

11, 1961

IN THE PRIVY COUNCIL

No. 40 of 1960

ON APPEAL
FROM THE COURT OF APPEAL OF GHANA

B E T W E E N :

AUSTIN RICHTER COLEMAN
(Plaintiff) Appellant

- and -

EMMA KWALEY SHANG alias
EMMA KWALEY QUARTEY
(Defendant) Respondent

UNIVERSITY OF GHANA
1961
INSTITUTE OF ADVANCED
LEGAL STUDIES

63652

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CASE FOR THE APPELLANT

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1. This is an appeal from a Judgment of the Court of Appeal of Ghana, dated the 23rd November, 1959, allowing an appeal from a Judgment of the High Court, Eastern Judicial Division, dated the 23rd March, 1959, in proceedings for the grant of letters of administration in respect of the estate of Stephen Coleman, deceased. The High Court decided that letters of administration should be granted to the Appellant (hereinafter called "the Plaintiff") but the Court of Appeal revoked the grant to him and ordered that letters of administration should be granted jointly to both the parties to the proceedings and that the Plaintiff should account to the Respondent (hereinafter called "the Defendant") as to the extent to which he had already administered the estate.

2. The principal facts in the case are as follows. The first wife of the deceased was Adaline Johnson by whom he had three children. After her death, the deceased married Wilhelmina on the 9th February, 1907, in accordance with the provisions of the Marriage Ordinance, and had five children by her. The Plaintiff, who was born on the 19th May, 1909, is the sole survivor of those five children. The second marriage subsisted until the death of

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pp.43-60.

pp.26-30.

p.30.

p.60

p.20, 1.17.

p.19, 1.36.

p.65.

p.20, 1.1.

p.20, 1.26.

Record

p.21, 1.16.
 p.21, 1.17.
 p.20, 1.48.
 p.3, 1.14.

Wilhelmina some time in the year 1940. During the lifetime of Wilhelmina, the deceased became friendly with the Defendant and had 10 children by her prior to 1940. The Defendant claims that she was married to the deceased according to native law and custom. The deceased died intestate on the 1st April, 1958.

3. The deceased having contracted a marriage under the Marriage Ordinance, and having died intestate leaving issue of the said marriage (namely, the Plaintiff), it is common ground between the parties that the estate of the deceased is to be distributed in accordance with Section 48 of that Ordinance, i.e. two-thirds in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates in force on the 19th November, 1884, and one-third in accordance with the provisions of the native customary law which would have obtained if the deceased had not been married under the Ordinance. The provisions of Section 48, sub-section (1), are set out in the Annexure hereto.

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4. The issue which arises for determination on this appeal is whether, having regard to the provisions of Section 48 of the Marriage Ordinance, the Plaintiff is entitled to a grant of letters of administration in preference to the Defendant. That issue involves, in particular, a consideration of the question whether the Defendant, who claims to have been married to the deceased according to native law and custom, is to be treated as the widow of the deceased for the purposes of the provisions of the law of England relating to the distribution of the personal estates of intestates in force on the 19th November, 1884, i.e. whether she is the "wife of the intestate" within the meaning of the Statute of Distribution (22 & 23 Cap.2, c.10) Section 3.

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p.1.

5. On the 19th November, 1958, the Plaintiff instituted this suit by a Writ in the High Court, Eastern Judicial Division, whereby he claimed against one Comfort Adoley Coleman and one Francis Jonathan Coleman, as defendants, that he be granted letters of administration in respect of the estate of the deceased.

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p.3.

6. By a Statement of Claim, dated the 2nd December, 1958, the Plaintiff alleged inter alia that he

is the eldest surviving and only lawful child of the deceased, and that the said Comfort Adoley Coleman and the said Francis Jonathan Coleman are issue of the deceased begotten out of wedlock.

