FRANCES C. WILSON, Executrix of the Estate of A. Dash Wilson, Sr., deceased, Appellant, *v.* JOHN L. DENNIS, et al., Appellees.

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

Argued October 28, 1974. Decided November 15, 1974.

1. Where three days are required for placarding of a deed before offering it for probate, and only one day's notice is given, the probation and registration of the deed is void.
2. The Supreme Court will not do for a party what the party failed to do for himself.
3. In actions of ejectment the Supreme Court will give preference to the older deed.
4. The State cannot grant land, the title of which has already been transferred, for contractual obligations must be respected under the Constitution.
5. Copies of deeds attested to by an official, herein the Secretary of State, will be given consideration by the Court in the absence of the originals which cannot be found or are unavailable to the party.
6. The Court is reluctant to disturb long-established titles to realty, especially where the rights of innocent parties are involved, who would be hurt thereby.
7. If an application for substitution for a deceased party is not made within one year after the death of the party, judgment may be entered by default in the action against the deceased defendant.
8. The trial court is empowered, *sua sponte,* to order substitution for a deceased party.
9. The Supreme Court will not allow a party to repudiate his own acts.
10. For issues to be reviewed by the Supreme Court they must be set forth in a bill of exceptions which contain the objections made at the time of trial, raising such issues for the Court's consideration.
11. If a defendant fails to appear at a trial or fails to proceed, the court is empowered to enter judgment by default upon application of the plaintiff.

The appellant was substituted for her deceased husband in an action of ejectment brought against him by the appellees. After the widow had made one motion for continuance which was granted, neither she nor her counsel appeared at the trial, and consequently judgment by default was entered against her, from which she appealed.

Title to 100 acres of land came to the plaintiffs through a chain of titles beginning in 1857 when President Benson executed a bounty land deed for the property to the initial grantee. For 108 years the grantee and those, including the plaintiffs, who took title thereafter remained in undisturbed possession of the 100 acres.

In 1965, President Tubman executed to deceased a public land sale deed for 26.4 acres of the aforesaid 100 acres, giving rise to the action in ejectment. In addition, the plaintiffs contended probation of the deed was invalid because insufficient notice thereof had been given by defendant.

The principal arguments of the appellant were that the 26.4 acres were not on plaintiffs' land and that default judgment could not be rendered against her because she had served an answer.

The Supreme Court discounted the contentions of defendant and pointed out that she could have asked for arbitration of the issue of location of her land or produced witnesses at the trial rather than default in appearing. The judgment was *affirmed*.

Beauford Mensah and *D. Caesar Harris* for appellant. *Samuel E. H. Pelham* for appellee.

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

This is a case on appeal by the widow of A. Dash Wilson, Sr., as a substituted party in an action of ejectment brought against her late husband by the heirs of Wilmot E. Dennis. For the legal and factual reasons hereinafter set down in this opinion, we have affirmed the judgment of the trial court.

This Court from the earliest days of its existence has laid down the rule that in ejectment the plaintiff should prove his title and, if and when possible, from the source

of all land titles, the Republic of Liberia. In the record before us we find that in July, 1857, President Stephen Allen Benson signed a bounty land deed for 100 acres of land in what was then known as First Range, Monrovia, to George Henry Shaw. For 108 years the grantee, and those who took after him, enjoyed undisturbed possession of this particular tract of land; but in 1965, the late A. Dash Wilson, Sr., obtained from President William V. S. Tubman a Public Land Sale Deed for 26.4 acres of the aforesaid 100 acres. The location of this property is in what is known as the Sinkor Area, Oldest Congotown. Later in this opinion we shall say more about a President, either by misrepresentation, misinformation, or mistake, selling public land which had been previously sold by his predecessor in office.

