



LIABILITY OF EXECUTOR DE SON TORT IN RIVERS STATE: A REVIEW OF ADEMOLA KOLADE & OTHERS V. ALHAJI ABIOLA OGUNTOKUN SC.109/2008

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ABSTRACT

Generally, the estate of a deceased person is administered by personal representatives. Where a person dies intestate, letters of administration are required, conferring authority on personal representatives to administer the estate of the deceased. Sometimes, before the grant of letters of administration, the estate is dealt with by heirs. Persons who interfere with the estate of deceased persons without obtaining letters of administration or without being named as executors in a valid will are referred to as executors de son tort. In Kolade v Oguntade, the Supreme Court, considering the Administration of Estates Law of Osun State, ss 4 and 10, among other provisions and case law, held that heirs, even though they have not been issued with letters of administration are regarded as personal representatives and if subsequently they are granted letters of administration, the letters of administration will be deemed to have taken effect from the date of the death of the intestate. This article examines relevant provisions of the laws on administration of estates in Rivers State, arguing that the above position as stated in Kolade v Oguntade should be inapplicable under the Rivers State Administration of Estates Law, 1999.

INTRODUCTION

Administration of estates has to do with ensuring that the estate of a deceased person is properly managed and the residuary estate passed to his beneficiaries according to the law and the wishes of the deceased person, where he leaves behind a valid will.¹ Generally, administration of estates is undertaken by persons referred to as personal representatives of the deceased person. According to the Administration of Estates Law (AEL) of Rivers State, section 58 (a) ‘Personal representative’ refers to ‘the executor, original or by representation or administrator for the time being of a deceased person.’ The above provision throws up the question of who an ‘administrator for the time being’ is. Is an ‘administrator for the time being’ a person who is administering an estate of an intestate in the interim before the grant

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¹ Hon. Justice Enebeli (Rtd), ‘Law and Practice of Administration of Estates and Probate’ a paper delivered at the *Colloquium on Private and Property Law Development in Nigeria* held on 20th and 21st September, 2023 at the Faculty of Law, Rivers State University, 1.



of letters of administration; that is an executor *de son tort*, or is it referring to a validly appointed administrator operating under validly issued letters of administration? Furthermore, the AEL, Rivers State, section 2 raises the issue of whether pending the grant of letters of administration, the law recognizes the heirs of an intestate as personal representatives. In other words, can the heirs of an intestate legally administer the estate of the deceased pending the grant of letters of administration and do letters of administration operate retrospectively to give legal backing to the actions of a heir who administered the estate of the intestate before the grant of letters of administration? In relation to administration of estates in Osun state, these issues were brought before the court in *Ademola Kolade and Others v Alhaji Abiola Oguntokun*.² In this suit, the court, interpreting the Administration of Estates Law, Osun State, section 10 stated that when Letters of Administration is granted, it is deemed in law to have been vested in the administrator at the time of the death of the deceased. This decision has been taken to mean that even in Rivers State, letters of administration have retrospective effect.³ Comparing relevant provisions in Rivers and Oyo States, this article argues that the decision in *Kolade v. Oguntokun* should not be applicable in Rivers State.

THE FACTS OF *KOLADE AND OTHERS V. ALHAJI ABIOLA OGUNTOKUN*⁴

The respondent entered into a tenancy agreement dated 27th March, 1992, with Yusuf Olawoyin Kolade with respect to the latter's property situate at No.66 Alekuwodo Street, Osogbo. About 6 months after the agreement was entered into, Yusuf Olawoyin Kolade died intestate. Thereafter, the 3rd and 4th appellants were appointed by the 1st and 2nd appellants, who are also children of the late Yusuf Olawoyin Kolade, to manage the estate of the deceased landlord. The appellants, in fact, assert that the 3rd and 4th appellants had the written authorization of all the 23 children of the late Yusuf Olawoyin Kolade, to manage their deceased father's estate. Based on this authorization, the 3rd and 4th appellants proceeded to administer the estate of their deceased father before the grant of letters of administration.

The respondent instituted an action against the appellants contending that the 1st and 2nd appellants, even though they were children of the deceased landlord, had no authority to terminate or disturb the tenancy agreement since they had not obtained letters of administration from the relevant authorities, neither were they executors of the deceased's

² (2017) 18 NWLR 153; (2017) *All FWLR* (Part 895) 1557.

