ARTHUR SHERMAN and REGINALD SHERMAN, Administrators of the Intestate Estate of REGINALD A. SHERMAN, Deceased, Appellants *v.* ALEXANDER B. CLARKE, Sole Surviving Heir of EVA WATSON, Deceased, Granddaughter of R. J. B. WATSON, Deceased, Appellee.

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

Argued May 9, 10, 1966. Decided June 30, 1966.

1. A pleading may be once amended by leave of court after assignment of a case for hearing, but before trial, when the opposing party itself has requested a continuance, thereby demonstrating the absence of any prejudice by reason of delay. 1956 CODE 6:320.
2. The use of the word "fraud" in a reply will not be deemed a departure in pleading from a complaint which, in substance, alleged fraud although it omitted the word.
3. In an ejectment action, defendant's plea of adverse possession impliedly admits plaintiff's color of title.
4. A defendant who has occupied real property only 12 years cannot succeed in a plea of adverse possession in an ejectment action under a 20-year statute of limitations.

On appeal in an ejectment action, a *judgment* for the plaintiff below was *affirmed.*

Garber Law Firm for appellants. *Simpson Law Firm* for appellee.

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

Situated on Ashmun Street in the City of Monrovia, Montserrado County, is Lot No. 103 which was sold by one J. B. Watson, now deceased, of Grand Cape Mount County, the grandfather of the present appellee, to one Reginald A. Sherman, also now deceased, a resident of the same county and the father of the present appellants.

This piece of property was devised by the last will and testament of the late R. J. B. Watson to his granddaughters, Eva and Clarissa Watson, the daughters of the aforesaid J. B. Watson.

Clara Watson having predeceased her sister Eva without leaving any heirs, fee title to the property vested exclusively in Eva who was the mother of the present appellee. He claimed that the property had not been disposed of by his mother before her death; that his grandfather, J. B. Watson, the father of his mother, was not the owner of the property and therefore could not dispose of it, and that the sale of the property to appellants' father was illegal and therefore without any color of right. Appellee's effort to regain possession of his property because of what he considered an illegal transaction of his grandfather failed; hence these ejectment proceedings.

Appellants on their part admitted that title to the property had descended by inheritance to appellee's mother, but contended that the property was acquired by honest purchase and that since this transaction of sale and the occupation of the property had matured beyond a period of 20 years, the statute of limitations barred appellee from contesting their right of ownership, their late father, Reginald A. Sherman, having been in open, notorious, and adverse possession of the property for more than 20 years.

Pleadings in this case progressed up to and including the surrebutter. At the March 1962 term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, His Honor Joseph P. Findley passed on the law issues and ruled the case to trial. Exceptions were noted against this ruling, and trial of the case on its merits proceeded.

At the October 1964 term of this Court, the case came up for review and a submission of all of the legal and factual issues was presented. Because of the challenge to the jurisdiction of the trial judge to enter upon trial of the

case due to the expiration of his term time, priority to this jurisdictional issue took precedence in this review.

Exceeding term-time jurisdiction by the trial judge, that is to say, beyond the 42 days allowed by statute, was substantially established and would have resulted in the entire proceedings being declared a nullity but for the waiver by neglect of appellants to prohibit the trial judge from proceeding with the case; hence this Court decreed a remand of the case to be tried *de novo* by the said trial court. The retrial thus commanded took place at the February 1965 term of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, and resulted, as before, in favor of appellee; hence the case has found its way back on appeal to this Court.

Before passing on the merits of the claims of ownership and title to the property in question, we must look at the bill of exceptions listing only five counts, the first two of which charged reversible error against the trial judge for sustaining Counts 2 and 3 of plaintiff's complaint as well as the amended reply against defendants' plea of statute of limitations raised in their answer and other issues recited in their subsequent pleadings.

