

G113.G.4.

11, 1961

IN THE PRIVY COUNCIL

No.40 of 1960

ON APPEAL
FROM THE COURT OF APPEAL, GHANA

B E T W E E N

AUSTIN RICHTER COLEMAN (Plaintiff) Appellant

- and -

EMMA KWAMEY SHANG alias
EMMA KWAMEY QUARTEY (Defendant) Respondent

RECORD OF PROCEEDINGS

UNIVERSITY OF LONDON
W.C.1.
19 FEB 1962
INSTITUTE OF ADVANCED
LEGAL STUDIES

63650

T.L. WILSON & CO.,
6 Westminster Palace Gardens,
London, S.W.1.
Solicitors for the Appellant.

A.L. BRYDEN & WILLIAMS,
53 Victoria Street,
London, S.W.1.
Solicitors for the Respondent.

IN THE PRIVY COUNCILNo.40 of 1960

ON APPEAL
FROM THE COURT OF APPEAL, GHANA

B E T W E E N

AUSTIN RICHTER COLEMAN (Plaintiff) Appellant

- and -

EMMA KWALEY SHANG alias
EMMA KWALEY QUARTEY (Defendant) Respondent

RECORD OF PROCEEDINGS
INDEX OF REFERENCE

No.	Description of Document	Date	Page
	<u>IN THE HIGH COURT, GHANA</u>		
1	Writ	19th November 1958	1
2	Statement of Claim	2nd December 1958	3
3	Defence of Comfort Adoley Coleman	16th December 1958	4
4	Affidavit of Francis Jonathan Coleman	25th October 1958	5
5	Defence of Francis Jonathan Coleman	18th December 1958	7
6	Reply to Defence of first Defendant.	5th January 1959	8
7	Summons for Directions	5th January 1959	9
8	Notice to Prohibit Grant	10th January 1959	10
9	Affidavit of Emma K. Shang	22nd January 1959	10

No.	Description of Document	Date	Page
10	Court Notes of withdrawal of Caveats and discontinuance by original Defendants and of Order for amendment of Writ by substitution of Emma Kwaley Shans for original Defendants	26th January 1959	13
11	Defence of Emma K. Shang	February 1959	13
12	Reply to Defence of Emma K. Shang	9th February 1959	16
13	Summons for Directions	11th February 1959	17
14	Court Notes on Summons for Directions	16th February 1959	18
15	Court Notes	13th March 1959	19
<u>PLAINTIFF'S EVIDENCE</u>			
16	A.R. Coleman	13th March 1959	19
<u>DEFENDANT'S EVIDENCE</u>			
17	Emma K. Shang	13th March 1959	20
18	Frank Doe Coleman	16th March 1959	21
19	Stephen A. Hammond	16th March 1959	23
20	Robert K. Hammond	16th March 1959	23
		17th March 1959	24
21	Joseph Reginato Mullinago	17th March 1959	25
22	Arguments of Counsel	17th March 1959	26
23	Judgment	23rd March 1959	26

No.	Description of Document	Date	Page
	<u>IN THE GHANA COURT OF APPEAL</u>		
24	Notice of Appeal	24th March 1959	31
25	Additional Grounds of Appeal	3rd July 1959	32
26	Motion for Stay of Execution	13th July 1959	34
27	Affidavit in Support	15th July 1959	35
28	Court Notes	5th October 1959	38
29	Judge's Notes of arguments	14th October 1959 15th October 1959	39 41
30	Judgment	23rd November 1959	43
31	Order	23rd November 1959	61
32	Court Notes granting Conditional Leave to Appeal	16th December 1959	62
33	Court Notes granting Final Leave to Appeal	28th March 1960	63

E X H I B I T S

Mark	Description of Document	Date	Page
"A"	Certificate of Marriage of S.Coleman and M.Eckener	9th February 1907	65
"B"	Letter, S. Coleman to A.R. Coleman	31st December 1955	66
"1"	Memorial Service Notice	8th June 1958	66
"2"	Letters (2) Senior Inspector of Taxes to Emma Q.Quartey	25th October 1958 8th December 1958	67 68
"3"	Power of Attorney, R.K. Hammond to Emma K.Shang	21st January 1959	68

Mark	Description of Document	Date	Page
"4"	Receipts:-		
	(a) H.P.Swaniker to S.Coleman	31st May 1945	70
	(b) H.P.Swaniker to S.Coleman	9th May 1949	70
	(c) H.P.Swaniker to S.Coleman	13th June, 1949	70
"5"	Receipts:-		
	(a) T.K.A.K.Adi to S.Coleman	17th December 1940	71
	(b) B.Asonker to S.Coleman	5th October 1934	71

LIST OF DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

Description of Document	Date
<u>IN THE HIGH COURT</u>	
Notice of Appearance for First Defendant	24th November 1958
Memorandum of Appearance for First Defendant	24th November 1958
Notice of Appearance for Second Defendant	25th November 1958
Memorandum of Appearance for Second Defendant	25th November 1958
Warning to Caveat	19th January 1959
Court Notes	19th January 1959
Motion for Stay of Execution	1st April 1959
Affidavit in support	2nd April 1959
Court Notes on Motion	6th April 1959
Motion in arrest of Judgment	6th April 1959
Affidavit in support	6th April 1959
Affidavit in opposition	10th April 1959

Description of Document	Date
Court Notes	13th April 1959
Motion for Stay of Execution	14th April 1959
Affidavit in Support	22nd April 1959
Affidavit in Opposition	2nd May 1959
Court Notes	4th May 1959
Court Notes	5th May 1959
<u>IN THE GIANA COURT OF APPEAL</u>	
Notice of intention to Appeal to Privy Council	30th November 1959
Notice of Motion for Conditional Leave to Appeal to Privy Council	30th November 1959
Affidavit in support	1st December 1959
Affidavit of service of Notice and Affidavit	11th December 1959
Notice of Appeal	1st March 1960
Notice of Motion for Final Leave to Appeal to Privy Council	8th March 1960
Affidavit in support	8th March 1960

IN THE PRIVY COUNCIL

No.40 of 1960

ON APPEAL FROM THE COURT OF APPEAL, GHANA

B E T W E E N

AUSTIN RICHTER COLEMAN (Plaintiff) Appellant

- and -

EMMA KWALEY SHANG alias
EMMA KWALEY QUARTEY (Defendant) Respondent

RECORD OF PROCEEDINGS

No. 1.

WRIT.

IN THE HIGH COURT OF JUSTICE, GHANA.

EASTERN JUDICIAL DIVISION,
DIVISIONAL COURT, ACCRA. 1958, Suit No.443/58.
A.D. 1958.

BETWEEN:- AUSTIN RICHTER COLEMAN of
House No. F.691/2 Canton-
ments Road, X'borg, Accra - Plaintiff,

versus

- 1. COMFORT ADOLEY COLEMAN of
House No. F.270/1, Lokko
Rd., X'borg, Accra.)
- 2. FRANCIS JONATHAN COLEMAN
of House No. F.270/1,
Lokko Rd., X'borg, Accra
and Emma Kwaley Shang
(amended by order of Court
dated 26.1.59)) Defendants.

ELIZABETH THE SECOND, by the Grace of God, of
the United Kingdom of Great Britain and Northern
Ireland and of Our other Realms, and Territories
Queen, Head of the Commonwealth, Defender of the
Faith, TO

- 1. COMFORT ADOLEY COLEMAN
OF HOUSE NO.F.270/2,
X'BORG, ACCRA.
- 2. FRANCIS JONATHAN COLEMAN,
OF HOUSE NO.F.270/1,
X'BORG, ACCRA.

in the Country of Accra.

In the
High Court.

No. 1.

Writ.

19th November,
1958.

10

20

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In the
High Court

No. 1.

Writ.

19th November,
1958

- continued.

WE command you, that within eight days after the service of this writ on you inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of

AUSTIN RICHTER COLEMAN of
HOUSE NO.F.691/2 CANTONMENTS
RD., X'BORG, ACCRA.

And take notice that in default of your so doing, the Plaintiff may proceed therein, and judgment may be given in your absence.

10

WITNESS, W.B. VAN LARE, Acting Chief Justice of Ghana, the 21st day of November, in the year of our Lord One thousand nine hundred and fifty-eight.

N.B.- This writ is to be served within twelve calendar months from the date thereof or, if renewed, within six calendar months from the date of the last renewal, including the day of such date and not afterwards.

The Defendant may appear hereto by entering an appearance either personally or by Solicitor, at the Registry of the Divisional Court at Accra. A Defendant appearing personally may, if he desire, enter his appearance by post and the appropriate forms may be obtained by sending a postal order for 2s.11d. with an addressed envelope, foolscap size, to the Registrar, Divisional Court, Accra.

20

The Plaintiff is the lawful son of Stephen Coleman deceased claims against the Defendants Letters of Administration in respect of the property of the said Stephen Coleman (Deceased).

30

DATED AT ETSOSEGBOR CHAMBERS, ACCRA, this 19th DAY OF NOVEMBER, 1958.

(Sgd.) F.K. Apaloo
SOLICITOR FOR PLAINTIFF.

THIS WRIT was issued by F.K. Apaloo of Accra whose address for service is Bannerman Road, Accra.

Solicitor for the said Plaintiff who resides at Accra.

No. 2.

STATEMENT OF CLAIM

IN THE HIGH COURT OF JUSTICE,
EASTERN JUDICIAL DIVISION,
DIVISIONAL COURT, ACCRA.
A.D. 1958

In the
High Court

No. 2.
Statement of
Claim.
2nd December,
1958.

SUIT NO.443/58.

AUSTIN RICHTER COLEMAN ETC., Plaintiff

versus

10

1. COMFORT ADOLEY COLEMAN
2. FRANCIS JONATHAN COLEMAN Defendants

STATEMENT OF CLAIM DELIVERED ON
BEHALF OF THE PLAINTIFF HEREIN.

20

1. Stephen Coleman of Christiansborg, Accra, died at Accra intestate on the 1st April, 1958.
2. The Plaintiff is the eldest surviving and the only lawful child of the said intestate, Plaintiff's mother having been married under the provisions of the Marriage Ordinance.
3. The Defendants are issues of the Deceased begotton out of wedlock and are not entitled as against the Plaintiff to administer the estate of the Deceased.
4. Wherefore the Plaintiff claims grant of Letters of Administration in respect of the estate of the Deceased.

sic.

DATED AT ETSOSEGBOR CHAMBERS, ACCRA THIS 2nd
DECEMBER, 1958.

30

(Sgd.) F.K. Apaloo,
SOLICITOR FOR PLAINTIFF.

THE REGISTRAR,
DIVISIONAL COURT,
ACCRA

And To

1. K.BENTSI-ENCHILL, Esq., SOLICITOR FOR 1st DEFENDANT.
2. K.O. LARBI, Esq., SOLICITOR FOR 2nd DEFENDANT.

In the
High Court

No. 3.

DEFENCE OF COMFORT ADOLEY COLEMAN
IN THE HIGH COURT OF JUSTICE, GHANA
EASTERN JUDICIAL DIVISION,
DIVISIONAL COURT, ACCRA.
A.D. 1958

No. 3.

Defence of
Comfort Adoley
Coleman.

SUIT NO.443/58.

16th December,
1958.

AUSTIN RICHTER COLEMAN ETC. OF ACCRA Plaintiff,

versus

- 1. COMFORT ADOLEY COLEMAN 10
- 2. FRANCIS JONATHAN COLEMAN Defendants.

STATEMENT OF DEFENCE FILED ON BEHALF OF COMFORT
ADOLEY COLEMAN ACTING ON BEHALF OF HERSELF AND
HER SISTERS CONSTANCE, FLORENCE CHARLOTTE, AGNES
AND VIRGINIA COLEMAN.

- 1. Paragraph 1. of the Statement of Claim is admitted.
- 2. Defendant admits that Plaintiff is the eldest surviving child of the deceased but says that she and her sisters are also lawful children of the deceased, their mother's marriage with the deceased having been formally solemnised after the death of Plaintiff's mother. 20
- 3. The Plaintiff's mother predeceased the deceased by 18 years during which period deceased's customary marriage with Defendant's mother was blessed by the Church and she lived with the deceased as his only wife and cared for him and nursed him until his decease, and upon his decease, performed the widow's custom in due form. 30
- 4. The Defendant says that her late father was an Osu man and as such his children are the persons entitled to succeed to two-thirds of his property on his intestacy in view of his marriage under the Ordinance and the fact that Plaintiff's mother predeceased the deceased.
- 5. The Defendant says that she and her sisters are also lawful children of the deceased and that they are equally entitled with the Plaintiff to a grant of Letters of Administration. 40
- 6. Save as is hereinabove expressly admitted the Defendant denied each and every allegation of

5.

the Plaintiff as if the same were set out in
extenso and denied seriatim.

DATED at Naoferg Chambers, Accra, this 16th day of
December, 1958.

(Sgd.) Bentsi-Enchill
SOLICITOR FOR THE 1ST DEFENDANT

THE REGISTRAR,
DIVISIONAL COURT,
ACCRA

In the
High Court

No. 3.

Defence of
Comfort Adoley
Coleman.

16th December,
1958

- continued.

10

and

TO THE ABOVE-NAMED PLAINTIFF
OR HIS SOLICITOR.

No. 4.

AFFIDAVIT OF FRANCIS JONATHAN COLEMAN

IN THE SUPREME COURT OF GHANA
EASTERN JUDICIAL DIVISION,
DIVISIONAL COURT, ACCRA.
A.D. 1958

PROBATE DIVISION

20

IN THE MATTER OF THE ESTATE OF STEPHEN COLEMAN
LATE OF CHRISTIANSBORG, Deceased

- and -

IN THE MATTER OF THE APPLICATION BY AUSTIN
RICHTER COLEMAN FOR GRANT OF LETTERS OF ADMIN-
ISTRATION HEREIN.

No. 4.

Affidavit of
Francis
Jonathan
Coleman.

25th October,
1958.

AFFIDAVIT OF FRANCIS JONATHAN COLEMAN

I, FRANCIS JONATHAN COLEMAN of Christiansborg,
Accra, make Oath and say as follows:-

30

1. THAT I am the Caveator herein.
2. THAT I have been served with a Warning issued
out of this Honourable Court at the instance
of the applicant herein warning me to file an
affidavit within six days setting forth my in-
terest in the above matter.
3. THAT my mother Agnes Na Badu Mensah was mar-
ried to my late father the deceased herein in
accordance with Native Customary Law in or
about the year 1910 and lived with her as man
and wife up to the time of her death in May,
1938.

40

In the
High Court

No. 4.

Affidavit of
Francis
Jonathan
Coleman.

25th October,
1958

- continued.

- 4. THAT the issues of the said marriage are myself and my sister Elizabeth Coleman.
- 5. THAT in addition to my mother, my late father married another woman by name Emma Kwaley Shang according to Native Customary Law and had 11 issues with her, six of them are alive.
- 6. THAT these two marriages contracted according to Native Customary law by my late father were to the knowledge of the applicant's mother.
- 7. THAT the applicant's mother having connived, condoned and actually encouraged a polygamous marriage for a period of over 39 years, the applicant herein cannot be permitted to say that he is the only lawful issue of our late father. 10
- 8. THAT for the past 14 years prior to the death of my late father, myself, my sister, my half sisters and their mother Emma Kwaley Shang lived with my father up to the time of his death; the applicant having deserted my said father. 20
- 9. THAT as children of our father's customary wives we are also entitled to inherit our father's property according to Ga Native Customary Law of succession.
- 10. THAT in the circumstances, I make this affidavit on behalf of myself and my sister Elizabeth Coleman opposing the grant of the Letters of Administration to the applicant herein alone.