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7. The said Comfort Adoley Coleman filed a Defence dated the 16th December, 1958, to which the Plaintiff filed a Reply dated the 5th January, 1959, and the said Francis Jonathan Coleman filed a Defence dated the 18th December, 1958. p.4.
p.8.
p.7.
- 10 8. On the 10th January, 1959, the Defendant filed a Caveat and subsequently, having been served with a Warning, filed an affidavit sworn on the 22nd January, 1959, wherein she set forth her grounds for opposing a grant of letters of administration to the Plaintiff. p.10.
p.11, 1.2.
p.10.
- 20 9. On the 26th January, 1959, the said Comfort Adoley Coleman and the said Francis Jonathan Coleman by leave withdrew their Caveats and discontinued, and the Writ was ordered to be amended by substituting the name of the Defendant in place of the names of the parties discontinuing. p.13.
10. By her Defence, dated -- February, 1959, the Defendant admitted that the Plaintiff is a child of the deceased by a lawful marriage and further pleaded inter alia as follows:- p.14.
p.14, 1.5.
- (i) That the deceased had other children besides the Plaintiff begotten in wedlock under native customary law and practice. p.14, 1.19.
- 30 (ii) That the Defendant is the wife of the deceased by Ga Native Customary law and practice and is therefore the surviving spouse both by native customary law and practice and at Law. p.14, 1.23.
- (iii) That the marriage of the deceased with the Defendant took place after the marriage with the Plaintiff's mother had been determined by the death of the Plaintiff's mother. p.14, 1.28.
- 40 (iv) That the Defendant is a prosperous trader and the estate which is the subject matter of this litigation was acquired with profits given to the deceased by the p.15, 1.5.

- Record Defendant for that purpose.
- p.15, 1.25. (v) That the Defendant has been duly authorised by the head of the deceased's family, one Robert Kofie Hammond, with the consent and concurrence of the Elders of the said family to apply for letters of administration in respect of the estate on behalf of herself and all the members of the said family.
- p.16. 11. The Plaintiff filed a Reply dated the 9th February, 1959, whereby he joined issue with the Defendant on her Defence and pleaded inter alia as follows:- 10
- p.16, 1.23. (i) That the fact that the deceased had other illegitimate children is no defence in law to the action.
- p.16, 1.28. (ii) That although the alleged marriage by Native Custom is no defence to the action, the Defendant will be put to strict proof of such marriage. 20
- p.16, 1.38. (iii) That he denies that Robert Kofie Hammond has ever been appointed Head of the family of the deceased and the Defendant will be put to strict proof of such appointment.
- p.17. 12. On a Summons for Directions, dated the 11th
p.18. February, 1959, it was ordered on the 16th February, 1959, that the issue in the action should be whether the Plaintiff or the Defendant is the proper person entitled to the grant of letters of administration to administer the estate of the deceased. 30
- pp.19-30. 13. The case was heard on the 13th, 16th, 17th and
pp.19-20. 23rd March, 1959, before Mr. Commissioner Gwira.
pp.65-66. The Plaintiff gave evidence and produced a Certificate of Marriage relating to the marriage of his
pp.20-21. mother Wilhelmina, issued under the Marriage Ordinance. The Defendant also gave evidence; as regards her alleged marriage to the deceased, she
p.20, 1.38. said:- "We were married according to Native Custom";
p.20, 1.44. she said that she provided the deceased with money and that when they had accumulated £4,000 she asked
p.21, 1.2. the deceased to put up a building and that he
p.21, 1.3. bought houses with some of the money; she said that she, as having provided those monies, was 40

applying for letters of administration and also as having been deputed by the Head of the deceased's family by a power of attorney (which was put in) and stated that Hammond was the head of the deceased's family but that she did not know the name of Hammond's father. Other witnesses were called for the Defendant, namely:-

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- 10 (i) Frank Doe Coleman, a son of the deceased, who gave evidence tending to support the Defendant's evidence that she had provided money for the deceased and said inter alia that he knew that the Defendant was married according to Native Custom. p.21, 1.21.
p.21, 1.22.
- (ii) Stephen Alfred Hammond, who said inter alia that his brother, Robert Kofi Hammond, is Head of the deceased's family, that he (the witness) knew that about 18 years previously the deceased was married to the Defendant according to Native Custom, and that some persons (presumably members of the family) met and decided that the Defendant should apply for letters of administration. p.21, 1.26.
p.23.
p.23, 1.9.
p.23, 1.10.
- 20 (iii) Robert Kofi Hammond, who said inter alia that he knows that the Defendant was the deceased's wife; that the deceased was his cousin and that he (the witness) is Head of the deceased's family. He stated that he signed the power of attorney appointing the Defendant to apply for letters of administration. p.23, 1.19.
p.23.
p.23, 1.39.
p.23, 1.40.
p.23, 1.41.
p.24, 1.2.
- 30 (iv) Joseph Regimato Mullinago, another cousin of the deceased, who said inter alia:- "I knew the Defendant was a concubine to late Coleman (i.e. the deceased) - after Austin's (i.e. the Plaintiff's) mother's death she went and lived with late Coleman (i.e. the deceased)." He stated that he signed the power of attorney but that some members of the family were not present when it was signed. p.25.
p.25, 1.14.
p.25, 1.20.
p.25, 1.36.
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14. The learned Commissioner found against the Defendant on her allegation that the deceased acquired properties with the monies given to him by the Defendant and upheld the claim of the Plaintiff,