The appellants contended that undue delay was caused by the withdrawal of appellee's original reply and surrejoinder 21 days after the filing of the surrejoinder and two days after the case had been assigned for hearing. Relying on the statutes controlling in this point, the trial judge ruled, and we quote:

> "It is clear from the record before us that the withdrawal of plaintiff was before trial; for no trial had commenced on the matter; the defendants had themselves tendered a motion for continuance for the next two or three days when, at the earliest, trial could have commenced.
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> "Furthermore, law writers on amendments even encourage amendment after trial has commenced, so that this court could only sustain an amendment within our

statutory requirement which specifies that the same be made before trial which, in the opinion of this court, is one and the same as the hearing of the issues of law and fact."

Without comment on the exception to the rule permitting amendment after the case has commenced, claimed to be encouraged by law writers, since this exception is inapplicable to the case, we must take a look at the statute to determine whether or not the opinion expressed by the trial judge is legally supported. Our Civil Procedure Law provides that:

> "At any time before trial, any party may, insofar as it does not unreasonably delay trial, once amend any particular pleading made by him. . . ." 1956 CODE 6:320.

The record shows that there was no undue delay in the trial of this case because of this claimed belated amendment. Moreover, the continuance of the case by the trial judge on application of appellants makes the ruling of the judge denying Count 1 of the rebuttal sound in law; hence same is hereby sustained.

Appellants' allegation of a departure in pleadings by appellee's use of the word "fraud" in the reply, which word was not specifically used in the complaint, does not strike us as well-founded, since appellee's complaint alleged an unauthorized disposition by sale of appellee's property and referred to the disposition of the money of the proceeds from which appellee got no financial benefit. These allegations, if proved, would have tainted the transaction with fraud as charged in appellee's complaint. The ruling of the trial judge overruling the charge of departure is therefore sustained.

The third point for our consideration in the judge's ruling on the law issues is that raised by the plaintiff in contending that the statute of limitations could not be pleaded in bar without confessing ownership in the plaintiff. This objection does not seem to be legally and log-

ically supported, since the raising of such a plea impliedly confesses ownership in the plaintiff while alleging that title has been lost by reason of undisturbed, adverse, and notorious possession of the property by the defendants for more than 20 years. Consequently it was not necessary to specifically plead and confess plaintiff's former title. This principle is upheld by the following authority.

> "A plea in confession and avoidance must give color; that is, admit the apparent truth of the plaintiff's allegations and give him credit from an apparent or *prima facie* right of action, which the new matter in the plea destroys. Color may be expressed or implied.
>
> "Implied color is the tacit admission of the plaintiff's *prima facie* case by failure to deny it." SHIPMAN, COMMON LAW PLEADING 350 §§ 200, 201 (3rd ed. 1923).

The judge's ruling overruling Count 1 of the amended reply and Count 2 of the second surrejoinder is therefore sustained.

Infancy on the part of appellee and ignorance of his mother's right to the property which on her death descended to him and the concealment of the transaction of sale of this lot to appellants by appellee's grandfather must now be resolved by recourse to the factual side of the case. This is covered and presented for review in the final ruling of the trial judge on the law issues, to wit:

> "The case is therefore ruled to trial on the complaint and answer using the defendant's deed only to tack his tenure of possession as a mere matter of evidence relevant to Counts 2 and 3 of the amended reply on the point that the facts of the accrual of plaintiff's cause of action were concealed from him and his mother by the machination and chicanery of defendant's father and the father's grantor together, excluding, of course, the matter of the fraudulent procure-

ment of the deed proferted with the answer, is alleged in Count 5 of the amended rejoinder wherein defendants denied that they so concealed such facts as stated by plaintiff in his reply; and this to the exclusion of the hypothetical matter of probation of the will in question, as noticed, to exclude the fact of concealment of such facts against plaintiff's interest. Costs to abide final determination of this action; and it is so ordered."