SWORN at Accra this 25th) (Sgd.) F.J. Coleman. 30
 day of October, 1958

BEFORE ME,

(Sgd.) E. Opare Danso
COMMISSIONER FOR OATHS.



No. 5.

DEFENCE OF FRANCIS JONATHAN COLEMAN
IN THE HIGH COURT OF JUSTICE, GHANA,
EASTERN JUDICIAL DIVISION,
DIVISIONAL COURT, ACCRA.
A.D. 1958.

In the
High Court

No. 5.

Defence of
Francis
Jonathan
Coleman.

Suit No.443/58.

AUSTIN RICHTER COLEMAN etc. of Accra Plaintiff,
versus

18th December,
1958.

- 10 1. COMFORT ADOLBY COLEMAN
- 2. FRANCIS JONATHAN COLEMAN Defendants.

2ND DEFENDANT'S STATEMENT OF DEFENCE

- 1. THAT paragraph 1 of the Plaintiff's Statement of Claim is admitted.
- 20 2. AS to paragraphs 2 and 3 of the Statement of Claim, the 2nd Defendant repeats and relies on paragraphs 2, 4, 5, 6, 7 and 8 of the 2nd Defendant's Affidavit filed on the 25th day of October, 1958, in opposition to grants of Letters of Administration to the Plaintiff alone, a copy of which is hereto attached.

DATED AT DADORE CHAMBERS, ACCRA, THIS 18th DAY OF DECEMBER, 1958.

(Sgd.) K.O. Larbi

SOLICITOR FOR 2ND DEFENDANT.

THE REGISTRAR,
DIVISIONAL COURT,
ACCRA

AND

- 30 TO THE ABOVE-NAMED PLAINTIFF,
- OR HIS SOLICITOR F.K. APALOO, Esq.,
- BANNERMAN ROAD, ACCRA.

In the
High Court.

No. 6.

REPLY TO DEFENCE OF FIRST DEFENDANT

No. 6.
Reply to
Defence of
First Defendant.

IN THE HIGH COURT OF JUSTICE,
EASTERN JUDICIAL DIVISION,
DIVISIONAL COURT, ACCRA.
A.D. 1959.

SUIT NO.443/58.

5th January,
1959.

AUSTIN RICHTER COLEMAN, ETC.

Plaintiff,

versus

COMFORT ADOLEY COLEMAN & ANOTHER

Defendants.

10

REPLY TO STATEMENT OF DEFENCE FILED ON
BEHALF OF 1ST DEFENDANT

1. THE Plaintiff says in answer to paragraphs 2,3,
4 and 5 of the Statement of Defence that the De-
fendants were procreated in adultery and are not
lawful children of the late Coleman as the De-
ceased could not lawfully have contracted valid
marriages with their mothers at the dates of
their birth.

2. The Plaintiff generally joins issue with the De- 20
fendants upon their statement of Defence.

DATED AT ETSOSEGBOR CHAMBERS, ACCRA, THIS 5TH DAY
OF JANUARY, 1959.

(Sgd.) F.K. Apaloo
SOLICITOR FOR PLAINTIFF.

THE REGISTRAR,
DIVISIONAL COURT,
ACCRA.

AND

K.BENTSI-ENCHILL, Esq.,
SOLICITOR FOR 1st DEFENDANT

30

AND

TO KOI LARBI, Esq.,
SOLICITOR FOR 2ND DEFENDANT.

No. 7.

SUMMONS FOR DIRECTIONS

IN THE HIGH COURT OF JUSTICE,
EASTERN JUDICIAL DIVISION,
DIVISIONAL COURT, ACCRA.
A.D. 1959.

In the
High Court.

No. 7.

Summons for
Directions.

5th January,
1959.

SUIT NO. 443/58.

AUSTIN RICHTER COLEMAN OF ACCRA

Plaintiff,

versus

10 COMFORT ADOIEY COLEMAN AND ANOTHER

Defendants.

SUMMONS FOR DIRECTIONS ORDER 30 RULE 1

LET all parties concerned attend the Court on Monday the 19th day of January, 1959, at 8 o'clock in the forenoon or so soon thereafter on the hearing of an application for Directions in this action as follows:-

1. Whether the 2nd Defendant's Statement of Defence should not be struck out as being not in accordance with Court Rules.
- 20 2. Whether the Plaintiff is not on the pleadings the proper person by reason of his age and the fact that he is the surviving issue of a legitimate union, the proper person to administer the personal estate of his deceased father.
3. That the case be placed on the short cause, and a date to be fixed for trial of all the issues raised.
4. That costs of this application be costs in the cause liberty to apply.

30 DATED AT ETSESEGBOR CHAMBERS, ACCRA, THIS 5TH DAY OF JANUARY, 1959.

(Sgd.) F.K. Apaloo
SOLICITOR FOR PLAINTIFF.

THE REGISTRAR,
DIVISIONAL COURT,
ACCRA

AND

TO K.BENTSI-ENCHILL, Esq.,
SOLICITOR FOR 1ST DEFENDANT.

40 AND KOI LARBI, Esq.,
SOLICITOR FOR 2ND DEFENDANT.

In the
High Court.

No. 8.

NOTICE TO PROHIBIT GRANT

NOTICE TO PROHIBIT GRANT OF PROBATE OR
ADMINISTRATION.

No. 8.

Notice to
Prohibit Grant.

IN THE SUPREME COURT OF GHANA.

10th January,
1959.

IN THE MATTER OF STEPHEN COLEMAN, deceased

Let nothing be done in the matter of Stephen Cole-
man late of Christiansborg, Accra, deceased, who
died on the 1st day of April, 1958, at Christians-
borg, aforesaid and had at the time of his death
his fixed place of abode at Christiansborg, Accra
within the jurisdiction of this Court without warn-
ing being given to EMMA KWALEY SHANG of Christians-
borg, Accra.

10

DATED this 10th day of January, 1959.

(Sgd.) A.G. Heward-Mills,
SOLICITOR FOR CAVEATRIX
AGBADO CHAMBERS, ACCRA.

No. 9.

No. 9.

Affidavit of
Emma K. Shang.

AFFIDAVIT OF EMMA K. SHANG

20

22nd January,
1959.

IN THE SUPREME COURT OF GHANA,
EASTERN JUDICIAL DIVISION,
DIVISIONAL COURT, ACCRA.
A.D. 1959

PROBATE DIVISION

IN THE MATTER OF THE ESTATE OF STEPHEN COLEMAN
LATE OF CHRISTIANSBORG, ACCRA
Deceased

- and -

IN THE MATTER OF THE APPLICATION OF AUSTIN RICHTER
COLEMAN FOR THE GRANT OF LETTERS OF ADMINISTRATION
HEREIN

30

AFFIDAVIT OF EMMA KWALEY SHANG
alias EMMA KWALEY QUARTEY

I, Emma Kwaley Shang alias Emma Kwaley Quartey of
Christiansborg, Accra, make oath and say as
follows:-

In the
High Court.

No. 9.

Affidavit of
Emma K. Shang.

22nd January,
1959

- continued.

1. That I am the Caveatrix herein.
2. That I have been served with a Warning issued out of this Honourable Court at the instance of the application herein warning me to file an Affidavit within six (6) days setting forth my interest in the above matter.
3. That I am the wife of the late Stephen Coleman and that the said marriage was consummated according to Ga Native Customary Law and I am therefore the surviving spouse of Stephen Coleman, deceased.
4. That in pursuance of the said marriage the said Stephen Coleman and I were blessed in Church and that up till the day of the death of the said Stephen Coleman deceased we took Communion in CHURCH as man and wife and lived and co-habited as man and wife.
5. That in further pursuance of the said marriage the late Stephen Coleman informed the Income Tax Department that I am his only wife and that up to the time of his death and after the said death the Income Tax Department has dealt with me as his only wife and surviving spouse.
6. That the said marriage according to Ga Native Custom was consummated after the marriage with the applicant's mother, Wilhemina Coleman, had been terminated by the death of the applicant's mother in or about 1940.
7. That at the time of the said marriage with the Caveatrix, the late Stephen Coleman was a Civil Servant and had no money at all with which to acquire any estate or at all.
8. That the Caveatrix was then a prosperous trader and that with the profits from her business the late Stephen Coleman acquired the estate which is the subject of this action as their property as joint tenants.
9. That all the properties which comprise the estate of the late Stephen Coleman were acquired during the time when the marriage with the applicant's mother had been determined by the death of the applicant's mother.
10. That up till the time of his death the applicant and the late Stephen Coleman were bitter enemies following an attempt on the life of Stephen Coleman deceased by the applicant.

In the
High Court.

No. 9.

Affidavit of
Emma K. Shang.

22nd January,
1959

- continued.

11. That the applicant for the past sixteen (16) years and upwards had nothing at all to do with the late Stephen Coleman and that he did not even know of the death of his father until, I, the Caveatrix and surviving spouse and the head of the family Robert Kofie Hammond sent to tell him.

12. That all the testamentary expenses and debts owed by late Stephen Coleman deceased were paid by Robert Kofie Hammond head of the family of Stephen Coleman deceased and the Caveatrix jointly and that the applicant Austin Richter Coleman assisted the head of the family and the Caveatrix by contributing Twenty Pounds (£20) towards the funeral expenses.

10

13. That I have been duly authorised by Robert Kofie Hammond, the head of the family of Stephen Coleman deceased with the consent and concurrence of all the Elders of the said family to apply for Letters of Administration in respect of the estate of Stephen Coleman, deceased.

20

14. That in the circumstances, I make this Affidavit on my behalf and on behalf of the members of the family of Stephen Coleman, deceased opposing the grant of Letters of Administration to the applicant herein.

SWORN AT ACCRA this 22nd day of January, 1959, after the contents have been first read over interpreted and explained to her in the Ga Language by E.O. DANSO when she seemed to understand the same before making her mark hereto in my presence -

Emma Kwaley Her
Shang x R.T.P.
DEPONENT. Mark

30

Before me,

(Sgd.) E.O. Danso
COMMISSIONER FOR OATHS.

W/to mark the thumb
print
E.O. Danso.

40

THE DIVISIONAL REGISTRAR,
DIVISIONAL COURT, ACCRA.

AND

TO THE ABOVE-NAMED APPLICANT
AUSTIN RICHTER COLEMAN OF CHRISTIANSBERG,
ACCRA.

No. 10.

COURT NOTES OF WITHDRAWAL OF CAVEATS AND
DISCONTINUANCE BY ORIGINAL DEFENDANTS

26th January, 1959.

IN THE HIGH COURT OF JUSTICE, GIANA,
EASTERN JUDICIAL DIVISION, held at
Victoriaborg, Accra, on Monday the
26th day of January, 1959, before
D.E. Gwira, Esquire, Commissioner of
Assize and Civil Pleas.

In the
High Court.

No.10.

Court Notes of
withdrawal of
Caveats and
discontinuance
by original
Defendants.

26th January,
1959.

10

SUIT NO.443/58.

AUSTIN RICHTER COLEMAN Plaintiff,
versus
COMFORT ADOLEY COLEMAN & OTHERS Defendants.

Twum Barimah for Apaloo for Plaintiff.

Cudjoe for Enchill and Larbi for Defendants.

20

Counsel informs Court on behalf of the two
Defendants Comfort Adoley Coleman and Francis
Jonathan Coleman they want to withdraw their Cave-
ats and discontinue the action. Leave granted
accordingly.

Costs for Plaintiff assessed at £21 against
the Defendants personally, and the writ be amended
to read Austin Richter Coleman versus Emma Kwaley
Shang.

(Sgd.) D.E. Gwira
COMMISSIONER.

No. 11.

DEFENCE OF EMMA K. SHANG

IN THE HIGH COURT OF JUSTICE,
EASTERN JUDICIAL DIVISION,
DIVISIONAL COURT, ACCRA.

No.11.

Defence of
Emma K. Shang.
February, 1959.

30

SUIT NO.443/58.

AUSTIN RICHTER COLEMAN OF CHRISTIANSBORG Plaintiff,
versus
EMMA KWALEY SHANG (alias EMMA KWALEY
QUARTEY) of CHRISTIANSBORG, Defendant

In the
High Court.

No.11.

Defence of
Emma K. Shang.
February, 1959.
- continued

DEFENCE DELIVERED ON BEHALF OF THE DEFENDANT
HEREIN

1. Paragraph 1 of the Statement of Claim is admitted.
2. Save that the Plaintiff is a child of the intestate by a lawful marriage paragraph 2 of the Statement of Claim is not admitted. The Defendant will contend that until the death of the said intestate the Plaintiff and the said intestate were bitterest enemies: following an attempt by the Plaintiff to end the said intestate's life by poisoning and that for eighteen (18) years before his death the Plaintiff lived apart from the said intestate, and did not have anything to do with the said intestate or at all and that the Plaintiff and the said intestate had disowned each other publicly. 10
3. Paragraph three (3) of the Statement of Claim is not admitted. The Defendant will contend that the said intestate had other children beside the Plaintiff begotten in wedlock under native customary law and practice. 20
4. The Defendant is the wife of the said intestate by Ga Native Customary Law and practice and she is therefore the surviving spouse of the said intestate both by Native customary Law and practice and at Law.
5. The marriage of the said intestate to the Defendant took place after the marriage of the said intestate with the Plaintiff's mother had been determined by the death of the Plaintiff's mother in or about 1940. 30
6. The marriage of the said intestate with the Defendant under Native Customary Law was blessed in the Presbyterian Church and until the death of her husband, the Defendant and the said intestate to lived and cohabited at House No.F. 270/1, Lokko Road, Christiansborg, and took Communion in Church as man and wife. sic.
7. In further pursuance of the said marriage the said intestate informed the Income Tax Department that the Defendant was his only wife and the Income Tax Department has dealt with the Defendant during the lifetime of the said intestate as his sole wife and after his death as his surviving spouse. 40
8. At the time of the said marriage the said intestate had already been a retired Civil Servant

for about some ten (10) years or more and was earning a meagre pension and living in a swish building and had no money with which to acquire any estate or at all.

In the
High Court.

No.11.

Defence of
Emma K. Shang.

February, 1959.

- continued.

10

9. The Defendant is a prosperous trader and the estate which is subject matter of this litigation was acquired with profits given to the said intestate by the Defendant for that purpose and during the lifetime of the said intestate the Defendant has received the rents and profits of the said estate until it was leased out by the said intestate with the Defendant's consent.

10. The Defendant will contend that the Plaintiff did not even know of the death of his father, the said intestate, until the Defendant traced him at Swedru and informed him accordingly.

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11. The Defendant will contend that all the funeral and other expenses and debts of the said intestate were paid by herself and the Head of the said intestate's family, Robert Kofie Hammond, and that the Plaintiff only assisted with Twenty Pounds (£20) which was paid through the Head of the said intestate's family.

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12. The Defendant will contend that she has been duly authorised by the Head of the said intestate's family with the consent and concurrence of the Elders of the said family to apply for letters of Administration in respect of the estate of the said intestate on behalf of herself and all the members of the said intestate's family.