According to the record, George H. Shaw's deed was probated and registered in Vol. N/N and later rerecorded in Vol. 93-V of Montserrado County and, therefore, was a valid instrument in accord with the laws of Liberia. In October, 1857, George Henry Shaw sold this property to Levi James, whose heirs in turn sold it on March 9, 1910, to the late Wilmot Dennis, father and grandfather of the plaintiffs, who are the appellees in this appeal. All of the deeds in this chain were proferted with the complaint and the reply, and we shall comment later in this opinion on the unusual procedure of making profert a chain of title in two pleadings instead of doing so in the complaint alone.

Plaintiffs brought an action of ejectment in September, 1971, against the grantee holding under and on the strength of the Public Land Sale Deed executed to him on December 5, 1965, as aforesaid. A. Dash Wilson, Sr., appeared for himself and filed an answer, to which the plaintiffs replied.

Two years later, and before the case could be called for trial in the Sixth Judicial Circuit, A. Dash Wilson, Sr. died; whereupon his widow, Frances Wilson, applied to

be substituted for her husband, in keeping with the law.

It must be noted that the plaintiffs also filed a motion for Frances Wilson to be substituted for her deceased husband; these two motions were granted by the court and she was so substituted.

On the face of the Public Land Sale Deed made profert with the defendant's answer it is observed, as plaintiffs have complained in their reply, that although the law requires that "all instruments, documents and other papers other than Wills, necessary to be probated, shall be offered in open Court and recorded by the clerk in the minutes for the day's sitting; after which it shall be bulletined for at least three (3) days, before being cried by the Sheriff . . ." and that "Bulletin of these matters shall be placarded on the door of the Court House for the required three days, to give public notice of the profferer's intention . . ."; yet, the aforesaid deed was offered for probate the very next day after President Tubman had signed it; that is to say on December 6, 1965, in violation of Rule 5 of the Monthly and Probate Court Rules quoted above.

It is our opinion that this deliberate violation of the Rule quoted above took advantage of the plaintiffs by depriving them of the notice to which the law entitled them; the said probation and registration must, therefore, by force of law have to be declared void.

In the defendant's answer five points have been raised in an equal number of counts, and we shall discuss them in reverse order, and we begin with count five, which claims difference in location of the land claimed by the parties on both sides.

According to the plaintiffs' chain of title made profert with the pleadings, President Benson in July, 1857, executed a Bounty Land Deed to George Henry Shaw for 100 acres of land in what was then known as First Range, Monrovia vicinity, and the number at the time was the number 3. In October of the same year George Henry

Shaw sold this parcel of land to Levi James, and the number of his deed was also number 3, and the location also was First Range, in the vicinity of Monrovia. This property must have descended to Levi James' heirs, because although there is no showing of how the property left the possession of Levi James, the next link in the plaintiffs' chain is a deed from Joseph and Lucretia James, heirs of Levi James. They sold the property in March, 1910, to Wilmot E. Dennis, father and grandfather of the plaintiffs, now the appellees before us.

It is interesting to note that although the number given the land remained the same, that is to say, number 3, the name of the location had in the 53 years between the sale to Levi James in 1857, and the subsequent sale to Dennis in 1910, changed to Long Beach, near Monrovia, in Montserrado County. It does not seem strange, therefore, that 55 years after Wilmot Dennis bought the property in 1910, the name of the location might have again changed to Sinkor, Oldest Congotown, in the City of Monrovia, as appears in A. Dash Wilson's deed dated December, 1965, and signed by President Tubman. We also take note of the fact that the number of the land in question has also changed from number 3, sold by President Benson in 1857, to N/N-O, which appears on the face of the deed executed by President Tubman in 1965.

On this very technical issue we would like to observe that since this question had been raised by the defendant in his answer, it seems strange that the substituted party defendant refused to attend the trial, where she might have objected to the admission of the plaintiffs' deeds because of the differences referred to. Moreover, it also seems strange that in face of this issue raised in the answer, the defendant did not see the need for asking for arbitration, to resolve the technical issues of difference in location and in numbers of the deeds on both sides. We cannot do for the party defendant what she failed to do for herself. Besides, the invalidity and nullity of the

probation of the defendant's deed issued on December 5, 1965, and probated on the 6th of the same month, contrary to the Rule quoted, renders the document defective, as compared with a chain of four deeds constituting the title of the plaintiffs all of which were regularly probated and registered.