That appellee is the legitimate and only surviving heir of his mother Eva, to whom was willed jointly with her sister Clara the lot in question by their grandfather R. J. B. Watson, has not been disputed since there is nothing of record to show that Clara, the sister with whom Eva held joint title to the property, left heirs of her body. There is nothing disclosed by the record to indicate that appellee's mother Eva disposed of this property by sale to anyone prior to her death except that one of the appellants' witnesses, Gaika Freeman, testified that it was of his certain knowledge that the father and mother of appellee gave their consent to the widow and sole executrix of the will of R. J. B. Watson for the sale of the property; yet the deed was not executed by appellee's mother. It is also clear from the record that the property was sold to appellants by appellee's grandfather J. B. Watson and not by Eva, his daughter, who was the fee title owner of this property; and this fact was established by the deed which was presented at the trial by appellants to tack their tenure of possession.

It remains now to be determined whether or not claiming the right of ownership because of open, notorious, and adverse possession of the property for more than 20 years with the alleged knowledge of appellee, or the circumstances which did not prevent him from knowing that the property was his by descent, has been established at the trial. Appellee has pleaded ignorance, first of the existence of the will which bequeathed the property to his

late mother. At the time of the probation of the will, appellee was not born, the will having been probated in the year 1919 and he having been born in the year 1920. He alleged that he left Cape Mount where he was born, and came to Monrovia in the year 1929 at the age of 9 years, and that he was completely ignorant of the disposition of the property to appellants by his grandfather, who had no title right to same, and that it was done by fraudulent concealment. This charge of fraudulent concealment was strongly contested by appellants as being without foundation in point of fact because of the public probation and registration of said transfer deed in the probate court of Grand Cape Mount County.

Appellee also alleged and contended that the first information he got of the sale and transfer of this property was from a Mr. A. Dondo Ware in the year 1949, and that his late mother Eva was not aware of her right of possession of the property up to the time she took ill and went into the interior for medical treatment, whereat she died.

It was in 1949 when the said A. Dondo Ware, according to his statements, was shown an old copy of the will and a promise was made to him to secure a copy from the clerk of court in Cape Mount County, which he did in 1960.

Witness Ware testified in confirmation of what appellee had alleged and we state hereunder some of the relevant points mentioned in his testimony as follows:

> "That the late R. J. B. Watson, great grandfather of appellee, died in Liverpool, England, in the year 1913, leaving a will in which he bequeathed the property in question to his two granddaughters, Clara and Eva; and that Clara came to her death through drowning, which vested the title right to the property, which was jointly held, in appellee's mother.
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> "That Lucretia D. Watson, widow and executrix of said last will of R. J. B. Watson, was in knowledge of and connived in the sale of the property in question to

appellants by appellee's grandfather, J. B. Watson, and that by this act of hers and knowledge of the property being that of Eva and her sister in which she, Lucretia, only had life interest thereafter to pass to these two sisters, concealed this information of title from Eva until she died; and that the sale of this property by J. B. Watson to appellants was within her, the executrix's knowledge."

Strenuous efforts were made to discredit the testimony of this witness by trying to show that his statement in favor of appellee and against appellants was influenced by prejudice and evil motives because of enmity that he had nourished against appellants' father. In this connection a witness, Gaika Freeman, was brought to the stand by appellants. Said witness testified, among other things, that the lot in question was sold to appellants by J. B. Watson and Lucretia Watson, widow of the testator and executrix of said last will, claiming also that she did it with the consent of appellee's mother and her husband, the father of appellee. Said witness also stated that the property was sold to satisfy a foreign debt which Counsellor L. A. Grimes had gone to Grand Cape Mount to collect from J. B. Watson, and, as disclosed in other parts of the record, to save him, J. B. Watson, from serious embarrassment and disgrace.

If the statement made by appellants' witness Gaika Freeman is accepted as true, then it seems to go in corroboration of the charge of concealment of this transaction from appellee's mother by the act of the testator's widow and executrix, since she was in complete knowledge of the fact that she only had a life interest in the estate which, according to the will, was due to pass to appellee's mother and sister, and that if she was not privy to this concealment, she would have disclosed information of this title to the appellee's mother, which the record does not show she did; rather she is alleged to have actually been a party to the arrangement of sale of the prop-

erty to appellants by J. B. Watson who had no title to the same.