DATED at Accra this day of February, 1959.

(Sgd.) A.G. Heward-Mills
SOLICITOR FOR DEFENDANT.

THE DIVISIONAL REGISTRAR,
DIVISIONAL COURT,
ACCRA

AND

TO THE ABOVE-NAMED PLAINTIFF,
HIS AGENT OR SOLICITOR OF ACCRA.

In the
High Court.

No. 12.

REPLY TO DEFENCE OF EMMA K.SHANG

IN THE SUPREME COURT OF GHANA,
EASTERN JUDICIAL DIVISION,
DIVISIONAL COURT, ACCRA.

No.12.
Reply to
Defence of
Emma K.Shang.

SUIT NO.443/58.

9th February,
1959.

IN THE MATTER OF THE ESTATE OF STEPHEN COLEMAN,
Deceased.

BETWEEN:- AUSTIN RICHTER COLEMAN
of Accra Plaintiff, 10

- and -

EMMA KWALEY SHANG (alias EMMA
KWALEY QUARTEY) of
Christiansborg Defendant.

REPLY TO STATEMENT OF DEFENCE

1. The Plaintiff joins issue with the Defendant on her Defence.
2. And in further answer to paragraphs 2, 8 and 9 thereof the Plaintiff says that the allegations therein contained are scandalous, frivolous and vexatious and would ask that they be struck out under Order 19 Rule 29 of the Rules of Court. 20
3. And in further answer to paragraph 3 thereof the Plaintiff says that the fact that the deceased had other illegitimate children is no Defence in Law to the action herein.
4. And in further answer to paragraphs 4, 5, 6 and 7 thereof the Plaintiff says 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. 30
5. And in further answer to paragraph 11 thereof the Plaintiff says that the funeral and other expenses were paid from moneys out of the estate to which the Defendant had access on the death of the deceased.
6. And in further answer to paragraph 12 thereof the Plaintiff denies that Robert Kofie Hammond has ever been appointed Head of the family of the deceased and that the Defendant would be put to strict proof of such appointment. 40

17.

DATED at Accra the 9th day of February, 1959.

(Sgd.) C.C. Lokko
SOLICITOR FOR PLAINTIFF.

THE DIVISIONAL REGISTRAR,
DIVISIONAL COURT, ACCRA

AND

TO THE ABOVE-NAMED DEFENDANT,
OR HER SOLICITOR, ACCRA.

In the
High Court.

No.12.

Reply to
Defence of
Emma K. Shang.
9th February,
1959
- continued.

No. 13.

No.13.

10

SUMMONS FOR DIRECTIONS

IN THE SUPREME COURT OF JUSTICE, GHANA
EASTERN JUDICIAL DIVISION,
DIVISIONAL COURT, ACCRA.

Summons for
Directions.
11th February,
1959.

SUIT NO.443/1958.

IN THE MATTER OF THE ESTATE OF STEPHEN COLEMAN
Deceased.

BETWEEN:- AUSTIN RICHTER COLEMAN
of Accra Plaintiff,

- and -

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EMMA KWALEY SHANG (alias
EMMA KWALEY QUARTEY) of
Christiansborg. Defendant.

SUMMONS FOR DIRECTIONS UNDER ORDER 30 RULE 1.

LET all parties concerned attend the Court on Monday the 16th day of February, 1959 at 9 o'clock in the forenoon or so soon thereafter on the hearing of an application for Directions in this action :-

30

1. Whether the Plaintiff or the Defendant is the proper person entitled to the Grant of Letters to administer the estate of the above-named deceased.
2. That the case be placed on the short cause List and a date be fixed for trial.
3. The costs of this application be costs in the cause.

DATED at Accra the 11th day of February, 1959.

(Sgd.) C.C. Lokko
SOLICITOR FOR PLAINTIFF

In the
High Court.

No.13.

Summons for
Directions.
11th February,
1959
- continued.

THE DIVISIONAL REGISTRAR,
DIVISIONAL COURT,
ACCRA

AND

TO THE ABOVE-NAMED DEFENDANT
OR HER SOLICITOR,
ACCRA.

No.14.

Court Notes
on Summons
for
Directions.
16th February,
1959.

No. 14.

COURT NOTES ON SUMMONS FOR DIRECTIONS

16th February, 1959.

10

IN THE HIGH COURT OF JUSTICE, GHANA
EASTERN JUDICIAL DIVISION held at
Victoriaborg, Accra, on Monday the
16th day of February, 1959, before
D.E. Gwira, Esquire, Commissioner of
Assize and Civil Pleas.

SUIT NO.443/58.

AUSTIN RICHTER COLEMAN

Plaintiff,

versus

- 1. COMFORT ADOLEY COLEMAN
- 2. FRANCIS JONATHAN COLEMAN
- 3. EMMA KWALEY SHANG

Defendants.

20

Lokko for Plaintiff.

Let the issues be as set out in the Summons for
Directions.

Adjourned 13.3.59.

(Sgd.) D.E. Gwira
COMMISSIONER.

No. 15.

COURT NOTES

IN THE HIGH COURT OF JUSTICE, GHANA,
EASTERN JUDICIAL DIVISION, held at
Victoriaborg, Accra, on Friday the
13th day of March, 1959, before D.E.
Gwira, Esquire, Commissioner of
Assize and Civil Pleas.

In the
High Court.

No.15.
Court Notes.
13th March,
1959.

SUIT NO.443/58.

10

AUSTIN RICHTER COLEMAN

Plaintiff,

versus

- 1. COMFORT ADOLEY COLEMAN
- 2. FRANCIS JONATHAN COLEMAN
- 3. ENMA KWALEY SHANG

) Defendants.

Lokko for Plaintiff.

Cudjoe for Defendants.

Counsel for Plaintiff objects to paragraph 2, 8 - 9 of Statement of Defence as they disclose no defence to the claim and are scandalous.

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Counsel for Defendants apply to delete paragraph 2 by putting a full stop after enemies and deleting the words following up to the word poisoning. As regards paragraphs 8 and 9 they go to support of my defence that the Caveatrix has an interest in the estate.

COURT:-

I rule that paragraph 2 should be deleted as required by Counsel for Defendants.

PLAINTIFF'S EVIDENCE

No. 16.

AUSTIN RICHTER COLEMAN

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Plaintiff: AUSTIN RICHTER COLEMAN:- S.O.B. in English:

I am a private gentleman. I live in Accra. The late Stephen Coleman was my father and was lawfully married to my mother Wilhelmina Coleman. Certificate of marriage tendered - marked Exhibit "A". I was born during the wedlock on the 19th May,

Plaintiff's
Evidence.

No.16.

Austin Richter
Coleman.

13th March 1959.

Examination.

In the
High Court.

Plaintiff's
Evidence.

No.16.

Austin Richter
Coleman.

13th March 1959

Examination
- continued.

Cross-
Examination.

1909, we were five children, 4 boys and a daughter. They are all dead. I am the only surviving child; I know the Defendant she is the wife of my father, and has about 6 (six) surviving children of my father. I am asking for grant of Letters of Administration because I am the eldest surviving lawful son of my father. The marriage with my mother was not dissolved: my father retired as a Sub-Assistant Treasurer in 1930. I was 21 years old. He was worth some money that time. I lived with him until I got married in 1941, and had to leave because the house was not convenient for me and my family. I was on good terms with him until he died. I had a letter from him dated the 31st December, 1955; tendered - marked Exhibit "B".

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Cross-examination by Counsel - for Defendant.

My father's first wife was Adeline Johnson. She had three children with my father - they were not living with the Defendant when my father died. I was at Swedru - my daughter telephoned me that my father was dead. I paid £33 to Robert Kofi Hammond; the other children also contributed: after my father's death there was a meeting convened by Hammond at which I was present. Notices were posted for the Memorial Services put in Exhibit "I" - my mother died in 1940 - my father retired on a salary of £396. We searched for a Will but we found no Will. It is not true that my father was helped to acquire properties with the help of the Defendant.

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- Case for Plaintiff closed -

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Defendant's
Evidence.

DEFENDANT'S EVIDENCE

No.17.

No. 17.

EMMA KWALEY SHANG.

Emma Kwaley
Shang.

Defendant: EMMA KWALEY SHANG - S.O.B. in Ga.

13th March 1959

Examination.

I am a trader and I live at Christiansborg. I knew the late Stephen Coleman. He was my husband. We were married according to Native Custom - we were later blessed by the Minister: after the death of my husband the Income Tax wrote me a letter - put in - marked Exhibit "II", at the time of my marriage I was keeping a store selling drinkables, tobacco. I was making £45 or £50 a month profit: I told him to keep the money and when we get

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sufficient we educate our children with it. I asked my husband that as we had accumulated £4,000 we should put up a building. He bought houses with some of the money. I was collecting the rents. As such I am asking for Letters of Administration and also as having been deputed by the Head of the family by a Power of Attorney - put in - marked Exhibit "III" - at the time of our marriage my husband not financial and had been pensioned - he had several children to look after. My husband had the 1st building about 12 years ago. Plaintiff's mother had died. The 2nd house was built about 5 years.

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In the High Court.
Defendant's Evidence.

No.17.

Emma Kwaley Shang.

13th March 1959.

Examination - continued.

Cross-examination by Counsel for Plaintiff :-

My husband the deceased had no money at the time. We were friendly when I was 18 years and we had 10 children before 1940. My husband was a money lender and he gave out monies on loans: my husband did not build a house for me anywhere. My husband did not give me any paper for the monies I gave him: Hammond was the Head of my husband's family. I do not know the name of Hammond's father.

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Cross-Examination.

Re-examination:-

My husband was lending money belonging to both of us.

Re-Examination.

Adjourned 16.3.59.

(Sgd.) D.E. Gwira
COMMISSIONER.

No. 18.

No.18.

EVIDENCE OF FRANK DOE COLEMAN

Frank Doe Coleman.

1st WITNESS FOR DEFENDANT:

16th March 1959.

FRANK DOE COLEMAN:-

Examination.

I am an Accountant. I live in Accra. I know the Plaintiff and Defendant. I was living with my father before he died since my childhood. When my father retired I was managing his financial affairs for him under his directions - he was not a money lender as far as I knew but he used to assist friends, he gave an assistance to Swaniker from time to time - receipts from Swaniker put in - marked "IV" - receipts from Dodoo Donkor and R.Adu Kwasi put in - marked "V" - my father was almost 82 when he died, before he died he had not got the

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In the
High Court.

Defendant's
Evidence.

No.18.

Frank Doe
Coleman.

16th March 1959.

Examination
- continued.

Cross-
Examination.

strength to go about his activities. Income Tax returns put in marked "VI". I used to see the Defendant coming to my father before. My father was not a rich man - his other source of income was from the rents - at the time the Defendant was married to my father he had only one swish building: no part of it was let to a tenant: at the time of his marriage in 1940 to Defendant he had no other source of income: my father's pension was £157.14.6d. - my father built one house in 1945-47, another in 1951-2: my father told me the Defendant bought a house in 1934.

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Cross-examination by Counsel for Plaintiff:-

My father did not tell me the Defendant had leased the house she bought to some Syrians: but he told me to go and negotiate for the lease of the house. The lease was prepared in my father's name. I witnessed my father's signature - this is not part of the transaction I was managing for my father. I have not witnessed the signature of the Defendant to any paper. I did not ask my father why he was making the lease in his name and not the Defendant's. I know the Plaintiff's mother was married under the Ordinance and the Defendant was married according to Native Custom. The status of the two are different. I do not know who gave Exhibit "III", "IV" & "V" to Counsel. I know they are kept in his writing table. I cannot say that the monies on Exhibit "IV" and "V" were monies belonging to the Defendant. I have access to the writing table: I am not acting in concert with the Defendant - I know my father lent money to several people. I do not know who took the Promissory Notes from the writing table. I do not know my father build a house in Nima. I do not know that my father gave a loan of £1,000 to Swaniker.

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Re-Examination

Re-examination:-

The Defendant is an illiterate and my father was managing her affairs.

Through the Court:-

40

At the time the property in Okai Shi was bought - Plaintiff's mother was alive: Defendant was not living in the house.

No. 19.

EVIDENCE OF STEPHEN ALFRED HAMMOND

2nd WITNESS FOR DEFENDANT:-

STEPHEN ALFRED HAMMOND alias AKUATIA:- S.O.B.in Ga:

10 I am a Debt Collector. I live in Accra. I know the Defendant. I know the deceased - he was my relative. I know Robert Kofi Hammond - he is my brother and is the Head of the family. I knew that about 18 years ago the deceased was married to the Defendant according to Native Custom. I know that Defendant was living with the Plaintiff and both of them are hard workers: I cannot tell how much was his pension. I know the Defendant was trading. I have never bought anything from her store. The deceased told me it was the Defendant who had helped him to put up a building at Sallem but he did not tell me what sort of help. We met and decided that she should apply for Letters of Administration.

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Cross-examination by Counsel for Plaintiff:-

I see Exhibit "B" - it is in the hand-writing of the deceased. The deceased did not ask me to collect his debts for him. The deceased told me it was the Defendant who had helped him and I should thank her. I am telling the Court what I know.

Re-examination:-

30 I say the Defendant was a trader at the time between 1940-57. The Defendant's grandmother had died.

No. 20.

EVIDENCE OF ROBERT KOFI HAMMOND

3rd WITNESS FOR DEFENDANT:

ROBERT KOFI HAMMOND:- S.O.B. in Ga:

40 I am a Carpenter. I live in Accra. The last witness is my brother. I know Plaintiff. I know the Defendant. I know the Plaintiff was the deceased's son and the Defendant his wife: The deceased and myself are Cousins. I am the Head of the family of the deceased. I became head about

In the High Court.

Defendant's Evidence.

No.19.

Stephen Alfred Hammond.

16th March 1959

Examination.

Cross-Examination.

Re-Examination.

No.20.

Robert Kofi Hammond.

16th March 1959.

Examination.

In the High Court.

Defendant's Evidence.

No.20.

Robert Kofi Hammond.

16th March 1959.

Examination - continued.

17th March 1959.

Cross-Examination.

30 years ago. No one has interfered with me. I see Exhibit "3". I signed it. The deceased told me he was not in good terms with the Plaintiff. I thought the Plaintiff will not manage the estate properly. I know the deceased - he was an ordinary Civil Servant. I do not know and he has never told me that he was giving loan: at the time the deceased married the Defendant, the Defendant had money because she was keeping a store. The deceased acquired properties after he had retired. I do not know how much was his pension.

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(Sgd.) D.E. Gwira
COMMISSIONER.

17th March, 1959.

Same Counsel.

Cross-examination by Counsel for Plaintiff:-

ROBERT KOFI HAMMOND: still on Oath:

3rd WITNESS FOR DEFENDANT:-

The late Stephen Coleman was older than myself. I was appointed Head of the family because Stephen Coleman was from the female side and I am from the male side. I gave the Premium Bonds to John Coleman to be given to Austin Coleman to cash it for me: being the Head of the family. I am the responsible person to keep the money: the Defendant kept a store in Mango's house after the death of the grandmother she removed the store to Klotey Coleman's house: I used to see the Defendant and the grandmother in the store and I did not go there to enquire who owns the store. When I used to see her in Klotey Glomo's house will be about 10 years. I did not see her there again. I last saw her in Klotey Glomo's house about 7 years, for the last seven years the Defendant has never kept a store: but she sells cloth and other commodities: When Defendant buys the oil she does not bring them to the house but sends them somewhere: My father's name is Martey: I have never been called Top: one Sarbah broke my house and I kept the materials in Stephen Coleman's house. I did not ask him for assistance to build my house which he refused. I do not know if Defendant or Stephen Coleman had a house at Nima.

