I cannot take leave of this case without expressing my warm thanks to the counsel who conducted it for the manner in which all the facts have been laid before this court. The work entailed must have been laborious in no ordinary degree and I am specially obliged to Mr. Evans for the able and masterly way he has elucidated this matter.

Order accordingly.

KING v. WILLIAMS (C.P. JOHNSON and L.J. JOHNSON Third Parties)

Supreme Court (Prior, Ag. C.J.): August 8th, 1929

[1] **Family Law — property — married women's property — legal estate of wife's separate property vests in husband as trustee, wife retains beneficial interest — property conveyed by husband and wife both executing deed and no acknowledgment before judge necessary:** If property is devised directly to a married woman for her separate use her husband acquires the legal estate by virtue of the *jus mariti* but becomes a trustee in equity for the married woman who retains the beneficial interest, if the woman is single at the time she acquires the property, the same situation pertains if she subsequently marries; the later execution of a mortgage deed by both husband and wife is sufficient to transfer both the legal and beneficial interests in the property and since the wife transfers only the beneficial interest her acknowledgment before a judge is unnecessary (page 174, lines 33—41; page 175, lines 11—15).

[2] **Land Law — estate tail — words of limitation — devise to A and the heirs of his body as tenants in common — "as tenants in common" has no effect, A takes estate tail:** A devise which is expressed in technical terms but with the addition of incompatible words of modification is construed as if those superadded words had not been used, so that in a devise to *A* and the heirs of his body as tenants in common the words "as tenants in common" have no effect and *A* takes an estate tail; similarly a devise to *A*, her heirs and assigns forever as tenants in common is effective to transfer a fee simple estate to *A*, the words "as tenants in common" again being ignored (page 175, line 30—page 177, line 27).

[3] **Land Law — fee simple — conditional fee simple — devise to A absolutely subject to gift over in event of death without issue confers fee simple on A defeasible if no issue living at his death:** When a testator devises property to *A* absolutely subject to a gift over in the event of *A* dying without issue, *A* takes a fee simple estate defeasible in the event of his leaving no issue living at his death and he cannot therefore convey an indefeasible fee simple estate in the property (page 178, lines 1—5; page 179, lines 2—6; lines 12—16).

[4] **Land Law — fee simple — words of limitation — devise to A his heirs and assigns forever as tenants in common — "as tenants in common" has no effect, A takes fee simple estate:** See [2] above.

[5] **Mortgage — covenants for title — damages — measure of damages for breach of covenant for title is original debt:** The measure of damages for the breach of a covenant for title in a mortgage is the amount of the original debt (page 180, lines 28—30).

[6] **Mortgage — remedies of mortgagee — damages — measure of damages for breach of covenant for title is original debt:** See [5] above.

[7] **Succession — wills — construction — devise to A absolutely subject to gift over in event of death without issue confers fee simple on A defeasible if no issue living at his death:** See [3] above.

[8] **Succession — wills — construction — words of limitation — devise to A, his heirs and assigns forever or A and heirs of his body as tenants in common — "as tenants in common" has no effect, A takes estate, in fee simple or in tail respectively:** See [2] above.

The plaintiff brought an action against the defendant to recover the amount of a payment made under a contract of sale which he had since repudiated. The defendant joined Mr. and Mrs. Johnson, the third parties who had mortgaged the property, claiming an indemnity from them.

The property in question was devised by her father's will to Mrs. Johnson, her heirs and assigns forever as tenants in common but with a gift over in the event of her dying without issue, and she was to hold the property for her sole and separate use independently of any husband. She subsequently married Mr. Johnson.

In 1927 the property was mortgaged to the defendant by a mortgage deed which contained a covenant for title and was executed by both Mr. and Mrs. Johnson. The defendant subsequently sold the property to the plaintiff under a power of sale contained in the deed and received a payment on account of the purchase money. The plaintiff later repudiated the contract on the ground that the defendant could not give a good title to the property, and brought the present proceedings to recover the money paid.

The plaintiff contended that the defendant was unable to pass a good title because — (a) the devise to Mrs. Johnson under her father's will gave her only a life interest in the property; and (b) the mortgage deed executed by Mr. and Mrs. Johnson was ineffective to convey Mrs. Johnson's interest in the property since she had not acknowledged the deed before a judge. He therefore

contended that he was entitled to repudiate the contract of sale and recover the payment he had made.

