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11, 1961

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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

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

63651

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CASE FOR THE RESPONDENT

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1. This is an appeal from a Judgment and Order of the Ghana Court of Appeal (Van Lare J.A. as C.J., Granville Sharp J.A. and Ollennu J.) dated the 23rd November, 1959, allowing the appeal of the Respondent (the Defendant at the trial) from a Judgment of the High Court of Ghana (D.E. Gwira Esq., Commissioner of Assize and Civil Pleas) dated the 23rd March 1959 and revoking the letters of administration granted to the Appellant and ordering that letters of administration be granted jointly to the Appellant and the Respondent and that the Appellant account to the Respondent as to the extent to which he had hitherto administered the estate.

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p.43, 61

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2. The Appellant is a lawful child of the marriage celebrated in accordance with the Marriage Ordinance (Cap.127) between Stephen Coleman (hereinafter called "the deceased") and Mina Eckener. The Respondent is the widow of the deceased, having married him according to native law and custom after the death of Mina Eckener in 1940. Before his marriage to Mina Eckener the deceased had been married according to native law and custom to Adeline Johnson, of which marriage there are surviving children. There are also children born to the deceased and the Respondent before their marriage. In this case both parties are claiming letters of administration in respect of the estate of the deceased, the Appellant on the ground of

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being the only lawful child of the deceased, the Respondent as the widow of the deceased and also as the person authorised by the head of the deceased's family with the consent and concurrence of the elders of the family to apply for letters of administration on behalf of herself and the members of the family. The trial judge held that the claim of the Appellant as the lawful son of the marriage under the Marriage Ordinance prevailed over that of the Respondent as a wife married according to native custom, but he made no finding concerning the Respondent's claim to represent the family. The Court of Appeal held that the Respondent was a lawful wife and that the children of the deceased's marriage with Adeline Johnson were lawful children for the purposes of inheritance in accordance with the Marriage Ordinance, and that the Respondent claiming for herself and in a representative capacity was entitled to five ninths of the estate and accordingly to letters of administration, but that in the circumstances of this case it was in the interest of the estate and the beneficiaries that letters of administration should be granted jointly to the Respondent and the Appellant.

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3. There was no substantial dispute about the facts relating to the question to be decided on this appeal, which is whether, having regard to the status of the parties and the provisions of the Marriage Ordinance, the Respondent is entitled to a joint grant of letters of administration.

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4. The Present Suit was commenced by writ dated the 19th November, 1958, issued by the Appellant against Comfort Adoley Coleman and Francis Jonathan Coleman, claiming letters of administration in respect of the property of the deceased. By his Statement of Claim dated the 2nd December, 1958, the Appellant claimed that he was the only lawful child of the deceased, his mother having been married under the Marriage Ordinance, and that the Defendants were issue of the deceased born out of wedlock and therefore not entitled as against the Appellant to administer the estate. The First Defendant filed a Defence dated the 16th December, 1958 in which she admitted that the Appellant was the eldest surviving child of the deceased, but contended that she and her sisters were also lawful children of the deceased, their mother's marriage having been formally solemnised after the

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<u>Record</u>	children begotten in wedlock under native customary law and practice and that she was the wife of the deceased by virtue of such law and was therefore the surviving spouse both under the customary law and under English law. By his Reply dated the 9th February, 1959, the Appellant joined issue with the Respondent on her Defence and further said that although her alleged marriage by native custom was no defence to the action, she would be put to strict proof of such marriage, and he further denied that Robert Kofie Hammond (by whom the Respondent had been appointed to represent the family) had ever been appointed head of the family of the deceased and that the Defendant would be put to strict proof of such appointment. On the 13th March 1959 it was ordered by the Court that the issues at the trial be as set out in the summons for directions, namely,	10
	"whether the Plaintiff or the Defendant is the proper person entitled to the Grant of Letters to administer the estate of the deceased."	20
p.19-25	5. The trial took place on the 13th, 16th and 17th March, 1959. The evidence, so far as is material to this appeal, may be summarised as follows:-	
p.19	The Appellant gave evidence that the deceased was his father and lawfully married his mother in accordance with the Marriage Ordinance and he produced a certificate of the marriage dated the 9th February, 1907. He said that he was born during the marriage on the 19th May, 1909 and was the only surviving child of the marriage. He said that he knew the Respondent, that she was the wife of his father and had about six children by his father. He said that he lived with his father until he himself marriage in 1941 and had to leave because the house was not convenient for him and his family, but that he was on good terms with his father until he died.	30
Ex.A, p.65	In cross-examination he said that his father's first wife was Adeline Johnson and that she had three children by his father. He had paid £33 to Robert Kofie Hammond towards his father's funeral expenses, the other children had also contributed, and after his father's death there was a meeting convened by Hammond at which he was present. Notices of a memorial service which were posted	40
Ex.I, p.66		

showed the name of Robert Kofie Hammond as the first chief mourner, but he denied that his father was helped to acquire properties with the help of the Respondent.

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The Appellant called no witnesses.

10 The Respondent gave evidence that the deceased was her husband, that they were married according to native custom, that they were later blessed by the Minister and that after his death she had been recognised as his wife by the Income Tax Department. She said that at the time of their marriage she kept a store, making £45 to £50 profit a month, which she gave to her husband to educate the children. She later suggested that they should put up a building and said that her husband bought houses with some of the money, but she collected the rents. She also said that she had been deputed by the head of the family by a power of attorney, which she produced, to apply to the Supreme Court of Ghana for letters of administration. In cross-examination she said that she had 20 ten children before 1940, that her husband was a money-lender, did not build a house for her anywhere, and did not give her any paper for the monies she gave him, and that Hammond was the head of her husband's family.