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Re-Examination

Re-examination:-

At the time of my appointment as Head, Stephen Coleman took part - since then no one has challenged my authority. When Defendant was in Klotey Glomo's house she was selling things.

No. 21.

JOSEPH REGIMATO MULLINGO

4th WITNESS FOR DEFENDANT:

JOSEPH REGIMATO MULLINAGO:- S.O.B. in English:In the
High CourtDefendant's
Evidence.

No.21.

Joseph Regimato
Mullinago.17th March,
1959.

Examination.

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I am a Pensioner. I know the Plaintiff. I live in Accra New Town. I knew late Stephen Coleman. He was my Cousin. When I was a boy I was living with late Stephen Coleman as my mother was his Aunt. My mother sent Coleman to school until he left school and started to work. When the late Stephen Coleman was pensioned I cannot say whether he was doing any other work. I knew the Defendant since 1922, she was not living in Coleman's house. I knew the Defendant was a concubine to late Coleman - after Austin's mother's death she went and lived with the late Coleman. I used to visit late Coleman and I saw he lived as an ordinary man. I knew the Defendant was trading in a large scale - she had two shops at Ashanti Blohu. I cannot tell the volume of her trade. I signed Exhibit "III" as a lawful son. Plaintiff was entitled to apply for Letters of Administration. We decided to give Exhibit "III" to Defendant because I say Plaintiff took the Premium Bonds and went and cashed them and did not give any account of them.

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Cross-examination by Counsel for Plaintiff:-Cross-
Examination.

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I am 69 years of age. The Defendant's house is about 30 yards from my house. I knew Defendant's mother and Grandmother. I knew her Grandmother kept a store in Mango's house. Defendant's stores are one in Klotey Glomo's place and I do not know the other store. The late Coleman gave me a loan which I repaid, I deposited my Documents with him. I knew Plaintiff worked for John Holt for 21 years. I did not know of any shortage. I know Coleman Adjei and Quashie Tawiah, they are members of Coleman's family, but were not present when Exhibit "III" was signed. They were summoned to a meeting but did not attend.

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Re-examination:

Re-Examination.

At family meeting everybody should be present.

Case for Defence closed

In the
High Court

No. 22.

ARGUMENTS OF COUNSEL.

No.22.
Arguments of
Counsel.
17th March,
1959.

Counsel for Defendant - Submits a case to determine the relative interests of the Parties. Plaintiff is the lawful son of the deceased. Defendant is the wife by Native Custom. Plaintiff said the deceased, his father, was a money lender but as a Civil Servant he could not lend money. He only gave small loans. There is evidence that deceased had a house in 1934, although I say all the properties were acquired in 1940. Defendant has interest in the Estate.

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Counsel for Plaintiff - Submits Plaintiff lawful son of a marriage under the Ordinance - Exhibit "A". All that has been said about property does not arise. If Defendant has an interest or a claim in the Estate she can pursue it somewhere. Defendant has not proved; notwithstanding Exhibit "III". Defendant is not entitled to grant of Letters of Administration.

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Judgment reserved.

(Sgd.) D.E. Gwira
COMMISSIONER.

No.23.
Judgment.
23rd March,
1959.

No. 23.

JUDGMENT

IN THE HIGH COURT OF JUSTICE, GHANA,
EASTERN JUDICIAL DIVISION, held at
Victoriaborg, Accra, on Monday the
23rd day of March, 1959, before D.E.
Gwira, Esquire, Commissioner of Assize
and Civil Pleas.

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SUIT NO.443/58.

AUSTIN RICHTER COLEMAN

Plaintiff,

versus

- 1. COMFORT ADOLEY COLEMAN)
- 2. FRANCIS JONATHAN COLEMAN)
- 3. EMMA KWALEY SHANG) Defendants.

JUDGMENT:-

In this case the Plaintiff is claiming as the lawful son of Stephen Coleman, deceased, grant of

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In the
High Court
—
No.23.
Judgment.
23rd March,
1959
- continued.

10 Letters of Administration in respect of the prop-
erty of the said Stephen Coleman, deceased. Three
defendants entered Caveats, but the 1st and 2nd
Defendants withdrew their Caveats remaining only
the third Defendant who contested the case. The
Plaintiff's evidence is that the late Stephen Cole-
man was his father, who was lawfully married to
his mother Wilhelmina Coleman, under the Ordinance
- Certificate of Marriage tendered marked Exhibit
10 "A" - he was born during the wedlock in May, 1909.
There were five children, 4 boys and a daughter,
they are all dead - he is the only surviving child;
he knows the Defendant who is the wife of his
father - she had about 6 surviving children with
his father. He is asking for Grant of Letters of
Administration of his father's estate because he
is the lawful son of his father, his mother having
been married to his father under the Ordinance, the
marriage was not dissolved. His father who was a
20 Civil Servant retired as Sub-Assistant Treasurer
in 1930. At that time he was 21 years old. He
lived with his father until he Plaintiff got mar-
ried in 1941. When he had to leave the house be-
cause the house was not convenient for him and his
family - he was in good terms with his father un-
til he died - he had a letter from him - letter
put in - marked Exhibit "B". In cross-examination
he said his father's first wife was Adeline Johnson
30 who had three children with his father. They are
not living with the Defendant, when his father died
he was at Swedru - his daughter telephoned him that
his father was dead - he paid £33 to Robert Kofi
Hammond. His mother died in 1940 - his father re-
tired on a salary of £396. It is not true that his
father was helped to acquire properties with the
help of the Defendant. This closed his case.

40 The Defendant in her evidence said she is a
trader in Christiansborg. The late Stephen Coleman
was her husband - they were married according to
Native Custom: They were later blessed by the Min-
ister. On the death of her husband the Income Tax
wrote her a letter which was put in - marked Ex-
hibit "II". At the time of her marriage she was
keeping a store selling drinkables tobacco and was
making £45 to £50 a month profit. She told the
husband to keep the money and when they get suffici-
ent to educate their children. She asked the hus-
band that as they had accumulated £4,000 they shall
put up a building. He bought house with some of
50 the money, she was collecting the rents, as such

In the
High Court

No.23.

Judgment.

23rd March,
1959

- continued.

she is asking for Letters of Administration and also as having been deputed by the Head of the family by a Power of Attorney - put in marked Exhibit "III": at the time of their marriage - the husband was not financial - he had been pensioned - he had several children to look after, her husband had the 1st building about 12 years ago. Plaintiff's mother had died, the 2nd house was built about 5 years. In cross-examination she said the deceased had no money at the time - they were friendly when she was 18 years old and they had 10 children before 1940. The deceased was a money lender and he gave out monies on loans. The husband did not build a house for her anywhere and he did not give her any paper for the monies she gave him. Hammond was the Head of her husband's family. In re-examination she said her husband was lending money belonging to both of them. Her first witness was Frank Doe Coleman. He is another son of the deceased Stephen Coleman - he was living with his father since his childhood. When his father retired he was managing his financial affairs under his directions - he was not a money lender as far as he knew but he used to assist friends. He gave an assistance to Swaniker - receipts from Swaniker put in - marked Exhibit "IV", receipts from Badoo Donkor, R.Adu Kwa Asiful put in - marked "V" - his father was almost 82 when he died - before he died he had not the strength to go about his activities - Income Tax returns put in - marked Exhibit "VI" - his father was not a rich man - other source of income was from the rents; at the time the Defendant was married to his father - he had only one swish building - no part was let; at the time of his marriage to Defendant in 1940 he had no other source of income - his father's pension was £175.14.6d. per annum - his father built one house in 1945-7 - another in 1951-2. His father told him the Defendant bought a house in 1934. In cross-examination he said his father did not tell him the Defendant had leased the house she bought to some Syrians but he told him to go and negotiate for the lease of the house. The lease was prepared in his father's name - he witnessed his father's signature, he has not witnessed the signature of the Defendant to any paper. He did not ask his father why he was making the lease in his own name and not in the Defendant's name - he knows the Plaintiff's mother was married under the Ordinance but the Defendant was married according to Native Custom - the status of the two

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are different. He cannot say the monies on Exhibit "IV" were monies belonging to the Defendant. He is not acting in concert with the Defendant - he knew the father lent money to several people. He does not know the father built a house at Nima - he does not know that his father gave a loan of £1,000 to Swaniker. In re-examination he said the Defendant is illiterate and his father was managing her affairs at the time the property in Okai Shi was bought - Plaintiff's mother was alive, Defendant was not living in the house. The 2nd witness gave evidence that the deceased was his relative and Robert Kofi Hammond his brother was the Head of the family. He knew that about 18 years ago the deceased was married to the Defendant according to Native Custom: she was living with the deceased and both of them are hard workers. He cannot say how much was the deceased pension. - He knew the Defendant was trading - he had once bought something from the store. The deceased told him it was the Defendant who had helped him to put up a building at Sallem but he did not tell him what sort of help. They met and decided Defendant should apply for Letters of Administration; in cross-examination he said the deceased told him it was the Defendant who had helped him and he should thank her. In re-examination he said the Defendant was a trader. The 3rd witness also was deposed that the deceased and himself are cousins. He is the Head of the family of the deceased - he has been head for about 30 years and none has interfered with him. The deceased told him he was not in good terms with the Plaintiff - he thinks the Plaintiff will not manage the estate properly. He did not know the deceased was giving out loans, at the time the deceased married the Defendant she had money because she was keeping a store. The deceased acquired properties after he had retired. In cross-examination he said the Defendant kept a store in Manfo's house - after the death of the grandmother she removed the store to Klotey Glover's house. She used to see the Plaintiff, the grandmother in the store - he did not go there to enquire who owns the store for the last seven years - the Defendant has never kept a store but she sells cloths and other commodities and oil.

The 4th witness said the late Stephen Coleman was his cousin, when he was a boy he was living with late Coleman and his mother who was his aunt. His mother sent late Coleman to school until he left school and started to work. He used to visit

In the
High Court

No.23.

Judgment.

23rd March,
1959

- continued.

In the
High Court

No. 23.

Judgment.

23rd March,

1959

- continued.

late Coleman and he said he lived like ordinary man. He knew the Defendant was trading in a large scale - she had a shop at Ashanti Blohu. In cross-examination he said he knows Defendant's mother kept a store at Manko's house. The late Coleman gave him money which he repaid.

This closed the Defence.

The Plaintiff's claim is that as the lawful son of the deceased his father having married his mother under the Ordinance and has tendered Exhibit "A", that he is the lawful son has not been disputed and as such he should be granted Letters of Administration of his father's estate. The Defendant admits she was married to the deceased according to Native Custom but contends she owns the larger portion of the estate having given monies to the deceased her husband and with which he acquired properties. She has called witnesses who have testified that she was a prosperous trader but she has not produced any paper to show that she owns any of the house or that the deceased had any money of her in his keeping the lease of the house to Syrians was made in the deceased's name and witnessed by her own witness, F.D.Coleman. 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.

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30

I therefore give judgment for the Plaintiff that Letters of Administration be granted to him. Costs out of pocket £9.8/-, Counsel's fees assessed at £52.10/- out of the estate.

(Sgd.) D.E. Gwira.

COMMISSIONER.

No. 24.

NOTICE OF APPEAL

IN THE GHANA COURT OF APPEAL

SUIT NO.443/58.

IN THE MATTER OF THE ESTATE OF STEPHEN COLEMAN,
(Deceased)

AUSTIN RICHTER COLEMAN Plaintiff,

versus

EMMA KWALEY SHANG alias
EMMA KWALEY QUARTEY Defendant.

In the Ghana
Court of Appeal

No.24.

Notice of
Appeal.

24th March,
1959.

10

NOTICE OF APPEAL (RULE 12)

TAKE NOTICE that the Defendant herein being ag-
grieved by and dissatisfied with the judgment of
the Divisional Court contained in the Judgment da-
ted 23rd March, 1959, delivered by Commissioner
Gwira DOTH HEREBY Appeal to the Court of Appeal
upon the Grounds set out in paragraph 4 hereof.

2. The person hereby directly affected by the Ap-
peal is the person set out in paragraph 5 hereof.

20 3. The Grounds of Appeal are as follows:-

- (1) That the learned Commissioner misdirected himself on point of law.
- (2) That the Judgment is against the weight of evidence on record.
- (3) That inadmissible evidence was admitted and admissible evidence rejected at the trial.

4. Relief sought from the Court of Appeal is a Re-
versal of the Commissioner's Judgment.

30 5. The person directly affected by this Appeal is
AUSTIN RICHTER COLEMAN of Christiansborg, Accra.

DATED at Agbado Chambers, Accra, this 24th day of
March, 1959.

(Sgd.) A.G. Heward-Mills
SOLICITOR FOR DEFENDANT.

THE REGISTRAR,
GHANA COURT OF APPEAL,
SUPREME COURT, ACCRA.

and

40 TO THE ABOVE-NAMED PLAINTIFF,
AUSTIN RICHTER COLEMAN.

In the Ghana
Court of Appeal

No. 25.

ADDITIONAL GROUNDS OF APPEAL

IN THE GHANA COURT OF APPEAL, ACCRA.

SUIT NO.443/58.

No.25.

Additional
Grounds of
Appeal.

IN THE MATTER OF THE ESTATE OF STEPHEN COLEMAN,
(Deceased)

3rd July 1959.

AUSTIN RICHTER COLEMAN Plaintiff-Respondent

versus

EMMA KWALEY SHANG alias
EMMA KWALEY QUARTEY Defendant-Appellant.

10

PLEASE TAKE NOTICE that at the hearing of the Appeal, Counsel for the Defendant-Appellant will ask the leave of this Honourable Court to argue the following grounds in addition to those already filed:-

ADDITIONAL GROUNDS OF APPEAL

1. Because the Defendant-Appellant was entitled and should have been granted Letters of Administration to administer the above Estate.
2. Because the Learned Commissioner erred in law in only dealing with this case on the basis that the Appellant was the widow by customary law; whereas she also put forward in this case, a claim as the Nominee of the family - a claim which was not considered. 20
3. Because the Learned Judge made no finding as to whether Hammond was the Head of the deceased's family - a finding which would certainly have enhanced the claim of the Defendant-Appellant to a grant of Letters of Administration, though not her own beneficial interest in the Estate. 30
4. Because the Learned Commissioner failed to consider adequately that the Defendant-Appellant as widow lawfully married under Native Customary Law and Usage as also her children of that Union with the deceased had a major interest in the two thirds of the Estate which was to be distributed in accordance with the provisions of the Law of England in force on the 19th of November, 1884 and as Nominee of the deceased's family she represented the one-third share to which the family were entitled under the Ordinance. 40

In the Ghana
Court of Appeal

No.25.

Additional
Grounds of
Appeal.

3rd July 1959
- continued.