The next point for our consideration is count four of the answer. In this count the defendant contends that the property in question is hers by virtue of a Public Sale Deed executed to her husband in 1965 by President Tubman. According to the issues raised on both sides, the question is whether or not A. Dash Wilson's 26.4 acres acquired in 1965, is or is not part of the Dennis' 100 acres of land acquired in 1857. Normally, and according to our practice in actions of ejectment, the older deed must be given preference. Therefore, the plaintiffs, whose chain of title began in 1857, would first carve out their 100 acres from the area, before any consideration is given to locating the defendant's 26.4 acres. But all of this has been obviated by the invalidity of the probation of A. Dash Wilson's deed, probated contrary to law, as aforesaid.

But to carry this point a little further, we would like to call attention to the principle laid down in *Davies* v. *Republic,* 14 LLR 249, 253–254 (1960):

> "We do not hesitate to say that lands granted . . . are carved out of public property not otherwise allocated or disposed of. The fact that the land is unencumbered is a condition precedent upon which the President conveys the title; hence the statute requires that the Land Commissioner should certify to that effect before the President's signature is affixed to the deed. It is quite easy to see, therefore, that the State could not possibly grant land, the title of which had already been transferred. It is physically impossible to give what one does not have.
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> "Contractually, the grantor is bound by perpetual

obligation to defend the grantee's ownership of property transferred by deed; and the fact that the Republic of Liberia is one of the parties, does not lessen the binding effect of the terms of the contract. Under the Constitution, we are commanded always to respect the obligations imposed by contracts; and indeed, that is a fundamental basis of simple and honest dealing which should be respected by all men and all nations."

We say the same in this case with respect to the impossibility attempted by President Tubman's sale of land in 1965, which had been disposed of by his predecessor in office, President Benson, who sold it in 1857. But I would also like to comment on the improbability of finding a block of 26 acres of unencumbered public land in the heart of the residential area of Monrovia in 1965. I will go further to say that this seems most likely an impossibility.

And now to counts two and three of the answer. These counts refer to the nonexistence of the deeds under which the plaintiffs have claimed title to the 100 acres in the deed executed by President Benson in 1857. The defendant also says that the plaintiff should show proper title in themselves. This is a fundamental rule in ejectment, established by many cases.

The allegation that the plaintiffs' title deeds do not exist must be considered in relation to the certificates attesting to copies of all the deeds in the public records and signed by the Secretary of State.

In view of this authentication by the State Department, as to each of the deeds in the plaintiffs' chain of title, it is difficult to give credence to the mere allegations to the contrary contained in the defendant's answer, especially since no witnesses were produced at the trial to substantiate the said allegations.

In support of the defendant's allegation of the nonexistence of one of the deeds in the plaintiffs' chain, the deed from George Henry Shaw to Levi James, he made

profert of a certificate issued by the Secretary of State, J. Rudolph Grimes, to the effect that such a deed supposed to have been recorded in Volume 13 and on page 183, could not be found.

It is of great significance to note that this certificate does not show that the records were checked by the Director of Archives, as they were for the three deeds in the plaintiffs' chain of title. But more important is the fact that the warranty deed from George Henry Shaw is shown by the record not to have been recorded in Volume 13, page 183, but recorded in Volume 93-V, on pages 41–43. Therefore, this certificate of Secretary Grimes is perfectly correct insofar as it states that said deed is not recorded in Volume 13.