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in the following terms:-

p.30, 1.25.

"I have considered the relationship as husband and wife but I am unconvinced that the deceased acquired properties with the monies given to him from time to time by the Defendant - her status being that of a wife married according to Native Custom cannot override the claim of the Plaintiff.

I therefore give judgment for the Plaintiff that Letters of Administration be granted to him."

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pp.43-60.

15. The Judgment of the Court of Appeal (van Lare, J.A. as C.J, Granville Sharp, J A. and Ollennu J.) was delivered by the learned acting Chief Justice. After disposing of a procedural point which does not arise for consideration on this appeal, the Judgment then proceeded to deal with the merits of the case. The Court stated certain propositions of law, which can be summarised as follows:-

pp.43-48.

p.48.

p.50, 1.34.

(i) That when a person who is subject to customary law marries under the Marriage Ordinance he does not cease to be a native subject to customary law by reason only of his contracting such marriage. It was held that the case of In re Otoo (deceased), Divisional Court Judgments (1926-29), p.84, was wrongly decided.

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p.49, 1.21.

p.52, 1.18.

p.53, 1.35.

(ii) That in Section 48 of the Marriage Ordinance, although the word "widow" in the phrase "leaving a widow or husband or any issue of such marriage" means a widow of a marriage under the Ordinance, that phrase does nothing more than indicate the condition precedent upon which English law would be applied to the estate of the intestate husband.

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p.55, 1.4.

p.55, 11.18-35.

(iii) That the view hitherto acted upon by the Courts in Ghana, namely, that if a native who has married under the Marriage Ordinance dies intestate no consideration is given to entitlement in the distribution of his estate to any widow other than a widow of the marriage under the Ordinance, or to any issue of the deceased other than

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his issue of the marriage under the Ordinance, is wrong.

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(iv) That in the Statute of Distribution the word "wife" means "lawful wife" and the word "child" means "lawful child"; and by the law of England legitimacy is a question of status, to be decided according to law of domicil. p.55, 1.36.

10 (v) That having regard to the provisions of the Marriage Ordinance:- (a) a marriage duly contracted by a man by customary law, prior to his marriage under the Ordinance, is valid and the issue are legitimate, p.58, 1.29.

(b) a marriage contracted by customary law during the subsistence of his marriage p.58, 1.38.

20 under the Ordinance is null and void and any children of such relationship are illegitimate, and (c) after the determination of the marriage under the Ordinance either by divorce or the demise of the wife, any marriage contracted by customary law is valid and the issue are legitimate. p.58, 1.42.

Applying these propositions of law to this case, the Court stated that the result was that (1) the three p.59.

children of the deceased by his first wife, Adeline Johnson, are legitimate and have equal status with p.59, 1.1.

the Plaintiff, who is issue of the marriage with Wilhelmina under the Ordinance; (2) the ten children which the deceased had by the Defendant during

30 the lifetime of Wilhelmina were procreated in adultery and are illegitimate as far as the Marriage Ordinance is concerned; and (3) the Defendant is p.59, 1.9.

a widow entitled to share in the estate under the Statute of Distribution because "the marriage between the deceased and the Defendant celebrated in accordance with native customary law after the demise of Wilhelmina is a valid marriage." p.59, 1.14.

16. The entitlement of the parties respectively was then stated by the Court of Appeal to be as follows:-

40 (i) Of the two-thirds of the estate which devolves according to the law of England in force on the 19th November, 1884, the Defendant, as the widow of the deceased, is entitled in her own right, to one-third, which is two-ninths of the whole estate. p.59, 1.29.