5. Because the Learned Commissioner in failing to consider the point raised in ground 4 supra erred in law; for if it had been considered, it would certainly have weighed down the scales of his discretion in favour of the widow - the Defendant-Appellant herein.
6. Because the proceedings appear to have been carried on with some degree of irregularity such as make the entire trial unsatisfactory.
- 10 7. Because the children of the widow i.e. the Defendant-Appellant by the deceased being lawful children in the eye of the Law have an interest in their father's Estate - a fact which should have been considered by the learned Commissioner in appraising the claim of their mother acting on their behalf for a grant of Letters of Administration.
- 20 8. Because the learned Commissioner was wrong in holding as he did, that the status of the Defendant-Appellant herein being that of a wife married according to Native Custom cannot override the claim of the Plaintiff-Respondent herein.
9. Because the Learned Commissioner misdirected himself on point of law in holding that the widow, the Defendant-Appellant herein had no claim to the grant of Letters of Administration as against the child of an Ordinance Marriage.

DATED at Cape Coast this 3rd day of July, 1959.

(Sgd.) C.F.H. Benjamin
SOLICITOR FOR DEFENDANT-APPELLANT.

TO THE REGISTRAR,
GHANA COURT OF APPEAL, ACCRA.

AND

TO THE ABOVE-NAMED PLAINTIFF-RESPONDENT
OR HIS SOLICITOR.

In the Ghana
Court of Appeal

No. 26.

MOTION FOR STAY OF EXECUTION
IN THE GHANA COURT OF APPEAL
ACCRA.

No.26.

Motion for Stay
of Execution.

SUIT NO.443/58.

13th July, 1959.

IN THE MATTER OF THE ESTATE OF STEPHEN COLEMAN,
Deceased.

BETWEEN:-	AUSTIN RICHTER COLEMAN	Plaintiff- Respondent,	
	- and -		
	EMMA KWALEY SHANG alias)	Defendant-	10
	EMMA KWALEY QUARTEY)	Appellant.	

PLEASE TAKE NOTICE that this Honourable Court will be moved by Mr. C.F. Hayfron-Benjamin, of Counsel for and on behalf of Madam Emma Kwaley Shang alias Emma Kwaley Quartey, the Defendant-Appellant herein for an Order of this Honourable Court restraining the Plaintiff-Respondent herein, his agents and/or workmen from alienating, disposing of the assets of Stephen Coleman, late of Accra, deceased, or otherwise interfering with the Estate in any way whatsoever pending the hearing and determination of the above Appeal by this Honourable Court; and also to appoint a Receiver to manage, preserve and deposit into this Honourable Court the proceeds accruing from the rents of the Estate of the Deceased aforesaid meanwhile.

(b) Defendant-Appellant herein seeks further an Order of this Honourable Court staying execution of the Judgment of the Divisional Court, Accra, herein dated the 23rd day of March, 1959, decreeing the Plaintiff-Respondent herein, the administrator of the Estate aforesaid and for such further or other Order or Orders as to this Honourable Court may seem meet in the premises.

Court to be moved on Monday the 21st day of September, 1959, at the hour of 9 a.m. of the clock or so soon thereafter as Counsel for the Defendant-Appellant herein may be heard.

DATED at Accra this 13th day of July, 1959.

(Sgd.) C.F.H. Benjamin
SOLICITOR FOR DEFENDANT-APPELLANT,
SCOS CHAMBERS, CAPE COAST. 40

1. TO THE REGISTRAR, GHANA COURT OF APPEAL, ACCRA.
 2. TO THE DIVISIONAL REGISTRAR, DIVISIONAL COURT, ACCRA.
 3. TO AUSTIN RICHTER COLEMAN, OF ACCRA, THE PLAINTIFF-RESPONDENT HEREIN.
- AND
4. TO MESSRS. ALLEN & ELLIOT, ACCRA.

In the Ghana Court of Appeal

No.26.

Motion for Stay of Execution.

13th July, 1959
- continued.

No. 27.

No.27.

Affidavit in Support.

15th July, 1959.

10

AFFIDAVIT IN SUPPORT
IN THE GHANA COURT OF APPEAL,
ACCRA

SUIT NO.443/58.

IN THE MATTER OF THE ESTATE OF STEPHEN COLEMAN,
Deceased.

BETWEEN:- AUSTIN RICHTER COLEMAN Plaintiff-Respondent,

- and -

EMMA KWALEY SHANG alias) Defendant-Appellant.
EMMA KWALEY QUARTEY)

20

I, EMMA KWALEY SHANG alias EMMA KWALEY QUARTEY, of Christiansborg, Accra, Petty Trader, make Oath and say as follows :-

30

1. THAT I am the Defendant-Appellant herein and am authorised by the Head of the Family of Stephen Coleman, late of Accra, Deceased, and his children by me to swear to this Affidavit and act on their behalf in the proceedings herein.
2. THAT I am also the widow of the said Stephen Coleman, deceased; having been married lawfully to him in strict accordance with the Native Customary Law and Usage.
3. THAT I am credibly advised that as the widow of the deceased aforesaid, I have a privity of claim and/or consideration in the granting of Letters of Administration of the Estate of the Deceased as against the claim of the Plaintiff-Respondent herein, the said Austin Richter Coleman, aforesaid.

In the Ghana
Court of Appeal

No.27.

Affidavit in
Support.

15th July, 1959
- continued.

4. THAT I am informed by Counsel and verily believe the same to be true that as a widow lawfully married under the Native Customary Law and Usage and my children from the said union, for whom I am also acting in the proceedings herein, I conjointly with them have a major interest in the allocation and distribution of the two-thirds ($\frac{2}{3}$) of the Estate which has to be distributed in accordance with the provisions of the Law of England on the 19th of November, 1884. 10
5. THAT aside of the interests of my children and my good self, which I hereby assert, the members of the family of Stephen Coleman, deceased, whose nominee I am, has, so I am advised, an interest of one-third ($\frac{1}{3}$) share of the said Estate devolving on them in virtue of the provisions of the Marriage Ordinance of 1884 (as Amended) of the Laws of the Gold Coast (Now Ghana). 20
6. THAT Austin Richter Coleman, the Plaintiff-Respondent herein was not on good and friendly terms with his father, the late Stephen Coleman in his life-time.
7. THAT the said Austin Richter Coleman, Plaintiff-Respondent herein, for a number of years lived apart from his father, due to a serious domestic offence, up to his father's dying day.
8. THAT, in consequence, I aver that the said Austin Richter Coleman is not familiar or acquainted with the business or other affairs of his father to justify a grant to him of Letters of Administration to administer the Estate of the above-named deceased gentleman. 30
9. THAT aside of the facts set out 'Supra', I aver with an emphasis that the Plaintiff-Respondent herein the said Austin Richter Coleman is not possessed of careful nature or habits, and the family of the deceased and my children, all of whom I represent in these proceedings, as also for myself, are apprehensive that he would not carefully, adequately, or faithfully administer the Estate and that in consequence their claim to a major interest in the Estate would be jeopardised, and their share fritted away. 40
10. THAT I am advised by Counsel and verily believe the same to be true, that the Learned Commissioner in failing to give due weight and

consideration to the inalienable claims of the members of the Stephen Coleman, deceased, his children and the widow, i.e., myself, to a major share of the Estate, erred in Law; for if some such claims had been considered, it would certainly have weighed down the scales of his discretion in my favour (being the widow of the Deceased) in the grant of Letters of Administration, to administer the Estate herein.

In the Ghana
Court of Appeal

No.27.

Affidavit in
Support.

15th July, 1959
- continued.

- 10 11. THAT I aver and state further that the Plaintiff-Respondent herein is making frantic efforts to collect the rents accruing from the houses of the deceased with the view to squandering them; in particular, he is trying hard to withdraw the proceeds of the house of his late father to the tune of (£750) Seven hundred and fifty pounds odd, deposited into the Divisional Court, Accra, by a Messrs. Allen and Elliot for his own use.
- 20 12. THAT unless Plaintiff-Respondent herein is restrained by an Order of this Honourable Court, the major interests of the Defendant-Appellant herein, her children and the members of the family of Stephen Coleman, deceased, whose nominee I am, will be considerably squandered and fritted away to my and their detriment.
- 30 13. THAT in these circumstances, I am authorised by the members of Stephen Coleman, deceased, and my children to swear to this Affidavit, which I do hereby swear for myself and also on their behalf in support of the application for an Order of this Honourable Court injuncting the Plaintiff-Respondent herein the said Austin Richter Coleman, his agents and/or workmen from administering or in any way dealing with the Estate of the deceased above-named, for the appointment of a Receiver to collect the assets and rents accruing from the Estate, to preserve and manage the same pending the final determination of the Appeal herein and also for an Order granting a Stay of Execution excepting as to costs, meanwhile, and for such further or other Order or Orders as to this Honourable Court may seem meet in the premises
- 40

In the Ghana
Court of Appeal

No.27.

Affidavit in
Support.

15th July, 1959
- continued.

SWORN at Accra this 15th day of
July, 1959, this Affidavit hav-
ing been first read over inter-
preted and explained to the
Deponent in the Ga Language by
me of Accra when she seemed to
understand the same perfectly
before making her mark hereto
in the presence of :-

Emma Kwaley
Shang her
alias x
Emma Kwaley mark
Quarthey R.T.P.

Before me,

(Sgd.) D.A. Tetteh
COMMISSIONER FOR OATHS.

10

No.28.

Court Notes.

5th October,
1959.

No. 28.

COURT NOTES

5th October, 1959.

IN THE COURT OF APPEAL, Monday the 5th day of
October, 1959.

Cor: van Lare, J.A. as C.J., Granville Sharp, J.A.
and Ollennu, J.

Civ. Motion No.42/59.

EMMA KWALEY SHANG and
EMMA KWALEY QUARTEY Defendant-Appellant

v.

AUSTIN RICHTER COLEMAN Plaintiff-Respondent

Motion on Notice for an Order to restrain the
Plaintiff-Respondent his agents/workmen from ali-
enating, disposing of the assets of Stephen Cole-
man, late of Accra, deceased etc. and to appoint a
Receiver to manage, preserve and deposit into Court
the proceeds accruing from the rents of the Estate
of the deceased

(b) For an order for Stay of Execution of the
judgment of the Divisional Court, Accra, dated
23rd day of March, 1959 etc.

C. Hayfron Benjamin for applicant.
Swanzy for Respondent.

By Court: By consent adjourned sine die.

(Intd.) v. Lare, J.A.

20

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No. 29.

JUDGE'S NOTES OF ARGUMENTS.

14th October, 1959.

IN THE COURT OF APPEAL, Wednesday the 14th day of October, 1959.

Cor: van Lare, J.A. as C.J., Granville Sharp, J.A. and Ollennu, J.

Civil Appeal 41/59.

Emma Kwaley Shang Defendant-Appellant

v.

10 Austin Richter Coleman Plaintiff-Respondent

Mr. Hayfron Benjamin for Appellant.

Mr. Kwaw Swanzy for Respondent.

Mr. Hayfron Benjamin: Opens.

Argues Ground 6: Proceedings appear to have been carried on with some degree of irregularity such as make the entire trial unsatisfactory. Refers p.13.

20 The Appellant not a party - at p. 13 Joined wrongly without jurisdiction. She entered caveat at p.10 on 10.1.59. Warning to her 19.1.59. She filed her interest 22.1.59 (pp.10-12) and served on Respondent on 24.1.59. Submits that Rules 20 & 21 Ord. 60 not complied with and therefore no proper adjudication of her caveat. At the most on 26/1/59 (p.13) the only defendants before the Court had withdrawn; therefore proper order should have been that the Plaintiff was entitled to a grant of Letters of Administration subject to the caveat filed by Appellant before this Court.

30 Rules must be honoured by their strict observance. The Court had no jurisdiction over the Appellant in the suit 443/58; and the judgment delivered against her is a nullity against the Appellant.

Refers to Sarn vs: Buadom, Full Courts 1922, p.24.

40 Swanzy: Non compliance of Rules of Court will not take away jurisdiction but may render a particular order voidable refer Or.70 Rules 1 & 2. Under Rules of Court a writ may be amended with leave of Court; amendment includes change of party or change in the claim. Or.28 and Order 16 r.11 - and R.28.

In the Ghana
Court of Appeal

No.29.

Judge's Notes
of Arguments.14th October,
1959.

In the Ghana
Court of Appeal

No.29.

Judge's Notes
of Arguments.

14th October,
1959

- continued.

No writ served but at pp.13-15 Respondent filed a statement of defence. Trial Court exercised equity in order to bring the parties concerned. If irregularity Appellant could have proceeded under Or.70 Rules 1 & 2.

Case cited decided Full Courts 1922 p.24 (Sarn vs: Buadom) decided before the coming into operation of our Rules.

Benjamin: Or.16 r.11 refers to causes and matter which is different from administration suits. Or.16 r.28 does not apply because no writ was served. 10

Proceedings stopped short of the Rules of Court. Since there was no writ against the Appellant nothing could go on against her.

By Court: Decision on this point to be considered with other grounds.

Mr. Benjamin: Argues 1, 2, 4 and 5:

Refers to judgment appealed from - p.30 line 29 Appellant claims as a widow of the deceased and also as representing herself, her children and also as a nominee of the family. Refers to p.24 line 4 p.14 para.2. These are aspects of the case which militate against the Respondent. Refers to Halsbury's 3rd Edition Vol.16 page 228 para.418. 20

Refers to Sec.44 of Marriage Ordinance Cap.127. Widow is a widow whether the marriage is under Native Custom or not.

Commissioner was misled the case of In re Frederick Akindede Somefun (Decd.) 7 W.A.C.A.156. But it is submitted that case of In re Adadevoh & Ors. etc. 13 W.A.C.A.304 overrules 7 W.A.C.A.156. 30

Also cites Bangbose vs: Daniel (1954) 3 ALL Eng. R. 263. The Commissioner should have exercised his discretion in favour of the Appellant who represents her children and other members of the family of the deceased.

Submits: (1) Trial unsatisfactory there being no writ of summons to support the findings of the Court.

(2) That on the evidence the Defendant might be inarticulate but clear on the evidence that she is the nominee of her children and the family, and her own interest. 40

Commissioner does not appear to have considered the interest of those represented by the Appellant. The ratio decidendi is that because Respondent is a child of a marriage under the Ordinance he must be preferred any other applicant.

Adjourned until tomorrow to hear Mr. Swanzy for Respondent.

(Sgd.) W.B. van Lare,
J.A., as C.J.

In the Ghana
Court of Appeal

No.29.

Judge's Notes
of Arguments.

14th October,
1959

- continued.

10 15th October, 1959.
Counsel as before.

Mr.Swanzy: Refers to pp.17 & 18 Issues settled. I agree that the proper person to obtain Letters of Administration is the person who is entitled to a greater share or represents those with larger interest.

Refers to Cap.127 sec.48(1).

20 Submits that the proper interpretation of this section is that either the surviving wife or the surviving husband or the surviving issue of a marriage under the Marriage Ordinance takes 2/3rds of the property where under English Law the heir at law would have taken the whole estate, any native law to the contrary notwithstanding. In this case the Respondent is the only surviving issue of a marriage contracted under the Marriage Ordinance. It follows as against the Appellant, the children of the Appellant born out of wedlock she is not entitled to a greater portion of the estate. We are
30 not concerned with her later customary marriage.

To Court: The children of the Appellant (p.21 line 16 were all born during the subsistence of the deceased's lawful marriage. Also pp.24-25.