³ (n1) 51.

⁴ (n2).



Will. Letters of administration (Exhibit D2) were eventually obtained on 13th June, 1994, during the pendency of the suit.⁵

At the trial court, it was held that the written consent of all the 23 children of late Alhaji Yusuf Olawoyin Kolade (exhibit D1) authorizing the 1st and 2nd appellants to act as their representatives in relation to their late father's estate was sufficient authority based on which the 1st and 2nd appellants could issue a quit notice and make other claims against the respondent. This finding was set aside by the Court of Appeal. The Court of Appeal held that the said written consent had no relevance in determining appellants' representative status in relation to their late father's estate. The Court further held that letters of administration could not have retrospective effect.⁶ At the Supreme Court, one of the two issues brought before the court for determination was 'whether the actions of the 1st and 2nd appellants as Administrators of their deceased father's estate can be declared null and void on the sole ground that their actions were carried out before the issuance of the letters of administration.'⁷ Concerning this issue, it was argued, among other things, by learned counsel to the appellants that the effective date of the right of an administrator to property relates back to the time of death of the intestate. Counsel to the respondent argued otherwise that 'a person does not have the locus to bring an application in a representative capacity as Administrator of an Estate until he has been granted Letters of Administration.'⁸

In resolving the above issue, the Supreme Court was called to determine certain provisions of the Administration of Estates Law of Osun State, with particular emphasis on sections 4 and 10. The Administration of Estate Law of Osun State, 2000, section 4(1) provides that 'All property to which a deceased person was entitled for an interest not ceasing on his death shall on his death, and notwithstanding any testamentary disposition thereof devolve from time to time on the personal representatives of the deceased.' The Court then considered the meaning of the term, 'personal representative' of a deceased person. To resolve this issue, the Court examined the provisions of the Administration of Estates Law of Osun State, sections 4(2) and (3) which defined personal representative as 'heirs and assigns of the deceased within the meaning of all trusts and powers' and 'in regard to any property to which he is entitled for an interest on his death.' The Court therefore opined that a personal representative of a deceased person is,

⁵ (n2)163.

⁶ Ibid 164.

⁷ (n2) 163.

⁸ (n2) 165.



a person who manages the legal affairs of another because of incapacity or death. It is not in dispute that the 1st and 2nd appellants are some of the heirs of the deceased and therefore qualify together with the other children they represent by virtue of exhibit D1, to be called, known and recognized as the personal representatives of the deceased. The second persons(s) to be known and called the personal representative(s) of a deceased is/are the Administrators of the Estate of the deceased who has/have been duly issued a letter of Administration of the Estate of the deceased. ... See also *Okonyia v. Ikengah* (2001) FWLR (Pt. 53) 162 (2001)2 [NWLR \(Pt. 697\) 336](#); Finally, in *Mohammed v. Klargestor (Nig.)Ltd.* (2002) 14 [NWLR \(Pt. 787\) at 335](#) this court held that where a person dies intestate, leaving many heirs behind as in the instant case, his property will devolve on his heirs as also provided under the Administration of Estate Law of Osun State, earlier referred to in this judgment.⁹

The Administration of Estates Law of Osun State, section 10, provides that ‘Where a person dies intestate and administration is granted under the law in respect of his estate, that estate shall be deemed to have been vested from the date of his death until administration is granted.’ Relying on the above provision, the Court, per Onnoghen, C.J.N., resolving this issue in favour of the appellants, held that

It is settled law that the effective date of the title of an Administrator of an estate of a deceased person relates back to the time of death of the intestate. ... Having regard to the state of the law, both case law and statutory, it is very clear that the lower court was in error when it held, *inter alia*, that “the power cannot have retrospective effect but will take effect from the date of the letters of Administration” at page 97 of the record. See also *Jeddo v. Imiki* (1972) 3 SC 173 at 181.¹⁰

The above decision in *Kolade v Oguntokun*¹¹ was arrived at based primarily on the court’s interpretation of the AEL, Osun state, sections 4 and 10. It is however, worthy of note that similar sections of the AEL, Rivers State are not worded in exactly the same manner as the above mentioned provisions of the AEL, Osun State.