Finally, we come now to count one of the defendant's answers. In that count the defendant contends that the metes and bounds in the deed made profert with plaintiffs' complaint do not disclose any particular quantity of land and, therefore, the said deed is invalid. This argument raises a technical issue which might only have been resolved by expert testimony. Unfortunately no such testimony was either sought by the defendant or produced at the trial. We have noted, however, that the metes and bounds referred to appear in the deed transferring the 100 acres from Joseph and Lucretia James to Wilmot Dennis in March, 1910. Those metes and bounds were copied exactly from the deed executed by President Benson to George Henry Shaw, and the deed thereafter from Shaw to Levi James and thereafter in the deed to Wilmot Dennis and his heirs.

Let us agree, for argument's sake, that the defendant might be correct in her assertion of the faulty description of metes and bounds. But how does she expect this fault to be corrected after 114 years, especially when she took no steps to have an expert substantiate at the trial such claim of faulty measurement?

In *King* v. *Scott,* 15 LLR 390, 408 (1963) this Court

said that "there would be untold disturbance to society if unduly belated demands would be allowed to defeat long-established vested titles to real property . . . and where the *status quo,* having been long-established, could not be disturbed without hurt to the rights of innocent parties."

We have now analyzed the entire answer of the defendant, and we find ourselves unable to sustain the issues raised therein.

Earlier in this opinion we indicated we would discuss the novelty of making profert with the complaint in an ejectment suit only one out of three deeds in the plaintiffs' chain of title. We specifically asked this question of appellee's counsel during his argument before us. He explained that at the time his complaint was prepared, all of the plaintiffs' original deeds had been given to Counsellor Lawrence Morgan by Mrs. Louise Dennis-Alston, one of the plaintiffs in this case and that these deeds were still in his possession. In the plaintiffs' reply, in count two thereof, it is alleged that these deeds were handed over in the presence of Stephen Tolbert. In count three of the said reply notice was given that a subpoena *duces tecum* would be applied for to have the deeds produced at the trial.

This allegation in the plaintiffs' reply has not been denied, nor did defendant attend the trial and bring witnesses to disprove the allegation. But we have found in the record a letter written by Stephen Tolbert, verifying plaintiffs' contention.

It is fortunate that the appellants were able to produce the letter, for it explained the defect in their chain of title. These absent links certainly would have rendered the chain imperfect.

In the bill of exceptions, and in counts two, three, and four thereof the appellant has contended that the judge in the court below did not pass upon the motion filed by Frances Wilson, for her to substitute for and stand in the stead of her deceased husband. It is contended, there-

fore, that Frances Wilson has not been properly substituted for the deceased defendant in the case and that she has not been served with a summons to be substituted. On this ground her lawyers say that the case presented to the jury was one-sided and that, moreover, the judge could not arbitrarily have her substituted.

Contrary to this allegation contained in the bill of exceptions, we found the documents in the record indicating proper service.

> "Republic of Liberia to P. Edward Nelson, Esquire, Sheriff for Montserrado County, GREETINGS:
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> "You are hereby commanded to summon Frances Cecelia Wilson, nominated Executrix of the estate of the late A. Dash Wilson to appear before the Civil Law Court for the Sixth Judicial, Montserrado County, sitting in its March 1974 Term, on the 20th day of March, 1974, at the hour of 10:00 o'clock in the morning at the Circuit Court House in the City of Monrovia to substitute as defendant in the above entitled cause of action.
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> "You are hereby commanded to make your official returns endorsed on the back hereof as to the manner of service. . . .
>
> "Given under my hand and Seal of Court in the City of Monrovia this 19th day of March, 1974.
>
> "[Sgd.] ROBERT B. ANTHONY, *Clerk,* Civil Law Court, Montserrado County."

Endorsement on the back of the document indicating service on the party was properly made by the sheriff.

We are of the opinion that service of this writ is shown to have been made, according to the sheriff's returns; and we think this was sufficient to place Frances Cecelia Wilson under the court's jurisdiction, as the substituted party defendant standing in the stead of the deceased A. Dash Wilson.