Page 20 line 26 Lawful wife died in 1940. Even if the Appellant represents her children (all born) she is not entitled to a greater share.

40 Respondent is entitled to 2/3rds of the estate in accordance with Sec.48. Section 48 Marriage Ordinance refers to the Law of Distribution in England on the 19th November, 1884. I refer to The Statute of Distribution 1670 - 22nd and 23rd Charles II Cap.10 - This Statute was not repealed until 1925. I refer to Halsbury's Statute of England (2nd Ed.) Vol.9 page 658 - Reads as

15th October,
1959.

In the Ghana
Court of Appeal

follows: This Act was repealed except as to deaths before 1926 by the Administration of Estate Act 1925 etc.

No.29.

Judge's Notes
of Arguments.
15th October,
1959

- continued.

I refer to the relevant section of the 1670 Act - Sections 3 & 5.

Sec.3: After necessary Statutory deduction distribution is between wife and children and children's children.

Sec.5: Surplusage as follows: $\frac{1}{3}$ of Surplusage to wife; all Residue ($\frac{2}{3}$) to children in equal portion.

10

Submits under the English Law surviving widow takes $\frac{1}{3}$ rd of the estate. Therefore under our law, surviving widow takes $\frac{1}{3}$ of $\frac{2}{3}$ = $\frac{2}{9}$ of the estate.

Surviving children take $\frac{2}{3}$ of $\frac{2}{3}$ = $\frac{4}{9}$ of the estate. The family (i.e. heir child) would take $\frac{3}{9}$ ($\frac{1}{3}$).

Applying this to the facts in this case -

Submits that the only child to be considered in this case is the Respondent who is entitled to $\frac{6}{9}$, because the provision to Section 48 of the Marriage Ordinance and not $\frac{4}{9}$ th because in this case there is no widow surviving.

20

I say after a further consideration the Respondent's share is $\frac{4}{9}$ of the deceased's estate.

Submits Appellant does not come into the play; she may under peculiar circumstances of this case be held to be representing only the family whose share is $\frac{1}{3}$ ($\frac{3}{9}$) only.

30

Section 7 of the 1670 Act where there is no surviving widow the widow's share go to the children, therefore in this case $\frac{2}{9}$ remaining goes back to the only surviving child (Respondent) would take $\frac{6}{9}$. Submits children of the Appellant do not come in because they are illegitimate.

On the question of whether the Respondent has been passed over. There is no strong evidence against the Respondent that he is not a fit and proper person to administer the estate.

40

Court: draws attention to p.20 line 18 - shows there are other children of the deceased (children of Adeline Johnson) married according to Native Customary law - for all purposes legitimate.

Mr. Swanzy: We do not know whether they are alive. Those children would have to take from the family. They are included in the 1/3rd.

Submits Exhibit "B" shows Respondent was friendly with his father in 1955. This proves the suggestion that the Respondent was not friendly with the late father.

Benjamin: Legitimacy of the 10 children of the Appellant. Refers to Sarbah p.43/44.

10 Submits that the greatest hint is Bamgbose vs: Daniel's case. Appellant came in a representative capacity and represents the family 1/3.

Asks Court to declare the personal interest of the deceased's widow, the Appellant in this case in the estate.

C.A.V.

(Sgd.) W.B. van Lare,
J.A. as C.J.

In the Ghana
Court of Appeal

No.29.

Judge's Notes
of Arguments.

15th October,
1959

- continued.

20

No. 30.

JUDGMENT.

IN THE COURT OF APPEAL, ACCRA, GHANA

Coram: van Lare, J.A. as C.J.
Granville Sharp, J.A.
Ollennu, J.

Civil Appeal No.41/59.

23rd November, 1959.

Emma Kwaley Shang,

Defendant-Appellant

v:

30

Austin Richter Coleman
of House No. F.691/2,
Cantonments Road, X'borg,
Accra,

Plaintiff-Respondent

JUDGMENT

VAN LARE, J.A. as C.J.: This is a judgment of the Court in the preparation of which we all participated. The proceedings in this case commenced with an application filed by the Respondent in the Divisional Court under Order 60 Rule 1 of the

No.30.

Judgment.

23rd November,
1959.

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

Supreme Court (Civil Procedure) Rules for grant of letters of administration in respect of the estate of his father the late Stephen Coleman of Christiansborg who died intestate on the 1st day of April 1958. Against the Respondent's said application two persons, one a paternal half sister and other a paternal half brother, entered a joint caveat. After the procedure laid down in Rules 18 and 20 had been complied with the Respondent issued a writ of summons against the two caveators in pursuance of an order of the Court made in that behalf as provided by Rule 21(2) of the Rules. After pleadings had closed, the Respondent, on the 6th day of January 1959 filed a summons under Order 30 Rule 1 for directions and had the same fixed for hearing on the 19th day of January 1959.

10

On the 10th day of January 1959 the Appellant also entered a caveat to the same application which the Respondent had made for grant of letters of administration. The Respondent on the 19th day of January 1959 caused warning to issue to the Appellant calling upon her to file her affidavit of interest. On the same date 19th January, 1959 the Summons for Directions came before the Court and was adjourned to the 26th January 1959. On the 22nd day of January 1959, the Appellant duly obeyed the warning and filed her affidavit of interest copy of which was served on the Respondent on the 24th day of January 1959. The Appellant's obedience of the warning constituted another dispute relating to the administration of the estate of the deceased intestate.

20

30

When the Summons for Directions in the suit issued in consequence of the first caveat came before the Court on the 26th day of January, 1959, leave was granted to the then Defendants to withdraw their caveat and also the defence they had filed to the Respondent's statement of claim; they were therefore struck out from the suit. The Court there and then made an order amending the writ of summons by joining the Appellant as a Defendant to the suit; but it made no further order as to service of the writ or notice on the Appellant.

40

Before us it is contended on behalf of the Appellant that the joinder of the Appellant at that stage of the proceedings was ultra vires the Court, because, firstly the original defendants having withdrawn their defence and having been struck out from the suit, the action abated and no

50

further order could be made in it; and secondly, as regards the caveat entered by the Appellant the stage had not been reached, where the Court could direct the Respondent to issue a writ of summons against her. It was further argued on behalf of the Appellant that the order of the Court joining her as Defendant was made in a purported exercise of the powers given to the Court under Order 16 Rule 11, and therefore the subsequent proceedings are null and void, as there was no proof of service of copy of the amended writ or notice upon the Appellant as required by the Rule.

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

10

Order 16 Rule 11 reads as follows :-

20

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as Plaintiffs or as Defendants, be struck out and that the names of any parties, whether Plaintiffs or Defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a Plaintiff suing without a next friend, or as the next friend of a Plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as Defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice".

30

40

This rule must be read together with Order 16 Rule 13 which is as follows:-

50

"Where a Defendant is added or substituted, the writ of summons shall be amended accordingly and the Plaintiff shall, unless otherwise ordered by the Court or a Judge, file a

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

"copy of the writ as amended, and serve the
"new Defendant with such amended writ or no-
"tice in lieu of service thereof in the same
"manner as original Defendants are served,
"and the proceedings shall be continued as if
"the new Defendant had originally been made a
"Defendant".

For the Respondent it has been argued that non-compliance with the requirement of Order 16 Rule 11 for service of copy of the writ of summons or notice upon the Appellant cannot invalidate the proceedings in view of the provisions of Order 70 Rule 1 which is as follows:- 10

"Non-compliance with any of these Rules, or
"with any rule of practice for the time being
"in force, shall not render any proceedings
"void unless the Court or a Judge shall so
"direct, but such proceedings may be set aside
"either wholly or in part as irregular, or
"amended, or otherwise dealt with in such 20
"manner and upon such terms as the Court or
"Judge shall think fit".

Service of process is an administrative matter and proof of it would appear on the Court's copy of the document served, or in an Affidavit of service. Such proof would not normally appear in an appeal record of proceedings unless the document served is reproduced as part of the record, or unless service was made an issue before the trial Court. Therefore if the person required to be served with any process appeared before the Court in answer to that process or filed documents in answer thereto, the presumption is that service of the process had been duly effected upon him. 30

In the case of H.A.Hughes Ltd. v: A.Cook & Co. (1918) W.N.145 where the Order 16 Rules 11 and 13 under the English Supreme Court Rules, which are identical with our Order 16 Rules 11 and 13, were considered, it was held that where the party whom it is sought to be joined is before the Court the Court may make the order joining him without service of the writ upon him. Such exactly is the position in this case. The Appellant was before the Court when the order joining her was made. She had sufficient notice and service of the writ upon her became unnecessary. 40

Caveat in opposition to application for letters of administration together with an affidavit of interest filed in consequence of warning served

upon the caveator amounts to a counter-claim that, as between the applicant for letters and the caveator, the latter has a better right to the grant of letters. The purpose of Order 16 Rule 11, is to secure the determination of all disputes relating to the same subject matter without delay, and expenses of separate actions: see Montgomery v. Foy & Ors. (1895) 2 Q.B.321 where Lord Esher, M.R. delivering the judgment of the Court after quoting Order 16 Rule 11 said "I can find no case which decides that we cannot construe the rule as enabling the Court under such circumstances to effectuate what was one of the great objects of the Judicature Acts, namely, that, where there is one subject-matter out of which several disputes arise, all parties may be brought before the Court, and all those disputes may be determined at the same time without the delay and expense of several actions and trials. It appears to me that the words of the rule are large enough to allow of the joinder of the British Saw Mills Company as Defendants in this case. I think the question arising between them and the Plaintiff is a 'question involved in the same cause or matter' within the meaning of the rule". See also the case of Bentley Motors (1931) Ltd. v. Lagonda Ltd. (1945) 114 L.J.R. Ch.208, where it was held that one of the main objects of Order 16 Rule 11 is to enable the Court "effectually and completely to adjudicate upon and settle all questions involved", to render unnecessary multiplicity of proceedings.

Again the jurisdiction of the Court to join a party under Order 16 Rule 11 may be exercised by the Court at any stage of the proceedings, so long as anything remains to be done in an action. Ives v. Brown (1919) 2 Ch.314; it can be exercised even after an admission of liability by one of two possible Defendants, and even after judgment, though all that remains is assessment of damage: see The Duke of Buccleuch (1892) p.301.

In the present case, although the original caveators had withdrawn their caveat and defence, the Respondent had not withdrawn his claim to grant of letters, and a dispute was still pending in the Divisional Court for the said Court "to determine the issue as to who is entitled to a grant of letters of administration" in respect of the deceased's estate.

We are therefore of the opinion that in the circumstances, the Court properly exercised the

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

jurisdiction given it by Order 16 Rule 11, and that the joinder of the Appellant was proper; we are further of the opinion that there being nothing to show that the provision in Order 16 Rules 11 and 13 for service of the writ or notice were not complied with and the Appellant having taken part in the proceedings after the order joining her as Defendant to the suit, it must be presumed that the provisions of the said rules were complied with, and in any event, Order 70 Rule 1 prevents the non-compliance from making the proceedings a nullity.

10

We now proceed to deal with the merits of the case. The basis of the Respondent's claim for letters to administer the estate is that he is the only surviving lawful child of the intestate being issue of a marriage under the Marriage Ordinance between his deceased father and Wilhelmina Eckener, celebrated in 1907. The Appellant in her statement of defence, admitted that the Respondent is a child of the intestate by his marriage under the Ordinance; she pleaded however that the Respondent is not the only lawful child of the intestate, and that the intestate had other lawful children begotten in marriage contracted under customary law; she also pleaded that she is a lawful widow of the deceased having been properly married in accordance with customary law, which customary marriage was lawfully effected after the death of the Respondent's Mother. She further pleaded that in opposing the Respondent's claim she was doing so on behalf of herself and the family of the deceased.

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The facts are not in dispute. They are briefly as follows:- The deceased Stephen Coleman, an Osu man, first as the evidence stands uncontradicted married a woman called Adeline Johnson and had three children by her, all of whom survived him. Later he married the Respondent's mother Wilhelmina under the Marriage Ordinance and had five children by her of whom the Respondent is the sole survivor. Wilhelmina died sometime in 1940. During the life time of Wilhelmina, the deceased lived and cohabited with the Appellant and had ten children by her. After the death of Wilhelmina the deceased married the Appellant in accordance with customary law, and had the said marriage blessed in the Presbyterian Church. No significance is attached to this blessing for the purposes of this judgment.

40

The only issue for determination by the Court in the matter is who is entitled to a grant of letters of administration: The learned Commissioner

of Assize and Civil Pleas who tried the case gave judgment for the Respondent holding that she being a wife married according to customary law the position of the Appellant cannot override the claim of the Respondent, a surviving issue of a marriage contracted by the intestate under the Marriage Ordinance.

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

10 In coming to that conclusion the learned Commissioner with whom we have every sympathy appears to follow decisions in similar matters which came before the Divisional Courts in this country in the past by which the phrase "leaving a widow or husband or any issue of such marriage" in Section 48 of the Marriage Ordinance Cap.127, was taken to mean that upon the death intestate of a person subject to customary law who married under the Ordinance, two-thirds of his property - real and personal - went without further consideration to the widow of such marriage, or the issue of such marriage or both such widow and issue, to the exclusion of all others. We refer to the case of In Re Otoo (deceased), Divisional Court (1926-29) p.84. In that case one Otoo died intestate in Accra, and one of his daughters, the Plaintiff, issue of a marriage under the Ordinance, petitioned for letters of administration. The Defendant, his uterine sister, opposed the petition, and also attempted to set up a "Samansiw" or nuncupative will, namely, an alleged verbal disposition of his property by the deceased before his death. Otoo had contracted a marriage under the Ordinance on the 17th July, 1890. The Court held that Otoo, by contracting such a marriage, had altered his legal status, and was therefore incapable of making a "samansiw". It further held that, as under the Marriage Ordinance the legitimate children of the deceased of whom the Plaintiff was one took a larger share of the intestate's property i.e. two-thirds than the Defendant who took only one-third, the Plaintiff was the proper person to whom letters of administration should be granted.

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50 The learned Commissioner must have also relied upon the decision of the West African Court of Appeal in a Nigerian case: The Estate of Frederick Akidele Somefun, 7 W.A.C.A.156. In the cases which have been before the Divisional Courts hitherto the points for determination in the instant case were not considered though there was sufficient evidence in some of them to arouse interest in their consideration, and although these points were raised in

In the Ghana
Court of Appeal

No. 30.

Judgment.

23rd November,
1959

- continued.

the Somefun case (supra) the decision which the West African Court of Appeal in that case arrived at was subsequently over-ruled in another Nigerian case: In Re Sarah I. Adadevon and Ten others and In the Estate of Herbert Samuel Heelas Maceulay (deceased) by the self same West African Court of Appeal in a judgment delivered on the 23rd November 1951, by Sir John Verity, C.J. Nigeria, in which a full and clear consideration was given to these questions - see 13 W.A.C.A.304. Further the Somefun case was subsequently over-ruled by the more authoritative judgment of the Privy Council in the case of Bangbose v: Daniel (1955) A.C.107 and 14 W.A.C.A.116 to which we shall refer at a later stage in this judgment and by which we are of course bound. These two latter cases were unfortunately not brought to the notice of the learned Commissioner who dealt with the instant case.