APPLICABILITY OF *KOLADE OTHERS V OGUNTOKUN* IN RIVERS STATE

In discussing the applicability of *Kolade v Oguntokun*¹² in Rivers State on the issues of recognizing heirs dealing with the estates of deceased persons before the grant of letters of

⁹ (n2) 166.

¹⁰ Ibid 168.

¹¹ (n2).

¹² *ibid*.

administration,¹³ and the application of the doctrine of relation back to letters of administration, it is pertinent to examine relevant provisions of the Rivers State AEL and the High Court (Civil Procedure) Rules, 2023.

Recognition of Heir operating without Letters of Administration as a Personal Representative

The AEL, Rivers State, section 58 provides that a ‘Personal representative’ refers to ‘the executor, original or by representation or administrator for the time being of a deceased person.’ If an ‘administrator for the time being’ refers to a person who is administering the estate of a deceased person pending the grant of letters of administration, it would mean that the AEL, Rivers State, section 58 failed to include administrators appointed under letters of administration in its definition of ‘personal representatives’. This would be a grave omission particularly as the AEL Rivers State, section 12 spells out the duties of personal representatives to be

- (a) Collect and get in the estate of the deceased and administer it in accordance with the law;
- (b) When required to do so by the court, exhibit on oath in court a full inventory of the estate and when so required render an account of the administration of the estate in the court;
- (c) When required to do so by the court, deliver up the grant of probate or administration to that court.

It cannot be the case that the drafters of the law intended the above to be performed by a person administering the estate of an intestate in the interim, pending the grant of letters of administration. In addition, the AEL, Rivers State, s58 defines an administrator to mean ‘a person to whom administration is granted.’ This therefore, means that the term ‘administrator’, as used in defining ‘personal representative’ in the same section, refers to an administrator to whom letters of administration has been granted. Going by this, the provision interpreting the meaning of ‘personal representatives’ could be construed to mean that ‘personal representatives’ may refer to executors appointed by a testator under his Will. It is trite that executors of a will do not necessarily have to be heirs or blood relatives of the testator. Personal representatives may also be the executor(s) of the last surviving executor of a testator.¹⁴ Furthermore, personal representatives may be persons who have obtained letters of administration over the estate of the intestate.¹⁵ This therefore means that ‘personal representatives’ as defined by the AEL, Rivers State, s58 excludes heirs and other persons

¹³ See also (n1) 69.

¹⁴ AEL, Rivers State, s6.

¹⁵ (n9).

administering the estate of an intestate without letters of administration duly issued. A proper construction of the AEL, Rivers State s.58 will aid in comprehension of the provisions of the AEL, Rivers State, section 2. The AEL, Rivers State, section 2 provides that

- (1) All property to which a deceased person was entitled for an interest not ceasing on his death shall, on his death and notwithstanding any testamentary disposition thereof, devolve from time to time on the personal representatives of the deceased:

Provided that any interest in land shall not be administered unless the administrator shows to the satisfaction of the court that other assets of the estate are insufficient to pay the estate's debts and expenses of his funeral and of taking out administration.

- (2) The personal representatives for the time being of a deceased are deemed in law to be his heirs and assigns within the meaning of all trusts and powers.
- (3) The personal representatives shall be the representatives of the deceased in regard to property to which he was entitled for an interest not ceasing on his death.

The AEL, Rivers State, section.2(2) as presently couched is an ambiguous provision in that it is subject to more than one possible meaning. On one hand, it has been interpreted to mean that pending the grant of letters of administration the law would regard the heirs of an intestate as the personal representatives of the intestate.¹⁶ This construction is however in conflict with the meanings ascribed to 'personal representative' and 'administrator' under the AEL, Rivers State, section 58.

On the other hand, the AEL, Rivers State, section .2(2) may be interpreted to mean that the personal representatives of a deceased person will be treated as the heirs and assigns of the deceased person within the meaning of all trusts and powers, pending the distribution of the residuary estate. On the distribution of the residuary estate, the actual heirs and assigns then take their rightful positions. While the latter construction may be argued to be remote, it accords more with the meanings ascribed to 'personal representative' and 'administrator' under the AEL, Rivers State, s58.