In reply the defendant denied that Mrs. Johnson had received only a life interest under her father's will contending that — (a) the words "as tenants in common" had no effect since they were incompatible with the technical sense of the devise to Mrs. Johnson "her heirs and assigns forever" which gave her a fee simple estate; and (b) since Mrs. Johnson had living three children by her present husband the gift over in the event of her dying without issue could not take effect and that her fee simple estate was therefore indefeasible.

The court gave judgment for the plaintiff. The defendant then claimed to be indemnified by the third parties on the ground that they were in breach of the covenant for title. He was awarded damages for breach against Mr. Johnson only.

Cases referred to:

(1) *Ashworth v. Outram* (1877), 5 Ch. D. 923; 36 L.T. 400.

(2) *Bennet v. Davis* (1725), 2 P. Wms. 316; 24 E.R. 746.

(3) *Re Booth*, [1900] 1 Ch. 768; (1900), 69 L.J. Ch. 474, applied.

(4) *Parker v. Birks* (1854), 1 K. & J. 156; 69 E.R. 409, applied.

(5) *Pontifex v. Foord* (1884), 12 Q.B.D. 152; 53 L.J.Q.B. 321.

(6) *Rich v. Cockell* (1802), 9 Ves. 369; 32 E.R. 644.

(7) *Smith v. Compton* (1832), 3 B. & Ad. 407; 110 E.R. 146.

(8) *Toppin v. Field* (1843), 4 Q.B. 386; 114 E.R. 944, applied.

(9) *Wynne v. Tempest*, [1897] 1 Ch. 110; (1897), 66 L.J. Ch. 81, distinguished.

PRIOR, Ag. C.J.:

This action has been brought in order to recover £53, the sum paid by the plaintiff to the defendant on account of £106, the purchase price of a house and land bought by the plaintiff at a public auction, the defendant selling under a power of sale contained in a mortgage deed executed on February 17th, 1927, in favour of the defendant by Christian Pius Johnson and his wife Lucy Josephine Johnson, who have been brought into the action as third parties.

The plaintiff claims to recover the sum of £53, paid by him on account of the purchase price, on the ground that he repudiated

the contract of sale and that he was justified in doing so because the defendant could not give him a good title to the property in question.

The plaintiff alleges that the defendant was unable to give him a good title for two reasons. First, he says that the mortgage deed executed by Mr. and Mrs. Johnson in favour of the defendant was never acknowledged by Mrs. Johnson before a judge, and that such an acknowledgment was necessary in order to convey Mrs. Johnson's interest. Secondly, he says that this property was devised to Mrs. Johnson by the will of her father, and that this will only gave her a life interest. So far as regards the absence of any acknowledgment of the mortgage deed by Mrs. Johnson, I have come to the conclusion that no acknowledgment was necessary.

An estate in the property in question was devised to Mrs. Johnson by the twelfth paragraph of the will of her father, Mr. William George, which will was executed on January 26th, 1916 presumably before Mrs. Johnson's marriage. I shall have to refer to the terms of this devise later.

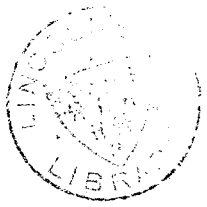
The eighteenth paragraph of the will is in the following terms:

> "I hereby also direct that any woman having and taking a vested interest in my estate shall take, hold and enjoy the same for her sole and separate use independently of any husband and free from his debts, control, liabilities, engagements and interference and her receipt alone to my executors shall be a sufficient discharge."

This property was therefore devised to Miss George for her separate use.

It is to be observed that although certain persons are appointed to be trustees of the will, this property is devised directly to Miss George. But, as is stated in Lush's *Law of Husband & Wife*, 3rd ed., at 126 (1910):

> "In order. . . to secure to the wife the independent enjoyment of property, so as to defeat the husband's right at law, it was not essential to appoint trustees and vest the property in them to hold upon trust for the wife. For if property of any kind, whether an estate in land. . . or chattels. . . or a sum of money. . . were transferred directly to a married woman to her 'separate use,' her husband, though he acquired the estate in law by virtue of the *jus mariti*, became in equity trustee for the wife."



The correctness of that statement of the law is confirmed by the cases *Bennet* v. *Davis* (2); *Rich* v. *Cockell* (6); and *Ashworth* v. *Outram* (1).