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A review of the authorities such as we have here indicated in our opinion throws into sharp relief the importance of the present appeal which accords to us an opportunity in this judgment to state what in our opinion is the position where a person who is subject to native customary law, contracts a marriage firstly under customary law and subsequently marries again in circumstances in which he may lawfully do so, under the Marriage Ordinance, and further again after he is free to marry a third time marries under native custom, and dies intestate leaving widow or children born under either a valid customary marriage or a marriage under the Ordinance or under both such marriages.

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We are of opinion that a person subject to customary law who marries under the Marriage Ordinance, does not cease to be a native subject to customary law by reason only of contracting that marriage; the customary law will be applied to him in all matters save and except those specifically excluded by the statute, and other matters which are necessary consequences of the marriage under the Ordinance. Consequently when such a person has a case in Court, native law and custom would be deemed to be the law applicable to that cause or matter as provided under section 87(1) of the Courts Ordinance. We think it would be unreasonable and repugnant to natural justice to hold otherwise as such a proposition would in effect exclude from access to Native Courts all persons married under the Ordinance because it would follow

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from such an opinion that they had by their marriage choice elected to make themselves "Non-natives". To state the matter in this way clearly indicates the absurdity of the proposition and its inherent improbability.

10 By Section 87(1) the only limitation which a marriage under the Ordinance can place upon a person's right to have his cause or matter determined in accordance with customary law is in matters relating to his said marriage and to such matters only during the subsistence of such marriage, save as where otherwise provided by law. Thus he cannot contract a valid marriage under the Ordinance while his marriage under customary law subsists, nor can he contract a valid marriage under customary law during the continuance of a marriage he has contracted under the Ordinance (Section 44 of the Ordinance); and consequently he cannot, during the continuance of his marriage under the Ordinance
20 have a legitimate child except by the wife of the said marriage, section 49 of the Ordinance. It follows that if during the continuance of his marriage under the Ordinance he, for example, commits adultery with a wife of another person married under customary law, and the husband of that person sues him, the law to be applied is the customary law as laid down in Section 87(1) of the Courts Ordinance, Cap.4, and not English law. But since
30 by his marriage under the Ordinance he has by express contract agreed that in any question which may arise in connection with that marriage transaction his obligations and rights should be regulated by English law, he will not be entitled to claim the benefit of provisions of the customary law for divorcing his wife: Ackah v: Arinta, S.F.L.R.79 and The Paramount Chief's Tribunal of Akwapim v: Budu D.Ct. 1931-37, 89.

41 Similarly in our opinion the right of a married person to make a will depends on the law of his domicile relating to wills and not upon the system of his marriage unless there is a special provision in the laws relating to marriage which regulates the testamentary rights of a person who so marries.

In this country there are two forms of wills; the will made in accordance with English law, and the will made in accordance with customary law "Samansiw" - nuncupative will - each of which may be valid if the peculiar requirements for making
50 it are complied with. The making of a will is not

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

a matter which arises out of the contract of marriage, consequently a person subject to customary law, though he may be married under the Marriage Ordinance, may in our opinion make a valid "Samansiw" - nuncupative will. We find it difficult to approve the dictum of Michelin, Ag. C.J. in Re Otoo (deceased) (supra) when he said:

"I am compelled to hold, however, that when a person who is subject to native law or custom, alters his legal status, by contracting a marriage under the Marriage Ordinance, 1884, he is incapable of making such a will (i.e. Samansiw) and this Court cannot give effect to a will so made by him. The only form of will which he can legally make, is one in accordance with the provisions of English law".

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We are of the opinion therefore that the case of Re Otoo (deceased) supra was wrongly decided.

Some of the most important incidents of marriage which a person subject to customary law contracts under the Marriage Ordinance are contained in Part 7 of the Ordinance, which part consists of only two sections, sections 48 and 49. Section 48 reads as follows:-

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"48(1) Subject to the provisions of the succeeding sub-section where any person who is subject to native law or custom contracts a marriage, whether within or without the 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;

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"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:

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"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 -

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"(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;

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"(ii) That real property, the succession to which cannot by the native customary law be affected by testamentary disposition, shall descend in accordance with the provisions of such native customary law, anything herein to the contrary notwithstanding.

"x x x x"

This section invokes the law of England relating to the distribution of personal estate of intestates in force on the 19th day of November 1884 and relates it to the distribution of two-thirds of the estate, real and personal, of two classes of intestates. These are:

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- (i) a person married under the Ordinance, and
- (ii) a person who is issue of marriage under the Ordinance.

In the case of a person married under the Ordinance who dies intestate the English law will apply only if such person (a) left a widow or husband of a marriage under the Ordinance or (b) left issue of a marriage under the Ordinance; otherwise the law of England will not apply.

40

In the case of issue of the marriage, no condition precedent is required to make the law of England applicable. It follows that since the Respondent is issue of a marriage between the deceased and Wilhelmina under the Ordinance, and has survived the deceased the law of England applies to his case.

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

The law in force in England on the 19th day of November 1884 relating to distribution of personal estate was based upon the Statute of Distribution, 1670 (22 & 23 Car.2 C.10), Statute of Frauds 1677 (29 Car. 2 C.3) Section 24, Administration and Distribution of Estates Act 1685 (1 Jac. 2 C.17) and judicial decisions which interpret these Acts. Discussions as to distribution, who are entitled in distribution and in what proportions under the said statutes, appear in 22 Eng. Repts. Ch. pages 367 to 382, and rules of distribution formulated from the statutes and the judicial decisions on them are set out in full in Volume 11 Halsbury Laws of England, 1st Ed. pages 16 to 23. For the purposes of this case the relevant statutes are: the Statute of Distribution (1670) and the Administration and Distribution of Estates Act (1685).

10

Section 3 of the Statute of Distribution (1670) provides that if a man dies intestate leaving a widow and issue the widow is entitled to one-third of the estate and the children to the other two-thirds; and if he leaves a widow and no issue she is entitled to one moiety. The other moiety falls to be distributed amongst his next-of-kin. The said section also provides that if he leaves issue and no widow, the estate is distributed equally among the children.

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Under section 48, when the English law applies it does so only as to two-thirds part of the estate; the other one-third is to be distributed in accordance with the provisions of the native customary law which would have obtained if such person had not been married under the Ordinance. The proportions to which wife and children in this country will be entitled in the whole of a deceased husband's estate in law therefore are:

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(i) wife $\frac{1}{3}$ of $\frac{2}{3}$ equals $\frac{2}{9}$;

(ii) children $\frac{2}{3}$ of $\frac{2}{3}$ equals $\frac{4}{9}$.

It is observed that the case of Odonkor and Freda W.Hansen Sackey v: Ashawa Akoshia, F.C. 1926-29, 322 appears to be the only case in this country in which the correct shares of wife and children according to the law have been considered.

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The next important question to be determined is who are the people who come within the definition of the term "wife" and who constitute the class under the term "children?"

Before proceeding to answer this question we must emphasise that the expression "leaving a widow or husband or any issue of such marriage" in Section 48 of the Ordinance does nothing more than indicate the condition precedent upon which English law would be applied to the estate of an intestate husband who married under the Ordinance, that is, if a wife of such marriage survives him; or if any issue of such marriage survives him the English law would also apply. It is not in accordance with the law in our view to hold that when a person subject to customary law marries under the Ordinance and dies intestate the only class of persons entitled under the Statute of Distribution to share the two-thirds of his estate are a widow or a husband and/or issue of such marriage as has been the practice hitherto in this country. Until now in this country the opinion which the Divisional Courts have followed is that if a native who had married under the Marriage Ordinance dies intestate no consideration is given to entitlement in the distribution of his estate either to any widow, other than a widow of a marriage under the Ordinance, or to any issue of the deceased of a marriage other than a marriage under the Ordinance. All such persons that is to say widow in respect of a lawful marriage according to Native Customary Law or children of such marriage born legitimate according to the law of the domicile which is native custom have been so far considered to fall out and therefore to be excluded from consideration as to distribution. It is this opinion we are in this judgment anxious more than anything else to declare to be erroneous in the light of recent decisions by the Privy Council.

Under the Statute of Distribution a "wife" means a "lawful wife" and child means "a lawful child". The question of "lawful wife" and "legitimate child" are questions of status to be decided by the law of domicile. Therefore if a marriage between a man and a woman is by the law of their domicile a valid marriage, the "wife" is a lawful wife for the purposes of the Statute no matter whether or not the marriage is invalid by the law of England or of any other place. Similarly if a child is legitimate by the law of the country where at the date of its birth its parents were domiciled, he is a legitimate child for the purposes of the Statute no matter whether or not that child would be illegitimate by English law. In such cases the

In the Ghana
Court of Appeal

—
No.30.

Judgment.

23rd November,
1959

- continued.

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

law of England recognises and acts on the status declared by the law of domicile and such persons will be "wife" and "child" for the purposes of the Statute of Distribution. The law has been made clear in the case of Re Goodman's Trust (1887) 17 Ch.D.266 C.A. where it was held by the Court of Appeal in England that a child born of its parents in Holland where they were domiciled and legitimated according to Dutch law, though it would be illegitimate if the parents were domiciled in England at the date of its birth was nevertheless a child entitled to claim under the Statute of Distribution. Cotton, L.J. in the course of his judgment at page 292 said:

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"If, as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth, that is, on his domicile of origin, I cannot understand on what principle, if he be by that law legitimate, he is not legitimate everywhere, and I am of opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognises and acts on the status thus declared by the law of the domicile.

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"In fact the Respondents wish to use the proposition, that 'in an English Act of Parliament those only are next-of-kin or children of a deceased brother whom the law of England recognises as legitimate', as if it were whom the law of England would recognise as legitimate if at the time of their birth their domicile, that is the domicile of their parents, had been English'. But, in my opinion, in deciding questions of legitimacy, that is of status, the law of England looks to the law of the actual, not of an hypothetical, domicile".

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And James, L.J. at page 298 said:

"Can it be possible that a Dutch father, stepping on board a steamer at Rotterdam with his dear and lawful child, should on his arrival at the Port of London find that the child had become a stranger in blood and in law, and a bastard, filius nullius?"

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

10 "It may be suggested that that would not apply
"to a mere transient visit or a temporary com-
"morancy, during which the foreign character
"of the visitor and his family would be recog-
"nised, with all its incidents and consequen-
"ces, but that it would only apply to a man
"electing to have a permanent English domicil.
"But what could, in that view, be more shock-
"ing than that a man, having such a family
"residing with him, perhaps for years, in this
"country as his lawful family, recognised as
"such by every Court in the Kingdom, being
"minded at last to make this country his per-
"manent domicil, should thereby bastardise his
"children; and that he could re-legitimate
"them by another change of domicil from London
"to Edinburgh? And why should we on principle
"think it right to lay down a rule leading to
"such results? I protest that I can see no
20 "principle, no reason, no ground for this,
"except in insular vanity, inducing us to
"think that our law is so good and so right,
"and every other system of law is naught, that
"we should reject every recognition of it as
"an unclean thing".

30 Section 41 of the Nigerian Marriage Ordinance
1884 is identical word for word with section 48 of
our Marriage Ordinance Cap.127, except for the
provision in the Ghana Ordinance that one-third of
the estate of the intestate, real and personal,
shall be distributed or descend in accordance with
native customary law. The Privy Council in the
case of Bamgbose v: Daniel (1955) A.C.107, 14
W.A.C.A.116, has held that under section 41 of the
Nigerian Marriage Ordinance (the equivalent of
section 48 of our Marriage Ordinance) and the ef-
fect of the Statute of Distribution which is applied
by the Ordinance, legitimacy or illegitimacy of a
child is to be determined by the law of the country
40 which is the country of origin where at the time of
its birth its parents were domiciled. Consequently
it was held that a man's children by nine wives of
valid polygamous marriages were legitimate child-
ren entitled to claim under the Statute of Distri-
bution.

50 We desire also to refer to the case of Cheaooy
Thye Phin & Ors. V: Tan Ah Loy (1920) A.C.369 in
which the Privy Council has held that since by the
Chinese law of marriage applicable to the Straits
Settlement of Penang a Chinaman may have secondary

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

wives, called "tsips" who have status as wives, such secondary wives are entitled upon the death intestate of their husband to share in his estate as widows: see also the case of Khoo Hovi Leony v: Khoo Hean Kwu, (1926) A.C. 529 P.C.

Turning to our own Marriage Ordinance Cap.127, it can be seen that under section 49(1) the only child who can be illegitimate under the Ordinance is the child procreated in adultery; and section 49(2) provides that "adultery shall not be held to include the intercourse of a man married by native customary law with an unmarried woman".

By section 44 of the Marriage Ordinance a person married under the Ordinance is incapable "during the continuance of such marriage of contracting a valid marriage under native law and custom, but save as aforesaid, nothing in this Ordinance contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom". Section 42 lays down inter alia that no marriage celebrated in Ghana under the Ordinance shall be valid where either of the parties thereto at the time of the celebration of such marriage is married by native law or custom to any person other than the person with whom such marriage is had. The simple and plain interpretation of these two sections, 42 and 44 of the Ordinance put together, in our opinion is as follows: Firstly, marriage which a man duly contracts by customary law prior to marriage under the Ordinance is valid and any issue of that marriage is legitimate. If a man, married under customary law, intends to marry under the Ordinance he must either marry the same person to whom he is already validly married according to customary law, or if he intends to marry a person other than the wife married by customary law then he must determine the customary marriage lawfully: secondly any marriage which a man purports to contract by customary law while the marriage under the Ordinance still subsists, is null and void, and any children of that relationship are illegitimate. Thirdly after the determination of his marriage under the Ordinance either by the divorce or demise of his wife, any marriage he duly contracts by customary law is valid, and the issue of that marriage are legitimate.

Applying the law to the facts of this case we have the following result:

(1) The three children which the late Stephen Coleman had by his first wife Adeline Johnson are legitimate children, and have equal status with the Respondent, issue of the marriage under the Ordinance with Wilhelmina. They together with the Respondent are entitled to share equally the portion of their father's estate which falls to children.

In the Ghana
Court of Appeal

—
No.30.

Judgment.

23rd November,
1959

- continued.

10 (2) The ten children which the deceased had by the Appellant during the lifetime of his wife Wilhelmina were procreated in adultery and are illegitimate as far as the Marriage Ordinance is concerned.

(3) The marriage between the deceased and the Appellant celebrated in accordance with native customary law after the demise of Wilhelmina is a valid marriage and the Appellant is a widow entitled to share in the estate of her late husband under the Statute of Distribution.

20 It follows that, since Stephen Coleman died intestate leaving the Respondent, issue of his marriage under the Ordinance, devolution of his estate would be as laid down in section 48 of the Marriage Ordinance, that is one-third devolves according to the native customary law and two-thirds is to be distributed according to the law in force in England on the 19th November 1884.

30 As the deceased died leaving a widow i.e. the Appellant, and children, namely the three by his first lawful wife Adeline Johnson, married according to native custom, and the Respondent issue of a marriage under the Ordinance, the widow i.e. the Appellant is entitled to $\frac{1}{3}$ of the $\frac{2}{3}$ i.e. $\frac{2}{9}$ in her own right, and the Respondent and the other three children are entitled to the remaining $\frac{4}{9}$ in equal shares; the Respondent is entitled to $\frac{1}{9}$ of the whole estate both real and personal; and $\frac{1}{3}$ to those entitled in accordance with the customary law which applies in Osu (Christiansborg).