Executor *De Son Tort*

An executor *de son tort* is 'A person who intermeddles with the assets of a deceased person in such a way as to denote an assumption of the authority or an intention to exercise the

¹⁶ (n1) 14.

functions of an executor.¹⁷ ‘...any person who intermeddles with the estate of a deceased without obtaining letters of administration is an executor *de son tort*.’¹⁸ The term is further explained as follows:

A person not lawfully appointed executor or administrator and without title to a grant may by reason of his own intrusion upon the affairs of the deceased be treated for some purposes as having assumed the executorship: such an intermeddler is called a tort executor or an executor *de son tort* (i.e. of his own wrong). The same term is used whether the deceased died testate or intestate, for the law knows no such appellation as ‘administrator *de son tort*.’¹⁹

In addition to the above, where a third party receives properties from the estate of a deceased person without giving full valuable consideration, or where a personal representative defrauds creditors of the estate or defrauds the estate itself, the said third party, and personal representative who defrauds will also be treated as executors *de son tort*. The AEL, Rivers State, section 15 provides that,

If any person, in defrauding of creditors or without full valuable consideration, obtains, receives or holds any estate or part thereof of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the estate received or coming to his hands, or the debt or liability released, after deducting-

- (a) Any debt for valuable consideration and without fraud due to him from the deceased person at the time of his death; and
- (b) Any payment made to him which might properly be made by a personal representative.

The executor *de son tort* may also be called an officious intermeddler. The Black’s Law Dictionary,²⁰ defines an officious intermeddler as ‘A person who confers a benefit on another without being requested or having a legal duty to do so, and who therefore has no legal grounds to demand restitution for the benefit conferred sometimes shortened to *intermeddler*.’ Even though it has been held that ‘an executor *de son tort* can properly do for the benefit of the estate anything which a legal representative can do’,²¹ generally, the executor *de son tort* is subject to all liabilities and he enjoys none of the privileges of an

¹⁷ *Edoziem v Amadi* (1962) All NLR 256; See also *Wokoma v Esiaba* (1975) ECSLR 100.

¹⁸ *Administrator-General & Public Trustee v Ilobi* (1972) ECSLR 587.

¹⁹ Williams, Mortimer and Sunnucks Executors, Administrators and Probate (16th Edition) 92-93 cited in *Yusuff v Dada* (1990) LPELR 168; (1990) 4NWLR 678.

²⁰ Bryan A. Garner (ed) *Black’s Law Dictionary* (9th ed, West 2004)1195.

²¹ *Rickett v. B.W.A. Ltd.* (1960) 5 FSC 113; (1960) SCNLR 227.



ordinary executor.²² For instance, where an administrator or executor incurs liabilities in the course of the performance of his duties, he will be indemnified by the estate of the deceased but an executor in his own wrong may not be indemnified. However, the AEL, Rivers State, section 15 appears to allow some form of indemnity in certain cases.²³

In *Adeniyi-Jones v Martins*²⁴ the defendant was sent an account for payment by the plaintiff, a registered medical practitioner who had rendered professional services to her late brother. The defendant admitted to having collected rents of the house occupied by her late brother but she refused to pay the Plaintiff. The Court held that the defendant had ‘intermeddled with the deceased’s assets in such a way as to denote an assumption of the authority or the intention of exercising the functions of the executrix’. ‘The slightest circumstances are required, such as demanding payment of debts due to the deceased, paying the deceased’s debt, etc.’ the court therefore held that the defendant had ‘rendered herself liable as an executrix de son tort of the estate of her deceased brother.’²⁵ Sometimes, the liability of an executor *de son tort* falls on his estate. The AEL Rivers State, section 16 states that

Where a person as personal representative of a deceased person (including an executor in his own wrong) wastes or converts to his own use any part of the estate of the deceased, and dies, his personal representative shall, to the extent of the available assets of the defaulter, be liable and chargeable in respect of such waste or conversion in the same manner as the defaulter would have been if living.

Order 59 Rule 17 Rivers State High Court (Civil Procedure) Rules penalizes persons who deal with the estate of deceased persons when there are named executors or administrators for the estate. It provides that

Where any person other than the named executor or administrator, or an officer of the court or person authorized by the judge takes possession of or administers or deals with the property of any deceased person, he shall, besides the other liabilities he may incur, be liable to a fine of not less than N500,000.00 as the Judge, having regard to the condition of the person interfering with the property and the other circumstances of the case, may deem fit to impose.