Under cl.17 of the will the trustees of the will had certain duties in connection with the real estate devised to Miss George, but these duties were to cease when she attained the age of 25 or on her earlier marriage. Applying the rule of law which I have just cited, I am of the opinion that on Miss George's marriage to Mr. Johnson, the latter became the trustee of this property, to the equitable estate in which this lady was entitled for her separate use. When therefore Mr. and Mrs. Johnson executed the mortgage deed they respectively conveyed the legal and equitable estates and inasmuch as Mrs. Johnson only conveyed the equitable estate to which she was entitled for her separate use no acknowledgment was necessary.

The second question which arises in this case is as to what estate in this property was given to Mrs. Johnson by her father's will. The devise of the property is in the following terms:

> "I devise all that my lot of land with the buildings thereon erected numbered 15 for municipal purposes with the remainder of the portion of land which shall be cut off from lot numbered 13 as I have before devised unto and to the use of my daughter the said Lucy Josephine George her heirs and assigns forever as tenants in common but in the event of her dying without issue I devise the same unto and to the use of my sons Obadiah George, Samuel George as tenants in common and after their deaths to their heirs and assigns forever as tenants in common."

Now in my opinion the authorities make it quite clear that where you have a devise to — "*A* and the heirs of his body as tenants in common" the superadded words "as tenants in common" are to be rejected and the devisee "*A*" takes an estate tail. Mr. Betts during the course of his very helpful argument referred the court to the following passage in *Jarman on Wills*, 6th ed., at 1890 (1910):

> "We next proceed to inquire as to the effect of coupling a limitation to *heirs of the body* with words of modification importing that they are to take concurrently, or distributively, or in some other manner inconsistent with the course of devolution under an estate tail, as by the addition of the words '*share and share alike*,' or '*as tenants in common*,' or

'*whether sons or daughters*,' or '*without regard to seniority of age or priority of birth*.' In such cases, the great struggle has been to determine whether the superadded words are to be treated as explanatory of the testator's intention to use the term *heirs of the body* in some other sense, and as descriptive of another class of objects, or are to be rejected as repugnant to the estate which those words properly and technically create. It will be seen, by an examination of the following cases, that, after much conflicting decision and opinion, the latter doctrine has prevailed, [even where words of limitation are superadded to words of modification], and it seems to stand on the soundest principles of construction. Those principles were violated, it is conceived, in permitting words of a clear and ascertained signification to be cut down by expressions from which an intention equally definite could not be collected. The inconsistent clause shews only that the testator intended the heirs of the body to take in a manner, in which, as such, they could not take; not that persons other than heirs were meant to be the objects. To make expressions of this nature the ground of such an interpretation is to sacrifice the main scope of the devise to its details. The Courts have, therefore, wisely rejected the construction which reads heirs of the body with such a context as meaning *children*, and thereby restricts the testator's bounty to a narrower range of objects; for, it will be observed, that although children are included in heirs of the body, yet the converse of the proposition does not hold, for an estate tail is capable of transmission through a long line of objects whom a gift to the children would never reach, (as grand-children and more remote descendants); to say nothing of the difference in the *order* of its devolution.

This rule of construction is supported by a series of decisions, commencing from an early period, and sufficiently numerous and authoritative to outweigh any opposing decision and dicta which can be adduced.

Thus, in the case of *Doe* d. *Candler* v. *Smith*. . . where a testator devised his freehold lands to his daughter A., and the *heirs of her body* lawfully to be begotton, for ever, as *tenants in common, and not as joint tenants*; and in case his said daughter should happen to die before twenty-one, or without having issue of her body lawfully begotten, then over; Lord

Kenyon, and the other Judges of the Court of King's Bench, held, that the daughter took an estate tail.

So, in *Pierson* v. *Vickers*. . . where a testator devised his estates at B. unto his daughter A., and to the heirs of her body lawfully to be begotten, *whether sons or daughters, as tenants in common, and not as joint tenants;* and in default of such issue, over; Lord *Ellenborough* and the other Judges of the Court of King's Bench, held, on the authority of the last case, and *Doe* v. *Cooper*. . . that the daughter took an estate tail.

Again, in the case of *Bennett* v. *Earl of Tankerville*. . . where the devise was to the use of A. and his assigns for his life without impeachment of waste, and, after his decease, to *the heirs of his body, to take as tenants in common and not as joint tenants;* and in case of his decease without issue of his body, then over; Sir *W. Grant*, M.R., held that the devisee took an estate tail."