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Ex.3, p.68

30 Supporting evidence on behalf of the Respondent was given by Frank Doe Coleman (son of the Respondent), Stephen Alfred Hammond (brother of Robert Kofie Hammond), Robert Kofie Hammond and Joseph Regimato Mullingo (cousin of the deceased). In particular, Frank Doe Coleman testified that his father was not a money-lender but assisted their friends with loans from time to time and that at the time of his marriage to the Respondent in 1940 his father had no source of income other than his pension and that he had built a house in 1945-7 and another in 1951-2.

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40 Robert Kofie Hammond testified that he had been the undisputed head of the family for 30 years and that he did not think the Appellant would manage the estate properly.

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6. In his Judgment dated the 23rd March, 1959, the trial judge summarised the evidence and concluded as follows:-

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

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7. The Respondent appealed to the Ghana Court of Appeal and filed additional Grounds of Appeal, which included the following paragraphs:-

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"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.

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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

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England in force on the 19th 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.

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10 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."

8. Pending the hearing of the appeal, the Respondent gave Notice of Motion for an order restraining the Appellant from disposing of the estates of the deceased pending the hearing and determination of the appeal and also for the appointment of a receiver and for a stay of execution of the judgment of the High Court. The Respondent swore an affidavit in support of the said motion, but on the 5th October, 1959, the said Motion by consent was adjourned sine die.

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20 9. On the 14th and 15th October 1959 the appeal was heard and on the 23rd November, 1959 the Court by appeal delivered a single considered Judgment. The first part of the Judgment (pp. 44-48) dealt with a contention put forward on behalf of the Respondent that the High Court had acted ultra vires when it substituted the Respondent as the Defendant in place of the original Defendants. The Court of Appeal rejected this contention and the Respondent does not seek to raise it again in connection with this appeal.

p.39-43

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30 10. The Court of Appeal then summarised the claims of the respective parties and the undisputed evidence and held that a native who marries under the Marriage Ordinance continues to be subject to customary law except in so far as that law is excluded expressly or by necessary implication by the Ordinance. The Court then set out the effect of the Ordinance upon the matrimonial and testamentary rights of a native. Section 48 of the Marriage Ordinance provides that where any person who is subject to native law or custom contracts a marriage in accordance with the Ordinance and dies intestate "leaving a widow or husband or any issue of such marriage" his estate shall be distributed as to two-thirds in accordance with English

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law governing the distribution of the personal estates of intestates in force on the 19th November, 1884, and as to one-third in accordance with the provisions of the native customary law which would have obtained if such person had not been married under the Ordinance. Under this provision the distribution of two-thirds of the estate of any intestate is governed by the Statute of Distributions, one-third going to the widow and the remaining two-thirds to the children. The Court of Appeal held, applying the principle of Re Goodman's Trust (1887) 17 Ch.D. 266, and Bangbose v Daniel (1955) A.C. 107, that the lawfulness of a wife or child depends upon the law of domicile and that accordingly the Respondent and the children of the marriage between the deceased and Adeline Johnson were respectively a wife and children within the meaning of the Statute of Distributions and entitled to share in the estate under Section 48 of the Marriage Ordinance.

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11. These findings are summarised in the following passages of the Judgment:-

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" ... 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

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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."

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"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".

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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:-

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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

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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."

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The Court of Appeal also held (which was not apparently disputed) that according to Osu custom all children, legitimate and illegitimate, were equally entitled to inherit their father's estate, and that accordingly the Respondent was entitled to two-ninths of the estate for herself and three-ninths for and on behalf of the family of the deceased, which they held that she represented in this suit.

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12. By Order dated the 16th December, 1959 the Appellant was given conditional leave to appeal to the Privy Council and by Order dated the 28th March, 1960 the Appellant was given final leave to appeal to the Privy Council.

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13. The Respondent humbly submits that the Appeal of the Appellant should be dismissed and that the Appellant should be ordered to pay the costs thereof and that the Judgment and Order of the Ghana Court of Appeal dated the 23rd November, 1959 should be affirmed for the following among other

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R E A S O N S

(1) BECAUSE the Respondent was the lawful wife of the deceased under native law and custom and is the only surviving spouse of the deceased.

(2) BECAUSE the words in Section 48(1) of the Marriage Ordinance "leaving a widow or husband or any issue of such marriage" are merely a condition precedent to the application of the relevant English law and under such law the Respondent is entitled to inherit a one-third share in her own right and is therefore entitled to a grant of letters of administration.

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- (3) BECAUSE the remaining two-thirds share required to be distributed in accordance with the relevant English law should be distributed equally between the Appellant and the three children of the marriage between the deceased and Adeline Johnson.
- 10 (4) BECAUSE under the native law and custom applicable to the case the ten illegitimate children of the deceased and the Respondent are entitled equally with the Appellant and the three children of the marriage between the deceased and Adeline Johnson to inherit the one-third share of the estate not required to be distributed in accordance with the relevant English law.
- 20 (5) BECAUSE the Respondent has been duly appointed by the head of the family of the deceased to apply for and obtain letters of administration on behalf of the family and is therefore entitled to a grant of letters of administration so far as concerns that part of the estate not inherited by the Appellant or the Respondent in their own right.
- (6) BECAUSE the trial judge misdirected himself on the law and thereby made a wrongful exercise of his discretion, whereas the Court of Appeal properly exercised their discretion as to the persons to whom letters of administration ought to be granted.
- 30 (7) BECAUSE the Judgment of the Court of Appeal is correct for the reasons therein stated and ought to be affirmed.

JOSEPH DEAN.

No.40 of 1960

IN THE PRIVY COUNCIL

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

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CASE FOR THE RESPONDENT  
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