth, speaking for the Court said, at page 501 :

> "It is manifestly illegal, if not arbitrary and contemptuous, for an inferior tribunal to entertain a suit in equity or an action at law when, as in the instant case, the subject matter thereof is involved in an appeal pending before this Court for final determination."

Under the circumstances the trial judge did not err in sustaining count 4 of the motion to dismiss.

Closely related to this issue is the contention of the appellee that the estate, not having been closed, is still under administration and, therefore, only the executrix has the capacity to institute any suit at law. In actions by heirs, next of kin, legatees or creditors, it is customary to aver that an application has been made to the personal representative to sue and that he has refused to do so, but it seems that it is not necessary to show a technical refusal. Moreover, such actions cannot be maintained without alleging and proving that there are no debts owing from the estate, and that no administration has been granted or, if granted, has been closed. 31 AM. JUR. 2d., *Executors and Administrators,* § 791. It is further stated an estate cannot sue or be sued as such. An action for or against it must be by or against the executor or administrator in his representative capacity. 31 AM. JUR. 2d, *Executors and Administrators,* § 713. It is obvious that this action is not for, but subtly against, the estate which is still being administered. Since the action is not on behalf of the estate, and since appellants are estopped from denying the validity of their own act, they have no standing to sue, and the judge did not err in sustaining appellee's contention on this issue.

Appellee also went further by asserting that the executrix, Ellen G. Cooper, widow of the testator, is a necessary party and, therefore, should have been joined as a party. We agree with this assertion, since she is not only the sole executrix but the special trustee as well, under clause 4 of the will. It is the duty of an executrix to defend all suits that may be brought against the estate and to protect the estate from doubtful or invalid claims and obligations. *Sharpe* v. *Urey,* 11 LLR 251 (1952). The legal representative of a decendent's estate, ordinarily the executor or administrator, is a proper and necessary party to any action affecting the property rights of the estate. 34 C.J.S., *Executors and Administrators,* § 751. The Civil Procedure Law, L. 1963–64, ch. III, § 551(1) provides for necessary joinder of parties.

> "When joinder required.
>
> "1. Parties who should be joined. Persons
>
> "(a) who ought to be parties to an action if complete relief is to be accorded between the persons who are parties to such action, or
>
> "(b) who might be inequitably affected by a judgment in such action . . . shall be made plaintiffs or defendants therein."

It is our opinion that the estate might be inequitably affected by a judgment in this action. Appellants contend that nonjoinder of a party is not necessarily a ground for dismissal of a complaint. We agree with this contention, but hasten to point out that their complaint was not dismissed on this ground.

In view of the foregoing, we must hold: that appellants lacked standing to sue, since the estate is not yet closed and is being administered by the executrix; that the pendency of a matter involving the same premises before the Supreme Court bars bringing another matter involving the same subject matter before an inferior tribunal. According to our Civil Procedure Law, L. 1963–64, ch. III, § 1102(1d,e):

> "At the time of service of his responsive pleading, a party may move for judgment dismissing one or more claims for relief asserted against him in a complaint or counterclaim on any of the following grounds: That there is another action pending between the same parties for the same cause in a court in the Republic of Liberia; That the party asserting the claim has not legal capacity to sue."

Moreover, although the leases are illegal, yet since appellants are in privity with the lessor, and have received benefits from the leases for nineteen years, they are estopped from taking advantage of their own wrong. To hold otherwise and allow one party to escape his obligation would serve to bring insecurity and instability to land transactions in Liberia. In conclusion, we quote Mr. Justice Shannon in *Van Ee* v. *Gabbidon,* 11 LLR 159, 162 (1952):

> "This Court always has been hesitant and cautious in decreeing the cancellation of lease agreements which have been entered into in good faith by parties, many of whom have been foreigners who have invested capital in our country. In so acting this Court feels itself serving the public good and subserving public policy which, in this connection, is to encourage investments that would conserve and maintain our economic stability."

It is probable that our conclusions would have been different had these proceedings been instituted by an interested party other than those in privity with the lessor. The ruling of the lower court is, therefore, affirmed with costs against appellants.

Affirmed.