If therefore the words "as tenants in common" are to be rejected when they followed the grant of an estate to "*A* and the heirs of his body," it follows *a fortiori* that they are to be rejected when they follow a devise to "*A* his heirs and assigns forever." I have come to the conclusion therefore that the words "as tenants in common" where they first occur in para.12 of the will must be rejected.

I therefore construe the devise to this lady "her heirs and assigns forever as tenants in common" as giving her a fee simple estate. The question now arises whether, in view of the words which follow, this fee simple estate is a defeasible or an indefeasible fee simple estate? It is admitted that Mrs. Johnson has living three children by her present husband.

Mr. Betts referred me to the following passage in 28 *Halsbury's Laws of England*, 1st ed., at 840 (1914):

"A gift over on death 'without having children' is construed as if on death 'without having had children,' and fails to take effect if the parent has any child, though no such child survives him. . . ."

As to the correctness of that statement there can be no doubt. But the words in the devise are "in the event if her dying without issue."

In *Jarman on Wills*, 6th ed., at 1720 (1910) I find this statement:

"Where land is devised to A. absolutely, subject to a gift over in the event of his dying without child or children, it seems that A. takes an estate in fee simple, defeasible in the event of his leaving no issue living at his death. . . 'child or children' being treated as equivalent to 'issue.' "

During the course of his last address I drew Mr. Betts' attention to this passage and he suggested that possibly in the case upon which the passage was based the limitation to A. was different from the limitation to Miss George in para.12 of Mr. George's will. The case referred to in the footnote to the passage I have cited is *Parker* v. *Birks* (4). The effect of that case appears to be given correctly in the headnote, which is in the following terms (1 K. & J. at 156; 69 E.R. at 409):

"A devise to A. and to his heirs and assigns for ever, but, in case he should die without child or children of his body lawfully begotten, a gift over to the children of B., their heirs and assigns for ever, *on the decease* of A.: Held, to confer an estate in fee-simple upon A., subject to be defeated by an executory devise, if, at his decease, there should be no *issue* of A. living."

The limitation to A. in that case is therefore identical with the limitation to Miss George in the will, subject to the rejection in the latter limitation of the words "as tenants in common."

In connection with the construction of the words "in the event of her dying without issue," I will also cite the reference in *Jarman on Wills*, 6th ed., at 1719 (1910) to one other case:

"Where the gift is to A. absolutely with a gift over in the event of his dying without child or children, there being no gift to the child or children, the general principle in favour of absolute vesting as soon as possible affords an argument for construing the gift over as intended to take effect only if A. never has a child, so that the gift to him becomes indefeasible as soon as a child is born. But in a case of this kind. . . Byrne, J., refused to allow the construction of the will to be affected by the principle referred to, and held that 'die without child or children' meant die without leaving a child or children. . . ."

The case referred to is *Re Booth* (3). I have read the case, and the effect of the learned judge's decision appears to me to be correctly given in the passage I have cited.

In view of these authorities and of other authorities referred to

in *Jarman on Wills* and of the provisions of s.29 of the Wills Act, 1837, I have come to the conclusion that the passage from *Halsbury's Laws of England* to which Mr. Betts has referred me is not applicable and that I must hold that Mrs. Johnson's fee simple estate is defeasible in the event of Mrs. Johnson leaving no issue living at her death.

So far as regards the gift over there appears to me to be nothing in its terms to prevent it from taking effect. In accordance with the authorities I have cited earlier in this judgment the words "as tenants in common" where they last occur would have to be rejected.

I therefore construe para.12 of the will as giving Miss George a fee simple estate in this property, defeasible, however, in the event of her leaving no issue at her death. When therefore Mrs. Johnson executed the mortgage deed she was not able to convey an indefeasible fee simple estate.

Inasmuch as the defendant has failed to produce a good title to this land I am of the opinion that the plaintiff was entitled to repudiate the contract. I further find that he did repudiate the contract, and that in all the circumstances his repudiation was not too late. I must therefore give judgment for the plaintiff against the defendant for £53 with costs.

I come now to the question which arose in this case between the defendant and the third parties. Mr. Hyde has contended that the third parties have been improperly brought into this action, and in support of his contention he has cited the case of *Wynne* v. *Tempest* (9). That, however, was a case with regard to the construction of O.XVI, r.48, of the Rules of the Supreme Court, 1883. That rule begins:

> "Where a defendant claims to be entitled to *contribution, or indemnity* over against any person not a party to the action. . . ." [Emphasis supplied.]