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p.59, 1.34.

(ii) Of that same two-thirds of the estate, the Plaintiff and "the other three children" are entitled to the remaining two-thirds in equal shares; as this is four-ninths of the whole estate, the Plaintiff is entitled under this head to one-ninth of the whole estate.

p.59, 1.40.

(iii) The remaining one-third of the estate is subject to Osu law, under which succession is patrilineal and all children of the father, however born, are entitled equally, and therefore all three sets of children, viz. the three children by Adeline Johnson, the Plaintiff, and the ten children by the Defendant, are equally entitled.

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p.60, 1.6.

On this view, it was held that the Defendant is entitled to five-ninths of the estate, i.e. two-thirds for herself and three-ninths (one-third) for and on behalf of the "family" of the deceased (presumably including the Plaintiff) which the Court stated that she represents in the suit.

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p.60, 1.9.

17. The Court of Appeal therefore decided that, on the principle that letters of administration are usually granted to the party who is shown to have the larger interest in the property, the Defendant should be entitled to a grant, but as she is illiterate, in the interests of the estate and the beneficiaries, there should be a joint grant to the Plaintiff and the Defendant.

p.60, 1.21.

p.62.

18. Conditional leave to appeal to Her Majesty in Council was granted on the 16th December, 1959. On that date, an application in arrest of the Judgment of the Court of Appeal on the ground that the Defendant's alleged marriage by native custom was not proved, was refused. Final leave to appeal was granted on the 28th March, 1960.

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p.62, 1.21.

p.63.

19. The Plaintiff respectfully submits that this appeal should be allowed with costs and the Judgment and Order of the High Court be restored for the following amongst other

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R E A S O N S

(1) BECAUSE the Judgment of the High Court dated the 23rd March, 1959, was right.

- (2) BECAUSE the case of In re Otoo (deceased),
Divisional Court Judgments (1926-29), was
rightly decided.
- (3) BECAUSE on any view of the facts the Defen-
dant is not the "wife of the intestate"
within the meaning of the Statute of Distri-
bution (22 & 23 Car.2, c.10) Section 3.
- 10 (4) BECAUSE it was not proved that there was a
valid marriage between the deceased and the
Defendant, celebrated according to native
customary law, after the death of Wilhelmina;
and the Court of Appeal erred in proceeding
upon the assumption that the said alleged
marriage was not in dispute.
- (5) BECAUSE it was not proved that the deceased
was an Osu man.
- 20 (6) BECAUSE the relevant provisions of the cus-
tomary law in accordance with which one-third
of the estate of the deceased is to be dis-
tributed were not proved.
- (7) BECAUSE it was not proved whether the three
children of the deceased by Adeline Johnson,
or any of them, are alive.
- (8) BECAUSE the Court of Appeal erred in regard-
ing the Defendant as representing the "family"
of the deceased, including the Plaintiff, in
this suit.

RALPH MILLNER.

A N N E X U R EMARRIAGE ORDINANCE, CAP.127Section 48

(1) Subject to the provisions of the succeeding subsection where any person who is subject to native law or custom contracts a marriage, whether within or without (Ghana), in accordance with the provisions of this Ordinance or of any other enactment relating to marriage, or has contracted a marriage prior to the passing of this Ordinance which marriage is validated hereby, and such person dies intestate on or after the 15th day of February, 1909, leaving a widow or husband or any issue of such marriage; (*Amended by 13 of 1951, s. 2.*) . 10

And also where any person who is issue of any such marriage dies intestate on or after the said 15th day of February, 1909, the personal property of such intestate, and also any real property of which the said intestate might have disposed by will, shall be distributed or descend in manner following, viz. - 20

Two-thirds in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates in force on the 19th day of November, 1884, any native law or custom to the contrary notwithstanding; and one-third in accordance with the provisions of the native customary law which would have obtained if such person had not been married under this Ordinance: Provided - 30

- (i) That where by the law of England, any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of the native customary law, and shall not become a portion of the said casual hereditary revenues;
- (ii) That real property, the succession to which cannot by the native customary law be affected by testamentary disposition, 40

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shall descend in accordance with the provisions of such native customary law, anything herein to the contrary notwithstanding.

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(3)

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CASE FOR THE APPELLANT

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