It can therefore be said that generally, meddling in the estate of deceased persons is discouraged by law, particularly where there are executors, or administrators deriving powers

²² *Carmichael v Carmichael*, (1846) Digest, Vol. 23, 70, cited in *Bank of West Africa v Rickett* (1959)NRNLR 125.

²³ Ss.14(1) and (2) AEL Rivers State. See meaning of ‘representation’ under the AEL, Rivers State, s.58; (n1) 74.

²⁴ (1943) 17NLR 9.

²⁵ (n24), per Baker J., 10-11.

from letters of administration. It is the letters of administration that confer authority to deal with the estate of an intestate on behalf of the beneficiaries.²⁶ Possession of Letters of Administration is conclusive evidence of authority to administer the estate of the deceased person. This authority may relate back to the time of the deceased's death.²⁷ Thus, a person who administers the estate of a deceased intestate before the grant of letters of administration may sometimes have the acts he performed as executor *de son tort* validated when subsequently he is granted letters of administration over the estate. This is the doctrine of relation back.²⁸

Application of the Doctrine of Relation Back to Letters of Administration

The doctrine of relation back was clearly evident in the AEL, Osun State, section 10. However, not all AELs have provisions couched in a manner that encapsulates this doctrine in favour of an executor *de son tort* who subsequently obtains letters of administration. For instance, in *Yusuff v Dada*,²⁹ while an application for the grant of letters of administration was pending, the 3rd Plaintiff who was the first son (Dawodu) of his father, sold his deceased's father's land for valuable consideration. The sale was done in the presence of witnesses. Letters of administration was later obtained by the plaintiffs. The other plaintiffs contended that they were joint administrators. They further contended that no one had been appointed head of the family and that no administrator was authorized to sell the property without the consent of the other administrators. The construction of the Administration of Estate Laws of Oyo State, section 10 was considered by the Supreme Court in the determination of this suit. The section provides that,

Where a person dies intestate and administration is granted under this Law in respect of his real and personal estate, that estate shall be deemed to have been vested from the date of his death until administration is granted, in the Chief Judge in the same manner and to the same extent as it vests in the probate Judge of Her Majesty's High Court of Justice in England.

Thus, unlike the AEL, Osun State, s10 which deems the estate vested in the administrator from the date of the death of the deceased, the AEL, Oyo State, section 10 deems the estate vested in the Chief Judge. In *Yusuff v. Dada*, the Court of Appeal, per Ademola, JCA held that

²⁶ *Olowu v Olowu* [1994] 4NWLR 95.

²⁷ *Administrator-General and Public Trustee v Ilobi* (1972) ECSLR 587; *Hewson v. Shelly* (1914) 2LR Ch. D. 13; *Hadjar v Pitchey* (1894) AC 437.

²⁸ (n2).

²⁹ (1990) LPELR 168.



the application of that section of the Law to this case means that the third respondent or for that matter the family if even it wishes, cannot pass effective title to anybody until the letters of administration have been granted by the court. Viewed from that stand point alone, any disposition made by the third respondent to the appellant whether as Dawodu or as the so-called head of the family is of no effect whatsoever.³⁰

One of the issues brought before the Supreme Court for determination was what effect the letters of administration issued to the plaintiffs would have on the sale of the deceased's land by the 3rd plaintiff to the defendant prior to the issuance of the letters of administration. In construing the Administration of Estates Law of Oyo State, section 10, the Court was impelled by the said provision to look to the Law of England for guidance. The Court held that the

it appears that in England an executor *de son tort* cannot, because of the estate of a person who dies intestate being vested in the probate Judge pending grant of letters of administration to that estate, make any valid disposition of the deceased's land. So, because of section 10 of the Law, the 3rd plaintiff, Abiodun Laniyonu, as head of Chief J.O. Laniyonu family, could not have made a valid disposition of the land in dispute to the defendant at a time when application for a grant of letters of administration to the estate of Chief J.O. Laniyonu was pending in court.³¹

The Supreme Court, per Agbaje, JSC held that the position of the 3rd plaintiff at the time he sold the land in dispute to the defendant was that of an executor *de son tort* regarding the estate of the deceased, J.O. Laniyonu. The court, however, in spite of the above finding held that 'because of the conduct of the 3rd plaintiff in the circumstances leading up to the present action by the plaintiffs against the defendant it will be unconscionable and inequitable to now allow the plaintiffs to assert their title to the land in dispute.' This decision was based on the finding of the court that the defendant honestly believed that the sale by the 3rd appellant gave him good title to the land.