The corresponding County Court rule by which the procedure of the Supreme Court in its summary jurisdiction is governed is O.Xa, r.1, which is set out in Pitt-Lewis', *County Court Practice*, 1st ed., at 332 (1880). This rule begins:

> "Where a defendant is or claims to be entitled to *contribution, indemnity, or other remedy or relief* over against any person not a party to the action. . . ." [Emphasis supplied.]

The words "or other remedy or relief" do not appear in the

County Court Rules now in force in England, because as Pollock, B. said in *Pontifex* v. *Foord* (5), they were found to give rise to many practical difficulties in working, and I think that this case in which I am now delivering judgment shows how inconvenient these words are. However that is the rule applicable here and I must give effect to it.

Now the first claim made by the defendant against the third parties is a claim "to be entitled to an acknowledgment" of this mortgage "by the said Lucy Josephine Johnson before a judge of the Supreme Court." So far as regards this claim I must decide against the defendant, and for three reasons. Firstly, because the claim is not for "contribution, indemnity or other remedy or relief" within the meaning of the rule. Secondly, because I have already held that an acknowlegment was not necessary in this case; and, thirdly, because no authority has been cited which shows that the court is empowered to compel a married woman to take an acknowledgment.

The second claim is for the payment of the sum of £53 which the defendant will have to repay to the plaintiff because the defendant has failed to give a good title to this property. In the mortgage deed Mr. Johnson covenanted that he and his wife had the right to grant a fee simple estate to the defendant. What I have found that they had the right to grant was a defeasible fee simple estate. There has therefore been a breach of the covenant by Mr. Johnson. Mrs. Johnson was not a party to this covenant and therefore the third party proceedings against her wholly failed.

In the case of *Toppin* v. *Field* (8) Patterson, J. stated that where mortgage is made with covenant for title, the measure of damages, in case of breach of the covenant, is the original debt. I think that this *dictum* contemplates a substantial breach of the covenant, but in my opinion there has been a substantial breach of the covenant in this case. In the mortgage executed by Mr. and Mrs. Johnson the original debt was £40. Moreover, I consider that on the authority of the case of *Smith* v. *Compton* (7) read in the light of the earlier proceedings between the same parties I ought also to order the third party Christian Pius Johnson to pay the defendant's costs of this action and to direct that these costs should be taxed as between solicitor and client.

I accordingly make an order in the following form:

Let the plaintiff recover against the defendant the sum of £53 and his costs.

Let the defendant recover against the third party Christian Pius Johnson the sum of £40 and so much of the said costs as the defendant may pay to the plaintiff, and the defendant's own costs of this action and of the third party proceedings against the third party Christian Pius Johnson, the defendant's cost of the action to be taxed as between solicitor and client.

Let the third party Lucy Josephine Johnson recover against the defendant her costs.

Order accordingly.

MACAULEY v. P.C. BONGAY and OTHERS

West African Court of Appeal (Tew, C.J. (Sierra Leone), Berkeley, J. (Nig.) and Michelin, J. (G.C.)): March 20th, 1930

[1] **Evidence — burden of proof — recovery of possession of land — plaintiff must succeed on strength of own title:** In an action for the recovery of possession of land of which the defendant has long been in undisturbed possession, the plaintiff must succeed on the strength of his own title and not on the weakness of the defendant's (page 183, lines 9—14).

[2] **Evidence — customary law — proved by evidence until notorious by frequent proof, then judicial notice:** Customary law should be proved in the first instance by calling witnesses acquainted with the customs until, by frequent proof, they have became so notorious that the courts will take judicial notice of them (page 184, lines 16—30).

[3] **Jurisprudence — customary law — proof of customary law – by evidence until notorious by frequent proof, then judicial notice:** See [2] above.

[4] **Land Law — recovery of possession — evidence — burden of proof — plaintiff seeking recovery after acquiescence in defendant's long undisturbed possession must succeed on strength of own title:** See [1] above.

The plaintiffs (now the respondents) brought an action against the defendant (now the appellant) in the Circuit Court for recovery of possession of land.

The plaintiff P.C. Bongay, suing on behalf of himself as Paramount Chief of the Big Bo Chiefdom and of the Tribal Authority of the Chiefdom, and two other plaintiffs described as "land owners," sought to recover possession of two areas of land from the defendant, a non-native settler to whom the land had been granted more than 30 years previously by the then Paramount Chief. The Circuit Court (Butler-Lloyd, J.) gave judgment for the