The law on substitution of parties is set forth in our

Civil Procedure Law. Within a year after the death of a party the court may order substitution of the proper party; if the substitution is not made, the action shall be dismissed as to the deceased plaintiff or judgment by default may be entered against the deceased defendant. The motion for substitution may be made by the successors or representatives of the deceased party or by any party, and, together with the notice of hearing, it shall be served on all the parties.

"Any person may notify a court of the death of a party. . . ." Rev. Code 1:5.36(2). It would seem to us that there was no need for the judge to have formally passed upon the motion, since it was within the authority of the court to have *sua sponte* ordered substitution for the deceased party. *Id.*

In looking through the record we observed that Frances Wilson prepared and filed her motion to be substituted for her deceased husband on March 19, 1974. Before the judge had any time to rule upon the motion, the very next day, March 20, 1974, she filed a motion for continuance, in which she named herself as the party substituted for her husband. So that even if the court had not been disposed to grant her motion for substitution, she had voluntarily assumed the role. It is, therefore, puzzling to us how she could in the circumstances seek to repudiate her own act. These counts of the bill of exceptions are, therefore, overruled.

The bill of exceptions also refers to the verdict of the jury and contends that the jury was incompetent to pass upon the issues raised in the case without an arbitrator's report. In looking through the record we have observed that although several notices of assignment for trial were served and returned, defendant and her lawyers absented themselves from the trial of the case, with the result that no request for arbitration was ever made.

Circuit Court Rule Seven (1972), states very clearly that "A failure to file a motion for continuance or to ap-

pear for trial after return by the sheriff of a written assignment, shall be sufficient indication of the party's abandonment of a defense in the said case, in which instance the court may proceed to hear the plaintiff's side of the case and decide thereon or, dismiss the case against the defendant and rule the plaintiff to costs, according to the party failing to appear." If the defendant could not appear for trial, why didn't she file another motion for continuance as she had done on a previous occasion? Not having done so, it left the court without any alternative but to proceed with the trial.

The appellant has contended in her bill of exceptions that as sole executrix of her deceased husband's estate which is still pending before the Probate Court, she cannot be made to appear before the Circuit Court in an ejectment suit involving a parcel of land which is part of the estate. This issue could not have been raised in the pleadings, because A. Dash Wilson died after pleadings in the case had rested, and his executrix was only appointed after his death.

However, Frances Wilson knew that she was nominated executrix of her deceased husband's estate when she voluntarily filed a motion to be substituted for him, which was granted by the trial judge.

Moreover, raising the issue for the first time in the bill of exceptions seems to be asking us to take jurisdiction over the point, although it had never been raised in the trial court which she could readily have done, and which is contrary to our practice.

It is our opinion that under our Civil Procedure Law issues brought for review by the Supreme Court must have been specifically raised in the trial court, by exceptions taken to the judgment, decision, order, or ruling against the party, setting them forth in the bill of exceptions. Rev. Code 1:51.7. But to include a matter in the bill of exceptions which has never been litigated in the court below is improper practice and deprives the

adverse party from defending against it. It also asks the Supreme Court to review a matter which has never been heard. This is contrary to the spirit and intent of Article IV, Section 2nd, of the Constitution, respecting the cases in which the Supreme Court might take original jurisdiction of matters.

We come now to consider the last point raised in the bill of exceptions. That the court rendered final judgment by default on May 21, 1974, in spite of the fact that the defendant had submitted an answer. She took exception to the adverse judgment and brought the matter on appeal before the Supreme Court. In considering this exception we would like to observe that our Civil Procedure Law is clear on the point. "If a defendant has failed to appear, plead, or proceed to trial, or if the court orders a default for any other failure to proceed, the plaintiff may seek a default judgment against him." Rev. Code 1:42.1.

After examining the record in this case and hearing arguments from both sides, we have not been able to find any legal reason why we should disturb the judgment of the trial court. We, therefore, affirm it, with costs against the appellant. It is so ordered.

Affirmed.