Applying the facts in the case now under consideration to the law as I have just set it out above, it is clear that the third plaintiff led the defendant to believe the land in dispute is his. As far as he is concerned it will be most unconscionable to allow him to resile from that position after the defendant has altered his position to his detriment as a result of the conduct of the 3rd plaintiff. As regards the other three plaintiffs, having regard to the law and the facts and circumstances of this case, it is inescapable to hold that they too had notice of the presence of the defendant on the land and did nothing to warn him until he has finished his building on the land.

³⁰ (n19) 667-668

³¹ (n19) 679.



The defendant was thus, entitled to raise any appropriate equitable defence. The equitable defence of estoppel by silence was therefore upheld.³² The issue was thus resolved in favour of the defendant.³³

The AEL, Oyo State, section 10 is similar to the provisions of AEL Rivers State, section 8(1) which provides that ‘Where a person dies intestate and administration is granted under this Law in respect of his estate, that estate shall be deemed to have been vested, from the date of his death until administration is granted, in the Chief Judge of the State.’ The Rivers State provision, however, does not look to England for guidance. The doctrine of relation back in favour of an executor *de son tort* is not reflected in the Rivers State counterpart to the AEL, Osun State, section 10. A provision worded in the same manner as s.10 relied on in *Kolade v Oguntade*³⁴ cannot be found in the AEL, Rivers State. It would therefore mean that this doctrine of relation back as stated in Kolade’s case should not apply in Rivers State. For Rivers State, a more appropriate precedent on this issue would be *Yusuff v Dada*.³⁵

CONCLUSION

This article reviewed the case of *Kolade v. Oguntade*³⁶ in relation to its applicability in Rivers State. The article sought to address the question of whether the Rivers State Administration of Estates Law accords the status of personal representatives to heirs who deal with the estate of deceased persons before the grant of letters of administration; whether the principle of relation back applies under the AEL, Rivers State; and whether the case of *Kolade v Oguntade*³⁷ should be applicable in Rivers State concerning the above mentioned issues.

In the said case, the Supreme Court interpreted the AEL, Osun State, section 4 as recognizing heirs acting before the grant of letters of administration, as a category of personal representatives.³⁸ The Court also interpreted the AEL, Osun State, section 10 as clothing the actions of such heirs with legality when they eventually obtain letters of administration.³⁹

A scrutiny of the meanings accorded the terms ‘personal representative’ and ‘administrator’ under the AEL, Rivers State, section 58 shows that under the AEL, Rivers State, a personal representative does not include an executor *de son tort*. The term ‘personal

³² (n19) 681.

³³ *ibid* 680-683.

³⁴ (n2).

³⁵ (n19).

³⁶ (n2).

³⁷ *ibid*.

³⁸ (n 9).

³⁹ (n 10).



representative’ is used in AEL, Rivers State, section 2 in an ambiguous manner that suggests that the heirs and assigns of a deceased are his personal representatives for the time being. This construction is however defeated by the meanings ascribed to ‘personal representative’ and ‘administrator’ under s.58. This article recommends that the Rivers State AEL, section 2 be amended to remove its ambiguity and bring it in line with the interpretation section of the statute.

Even though a heir who administers the estate of a deceased person before grant of letters of administration is an executor *de son tort*, it has been held that he can do, for the benefit of the estate anything which a legal representative can do.⁴⁰ He, however does this at the risk of incurring personal liability. Unlike an administrator granted letters of administration, the executor *de son tort* is left with minimal legal protection. In states with provisions similar to the AEL, Osun State, s10 on which *Kolade v Oduntade*⁴¹ was decided, an executor *de son tort* would have his actions validated when he is subsequently granted letters of administration over the estate. The Rivers State AEL, however, does not have such a provision that reflects the principle of relation back in favour of the executor *de son tort*. It would therefore be correct to state that, to this extent, the principle of relation back as applied in *Kolade v Oguntade*⁴² would be inapplicable in Rivers State.

⁴⁰ Rickett’s case (n 23).

⁴¹ (n2).

⁴² *ibid*.