40 Succession in Osu (a Ga Adangbe community) is patrilineal. By customary law children in a patrilineal family community belong to their father's family, and are entitled to enjoy their said father's estate. Again by customary law, all children however born are entitled to enjoy equally. Consequently all the three sets of children of the late Stephen Coleman, namely, his three children by

In the Ghana
Court of Appeal

No.30.

Judgment.

23rd November,
1959

- continued.

Adeline Johnson, the Respondent and the ten children by the Appellant are part and parcel of his family entitled to share in the personal property, and to continue enjoyment of the real property.

Upon these shares the Appellant is proved to be entitled to 5/9 of the estate i.e. 2/9 for herself and 3/9 (=1/3) for and on behalf of the "family" of her late husband which she represents in this suit. Following the principle that letters of administration are usually granted to the party who is shown to have the larger interest in the property, the Appellant is the person who should be entitled to grant of letters. It is therefore clear in our opinion that the learned Commissioner unfortunately erred in law when he based his decision on the following view:

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"Her (the Appellant's) status being that of a wife married according to native custom cannot override the claim of the Plaintiff (the Respondent)".

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However as the Appellant is illiterate, we think that in the interests of the estate, and of all the beneficiaries concerned, letters should be granted to her jointly with the Respondent to administer the estate and the Respondent is ordered to account to the Appellant as to the extent to which he has already administered the estate as a result of the letters of administration which he had obtained upon a grant by the learned Commissioner and which grant we have by this judgment revoked.

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In the result we allow the appeal.

- (Sgd.) W.B. van Lare
JUSTICE OF APPEAL
as CHIEF JUSTICE.
- " G. Granville Sharp
JUSTICE OF APPEAL.
- " N.A. Ollennu
JUDGE.

Hayfrom Benjamin for Appellant.

Kwaw Swanzy for Respondent.



61.

No. 31.

ORDER

In the Ghana
Court of Appeal

No.31.

Order.

23rd November,
1959.

23rd November, 1959.

In the Court of Appeal, Monday the 23rd day of
November, 1959.

Cor: van Lare, J.A. as C.J., Granville Sharp, J.A.
and Ollennu, J.

41/59.

Emma Kwaley Shang Defendant-Appellant,

v:

10 Austin Richter Coleman Plaintiff-Respondent.

Mr. Benjamin for Appellant.

Mr. Kom for Swanzy for Respondent.

Judgment of the Court delivered by van Lare.

20 The appeal is allowed. The letters of admin-
istration granted to the Respondent is revoked. It
is ordered that Letters of Administration be gran-
ted jointly to the Appellant and Respondent, and
the Respondent is ordered to account to the Appel-
lant as to the extent to which he has hitherto
administered the estate.

Appeal having been allowed, the Order as to
Costs awarded to the Respondent in the Court below
is set aside. The Appellant is entitled to her
Costs in the Court below assessed at £58/10/- and
also in this Court fixed at £53/12/- to be re-
covered from the estate.

Court below to carry out.

(Sgd.) W.B. van Lare,

J.A. as C.J.

In the Ghana
Court of Appeal

No. 32.

COURT NOTES GRANTING CONDITIONAL LEAVE TO APPEAL

No.32.

16th December, 1959.

Court Notes
Granting
Conditional
Leave to Appeal.
16th December,
1959.

In the Court of Appeal, Wednesday the 16th day of
December, 1959.

Cor: Arku Korsah, C.J., van Lare, and Granville
Sharp, JJ.A.

Civ. Motion 72/59.

Emma Kwaley Shang

Defendant-Appellant,

v:

Austin Richter Coleman

Plaintiff-Respondent.

10

Motion on Notice for an order granting
Conditional Leave to Appeal to Her
Majesty in Council (Privy Council),
England, And for an Order arresting
the judgment of this Honourable Court
etc.

Mr. Lokko for the Applicant.

Mr. Benjamin for the Respondent.

Counsel for applicant moves: Asking for leave to
appeal to Privy Council, also for the arrest of
this Court's judgment on the ground that marriage
by native custom of the Appellant was not proved.
We stated in Defence that that party be put to
strict proof.

20

Court: There shall be no order arresting the
Judgment of this Court as prayed.

Costs of Respondent fixed at £5.5.0 to be
paid by Appellant not out of the estate.

Order: Conditional leave to appeal to the Privy
Council is granted subject to the following
conditions:

30

(a) The Appellant within three months to de-
posit £500 in Court or to enter into security
with two sureties to the satisfaction of the
Court in the sum of £500 for the due prosecu-
tion of the appeal and the payment of all
such costs as may become payable to the Re-
spondent in the event of the Appellant not

obtaining an order granting him final leave to appeal or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the Appellant to pay the Respondent's costs of the appeal.

The question of the sufficiency of the security is to be decided by a single Judge of the Court upon motion by the Appellant due notice thereof being given to the Respondent.

10

(b) The Appellant to deposit in Court within three months the sum of £60 towards the cost of preparing the record.

(c) The Appellant to give notice to all concerned of the application for final leave to appeal.

Costs to be costs in the appeal.

(Sgd.) K.A. Korsah,
C.J.

In the Ghana
Court of Appeal

—————
No.32.

Court Notes
Granting
Conditional
Leave to Appeal.

16th December,
1959

- continued.

No.33.

20

COURT NOTES GRANTING FINAL LEAVE TO APPEAL

28th March, 1960.

In the Court of Appeal, Monday the 28th day of March, 1960.

Cor: van Iare, J.A. (Presiding), Granville Sharp, J.A., and Sarkodee-Adoo, J.

Civ. Motion No.9/60.

Emma Kwaley Shang

Defendant-Appellant,
(Respondent to P.C.)

v:

Austin Richter Coleman

Plaintiff-Respondent.
(Appellant to P.C.)

No.33.

Court Notes
granting Final
Leave to Appeal.

28th March,
1960.

30

Motion on Notice for an Order of the Court granting Final Leave to appeal from the judgment of the Court of Appeal dated the 23rd day of November, 1959 to Her Majesty's Judicial Committee of the Privy Council etc.

In the Ghana
Court of Appeal

No.33.

Court Notes
granting Final
Leave to Appeal.

28th March,
1960
- continued.

Mr. Lokko for applicant moves in terms of motion
paper and affidavit taken as read.

Mr. Hayfron Benjamin for Respondent heard.

By Court: Upon hearing Counsel we grant the ap-
plication as prayed. The Respondent is en-
titled to costs assessed at £3/3/-.

(Sgd.) W.B. van Lare,
J.A.

" G.Granville Sharp,
J.A.

" J.Sarkodee-Adoo,
J.

E X H I B I T SEXHIBIT "A"CERTIFICATE OF MARRIAGE OF S. COLEMAN AND M. ECKENER

CERTIFICATE OF MARRIAGE

(FORM C.)

The Marriage Ordinance, Cap. 105

9th February, 1907

MARRIAGE celebrated in the Accra District at
Bassel Mission Church, Christiansborg, in the
Gold Coast Colony.

10

Exhibits"A"

Certificate of
Marriage of
S. Coleman and
M. Eckener.

9th February,
1907.

When Married	Names and Surnames	Full Age or Minor	Condition	Rank or Profession	Residence at time of Marriage	Father's Name and Surname	Occupation, Rank or Profession of Father
9th February, 1907	Stephen Coleman		Bachelor	Clerk	Christiansborg	A. Coleman	Merchant
	Mina Eckener		Spinster	-		W. Eckener	

Married at Bassel Mission Church X'borg by (or)
before me,

(Sgd.) Samuel Wuta Ofei
Minister.

Exhibits

"A"

Certificate of
Marriage of
S. Coleman and
M. Eckener.
9th February,
1907
- continued.

This Marriage was celebrated between us,
(Sgd.) S. Coleman,
(Sgd.) Mina Eckener.
In the presence of us,
(Sgd.) V.C. Randolph.
(Sgd.) P.H. Schandorf)
(Sgd.) Charlotte Millings) Witnesses.
Witness to mark -
(Sgd.) S.W. Ofei.

"B"

Letter,
S. Coleman to
A.R. Coleman.
31st December,
1955.

EXHIBIT "B"

10

LETTER, S. COLEMAN TO A.R. COLEMAN

Dear Austin,

I am having a small lunch party tomorrow at
about 1.30 p.m. and shall be glad if you will join
us.

Affectionately,
Coleman.

Christiansborg.
31.12.55.

"1"

Memorial
Service
Notice.
8th June,
1958.

EXHIBIT "1"

20

MEMORIAL SERVICE NOTICE.

M E M O R I A L S E R V I C E
FOR THE LATE
S T E P H E N C O L E M A N

LATE SUB-ASSISTANT TREASURER AND PENSIONER OF THE
TREASURY DEPARTMENT, Father of Austin Coleman,
Francis Coleman, Comfort Adoley Coleman, uncle
of Edmund Sackey.

WHO DIED AT CHRISTIANSBORG ON 1st APRIL, 1958,

WILL BE HELD AT
 CHRISTIANSBORG
 PRESBYTERIAN CHURCH
 ON SUNDAY THE 8th JUNE, 1958 at 9.30 a.m.
 ALL SYMPATHISERS ARE CORDIALLY INVITED.
 CHIEF MOURNERS: Robert Kofi Hammond.
 Samuel Noi Ababio.
 J.R. Mullings.
 William Coleman-Adjei.

Exhibits

"1"

Memorial
 Service
 Notice.

8th June, 1958
 - continued.

10

EXHIBIT "2"

LETTERS (2) SENIOR INSPECTOR OF TAXES
 TO EMMA Q. QUARTEY

"2"

Letters (2),
 Senior
 Inspector of
 Taxes to
 Emma Q. Quartey.
 25th October
 and
 8th December,
 1958.

Senior Inspector of Taxes,
 Income Tax Department,
 P.O. Box 930,
 Accra, Ghana.

25th October, 1958.

My Ref.No.AE.4733/5019

Your Ref.No.

MADAM EMMA Q. QUARTEY,
 C/O HOUSE NO.270/1,
 LOKKO ROAD,
 CHRISTIANSBORG,
 ACCRA.

20

Madam,

I am informed that your husband Mr. Stephen
 Coleman departed this life on the 1st of April,
 1958. Please accept my condolence for this loss.

2. I should be grateful if you would kindly fur-
 nish me with information concerning his executor's
 name and address.

30

Yours faithfully,

(Sgd.) ? ?

AG. SENIOR INSPECTOR OF TAXES.

MKM/VQ.

Exhibits

File No.ASE.4733/5019.

"2"

Letters (2),
Senior
Inspector of
Taxes to
Emma Q.Quarthey.
25th October,
and
8th December,
1958
- continued.

SENIOR INSPECTOR OF TAXES,
INCOME TAX DEPARTMENT,
P.O. BOX 930,
ACCRA.

8th December, 1958.

I have the honour to invite your attention to my letter No.ASE.7433/5019 of the 25th October, 1958, concerning the name and address of the Executor and to your late husband's estate, and to ask you to be so good as to favour me with an early reply.

10

(Sgd.) ? ?

SENIOR INSPECTOR OF TAXES.

Madam Emma Q. Quarthey,
c/o House No.270/1,
X'borg, Accra.

"3"

EXHIBIT "3"

Power of
Attorney,
R.K. Hammond
to Emma K.
Shang.

POWER OF ATTORNEY, R.K.HAMMOND TO EMMA K.SHANG
IN THE SUPREME COURT OF GHANA,
EASTERN JUDICIAL DIVISION,
DIVISIONAL COURT, ACCRA.

20

21st January,
1959.

IN THE MATTER OF THE ESTATE OF STEPHEN COLEMAN
OF CHRISTIANSBORG, Deceased

KNOW ALL MEN BY THESE PRESENTS that I, ROBERT KOFIE HAMMOND of Christiansborg, Accra Head of the Family of Stephen Coleman of Christiansborg, deceased, with the consent and concurrence of the Elders of the said Family, which consent and concurrence are by Native Customary Law and Usage necessary for the execution of these presents and which consent and concurrence are signified by the said Elders being witnesses to these presents DO HEREBY APPOINT EMMA KWALEY SHANG alias EMMA KWALEY QUARTEY of Christiansborg surviving spouse of Stephen Coleman deceased, to apply and obtain from the Supreme Court of Ghana, Accra, Letters of Administration in respect of all the moveable and

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Exhibits

"3"

Power of Attorney,
R.K. Hammond
to Emma K.
Shang.

21st January,
1959

- continued.

10

immoveable property of Stephen Coleman deceased situate and recoverable at Accra within the jurisdiction of this Honourable Court and for the purpose as the act and deed of the said Robert Kofie Hammond Head of the family of Stephen Coleman aforesaid and of the whole of the said family including herself to execute and deliver such bond, covenant recognisance or other obligation as may be required upon the grant of such Letters of Administration or otherwise and also to receive all debts and all personal estate moveable and immoveable property which now or at any time hereafter may belong to or form part of the estate of the said Stephen Coleman deceased.

I HEREBY DECLARE that this Attorney shall be irrevocable for twelve (12) calendar months from the date hereof.

IN WITNESS whereof I have set my hand and seal this 21st day of January, 1959.

20

SIGNED SEALED AND DELIVERED by)
the within-named Robert Kofie)
Hammond Head of Family of)
Stephen Coleman, deceased as)
his act and deed after the con-)
tents herein has been first)
read over interpreted and ex-)
plained to him in the Ga Langu-)
age by J.R. Mullins of Accra)
when he seemed perfectly to)
have understood the contents)
fully before touching pen and)
his mark made hereto in the)
presence of -)

R. K.HAMMOND.

30

WITNESSES:

(Sgd.) ? ?

(Sgd.) ? ?



Exhibits

"4"

Receipts.

EXHIBIT "4"RECEIPTS

- 31st May, 1945. (a) Received from Mr. Stephen Coleman per Mr.H.D. Bossman the sum of Nine Pounds to be repaid within a month from date.
£9: 0: 0.
(Sgd.) H.P. Swaniker.
Christiansborg,
31st May, 1945.
- 9th May, 1949. (b) Received from Mr. Stephen Coleman the sum of Six Pounds Ten Shillings to be repaid at end of May, 1949. 10
£6:10: 0.
(Sgd.) H.P. Swaniker.
Christiansborg,
9th May, 1949.

T E M P O R A R Y

- 18th June, 1949. (c) Received from Mr. Stephen Coleman, the sum of (£4: 0: 0:) Four Pounds to be replaced.
(Sgd.) H.P. Swaniker.
£4: 0: 0.
Christiansborg,
18th June, 1949.
-

EXHIBIT "5"RECEIPTSExhibits"5"

Receipts.

(a) Dated on the 17th December, 1940.

I the undersigned have on this day received Seven pounds (£7: 0: 0) loan as a part of the Eighteen pounds (£18: 0: 0) promised from Mr. S. Coleman of X'borg.

(Sgd.) Thos.R.Adu Kwa Adi.

17th December,
1940.

10

(b) Received from Stephen Coleman Cash the sum of One pound ten shillings (£1.10/-) being loan of money with an interest of (10/-) ten shillings total £2.0:0. payable within one month's time from date.

Dated this 5th day of October, 1934.

Badoo Asonkor

His
x
mark

Christiansborg.

Witness to mark -

(Sgd.) ? ?

(Sgd.) ? ?

5:10:34.