What strikes us as strange in reference to the statement of appellants' witness Gaika Freeman is that, if the property was sold with the consent of appellee's mother, then why was the deed of transfer executed by J. B. Watson and not by Eva, the owner of the property? This brings us to the conclusion that the property could not have been sold with the knowledge and consent of appellee's mother, hence her title right in said property remained in effect up to the time of her death.

Very strong efforts were made to discredit the testimony of witness Ware confirming appellee's statement to the effect that the said witness was appellee's first and only source of information of the existence of this will and that this was not until the year 1949. Appellants endeavored to show the improbability of this statement of witness Ware since because of the relationship that existed between himself and appellee it was not possible for him to have been in knowledge that the right vested in appellee's mother by the will had been sold to appellants and to have concealed this information for a long period of time. Ware testified that he personally knew the testator and was in Cape Mount County and knew said will had been proved, probated, and registered.

Whilst it may be fair to assume this probability, it cannot be denied that this contention is hypothetical, since there was no compelling circumstances which made it imperative that Ware was required and legally obliged to convey this information to appellee before the time he did. Hence in the absence of any evidence to prove that the information was conveyed to appellee before the year 1949, we must conclude that Ware did not make known this fact to appellee before 1949.

Appellants contended that the probation and registration of the deed in question was of public record and it was not likely that interested parties to this transaction of

sale of said property could not know of the property having been sold when the record was publicly made and publicly recorded. This, we say, presents another hypothesis which cannot be accepted as conclusive in determining that it could not have been without the knowledge of appellee before he was informed by Ware in the year 1949.

We have not been able to discover anything in the record otherwise showing that appellee or his mother had knowledge of this transaction. In the circumstances, we have no alternative but to decide that the allegation of ignorance by him of this transaction until the year 1949 has not been successfully disproved and must therefore be accepted as being true. The statute of limitations, as it relates to asserting a right to recover real property from one in unlawful possession thereof and the limitation of time within which the action is to commence and the cause of action accrue, provides that:

> "The time within which to commence civil actions after the cause of action has accrued shall be as follows:
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> "(a) In an action to recover possession of real property, twenty years. . . .
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> "Failure to commence an action within the period specified therefore shall constitute a valid defense; but the party who wishes to avail himself of such defense must expressly plead the limitation." 1956 CODE 6:50.

And this Court has held that:

> "Title to land by adverse enjoyment owes its origin to and is predicated upon the statute of limitations, and although the state does not profess to take an estate from one man and give it to another, it extinguishes the claim of the former owner and quiets the possession of the active occupant who proves that he has actually occupied the premises under a color of right peaceably and quietly for the period prescribed

by law. The statute of limitations thereupon may be properly referred to as a source for title and real and truly as valid and effectual a title as a grant from the sovereign power of the state." *Thorne* v. *Thomson*, 3 L.L.R. 193 (1930) Syllabus 3.

There was insufficient proof of the property in question having been disposed of by sale by Eva, the mother of appellee, she being the fee title owner of said property up to the time of her death. Nor does the deed of transfer show upon its face that she was the grantor of said transfer to appellants. There is absent fom the record conclusive proof of appellee's being in knowledge before 1949 of the existence of the will which vested life interest in the property in the widow of testator to be passed in fee after her death to appellee's mother and her sister who predeceased her without heirs. Not until 1949 was appellee informed of the will. The lapse of time from 1949 to 1961 covers only 12 years and does not entitle appellants to assert the claim of the statute of limitations, they not having occupied and owned in open and notorious adverse possession of said property for a period of 20 years as the statute prescribes, before the assertion of title right by this action of ejectment which has been the subject of review on appeal by this Court.

The verdict of the jury and judgment of the court below declaring ownership of said property in appellee, and that he be put in possession thereof should be, and the same is, hereby affirmed with costs against appellants. And it is hereby so ordered.

Judgment affirmed.