

Wilson for the applicant;
Benka-Coker for the Crown.

SMITH, C.J. (Sierra Leone):

This is a criminal matter. The West African (Appeal to Privy Council) Order in Council, 1949, which repealed the Order in Council of 1930, only regulates civil appeals.

Leave to appeal in criminal cases can only be granted by the Judicial Committee itself. This court has no jurisdiction to grant leave.

Application refused.

RAHMAN v. ELBA

SUPREME COURT (Beoku-Betts, J.): February 26th, 1951
(Civil Case No. 112/50)

[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, the plaintiff must succeed on the strength of his own title and not on the weakness of the defendant's (page 91, lines 18–22; page 92, lines 11–13).

[2] **Evidence—burden of proof—title to land—statutory title—proof of adverse possession not necessary to acquire statutory title:** A statutory title to property can be acquired by any person who is in undisturbed possession of the property for the statutory limitation period without it being necessary to prove adverse possession on his part (page 95, lines 36–40; page 96, lines 11–14).

[3] **Family Law—property—married women's property—after 1933 married woman can acquire statutory title even against husband—must not be living together or facts to prevent limitation period from running:** Although a person cannot acquire a statutory title to property if he and the owner live together in the property, time can run against the owner if he leaves and the other person continues in possession; and therefore after 1933 a married woman who is in possession of property for over 12 years acquires a statutory title to the property even as against her husband, provided that they were not living together in the property during that time and there are not facts to prevent the limitation period from running (page 95, lines 26–31; page 96, lines 4–14).

[4] **Land Law—adverse possession—need not be proved to acquire statutory title:** See [2] above.

- [5] Land Law—capacity to hold and transfer land—married women—after 1933 married woman can acquire statutory title even against husband—must not be living together or facts to prevent limitation period from running: See [3] above.
- [6] Land Law—recovery of possession—evidence—burden of proof—plaintiff must succeed on strength of own title: See [1] above. 5
- [7] Land Law—title—statutory title—cannot be acquired by person who lives with owner in property—time runs against owner if leaves property and other person continues in possession: See [3] above.
- [8] Land Law—title—statutory title—evidence—burden of proof—proof of adverse possession not necessary: See [2] above. 10
- [9] Limitation of Actions—land—adverse possession—defendant need not prove adverse possession to acquire statutory title: See [2] above.
- [10] Limitation of Actions—land—recovery of possession—statutory title cannot be acquired by person who lives with owner in property—time runs against owner if leaves property and other person continues in possession: See [3] above. 15

The plaintiff brought an action against the defendant for a declaration of title to certain property, possession of the property, damages, and further or other relief. 20

The defendant and her husband lived together in the defendant's property after their marriage. The defendant conveyed the property to her husband, but when he subsequently left her she continued to live in the property and exercised the rights of an owner, renting one portion and collecting the rents from it. She stayed in the remaining portion herself for upwards of 13 years. Her husband then purported to sell the property to the plaintiff while the defendant was still in possession. The plaintiff instituted the present action against the defendant for a declaration of title to the property, possession, damages, and further or other relief. 25 30

The plaintiff contended that the defendant lived in the property of her husband, and that adverse possession could not operate as between a husband and wife living together in the same property.

The defendant contended that the Statute of Limitations operated in her favour and that, by being in undisturbed possession of the property for over 12 years, the plaintiff's right and title had been extinguished. 35

Cases referred to: 40

(1) *Bankole Bright v. Bankole Bright* (1943), 9 W.A.C.A. 48.

- (2) *Bankole Bright v. U.A.C. Ltd.* (1944), 3 S.L. Law Rec. 23.
 (3) *In re Hastings, Hallett v. Hastings* (1887), 35 Ch.D. 94; 57 L.T. 126.
 (4) *Lowe v. Fox* (1885), 15 Q.B.D. 667; 53 L.T. 886.
 5 (5) *Lynes v. Snaith* (1899), 1 Q.B.D. 486; 80 L.T. 122.
 (6) *Nepean v. Doe d. Knight* (1837), 2 M. & W. 894; 150 E.R. 1021.
 (7) *N'jie v. Hall* (1931), 1 W.A.C.A. 100.
 (8) *Pratt v. Noah* (1944), 3 S.L. Law Rec. 60.

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Legislation construed:

Imperial Statutes (Law of Property) Adoption Ordinance (Laws of Sierra Leone, 1946, *cap.* 108), s.4:

The relevant terms of this section are set out at page 95, lines 21-25.

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Margai for the plaintiff;
O.I.E. During for the defendant.

BEOKU-BETTS, J.:

20 The plaintiff claims, as the owner in fee simple, the house and land situate at No. 5 Bent Street in Freetown. From the statement of claim, the title of the plaintiff is derived from a purchase of the property from one Thomas Hamilton Elba who was stated to be the owner.

25 The plaintiff states that the defendant is occupying the property and refuses to give up possession of the same notwithstanding repeated demands by the plaintiff for the delivery of possession. The plaintiff therefore claims:

- (a) Declaration of his title to the property.
 (b) Possession of the property.
 30 (c) Damages for depriving the plaintiff of possession at the rate of £9 per month from January 24th, 1950 up to delivery of possession.
 (d) Such further or other relief as the court may think fit.

35 The defendant in her defence stated that she is the owner of the premises and that she has been in undisturbed possession of the same for over 13 years. The defendant further stated that Thomas Hamilton Elba is her husband and that, by a representation made to her by her said husband for the protection of her property, she conveyed the property to her husband on May 10th, 1932, but that
 40 she continued in undisturbed possession and has up to the present been exercising all her rights of ownership of the said property.

She pleaded that the title of the plaintiff is barred by the Statute of Limitations and that his right and title, if any, to the said property were extinguished by virtue of the Act referred to.

The plaintiff was granted leave to deliver a reply and he stated that the Statute of Limitations did not apply for the following reasons: 5

“(a) Although the defendant was staying at the said premises she did so with the permission, approval or consent of her husband.

(b) The defendant occupied the premises as lawful wife of the previous owner of the property who was supporting her and against whom her possession could not in the circumstances be adverse. 10

(c) The defendant up to June 1947 was occupying only part of the said premises whilst her husband through whom the plaintiff claims was occupying the remaining portion by his tenant from whom he received rents.” 15

As the plaintiff claims possession and, even from the pleadings, the plaintiff admits that the defendant is in possession and has refused to give up possession, the ordinary law applies that the plaintiff must succeed on the strength of his title and not on the weakness of the defendant's. To establish his title the plaintiff sought to prove that he bought the property from one Thomas Hamilton Elba, the husband of the defendant, who was the owner of the property. Exhibit B is clear evidence that the property was sold by Elba to the plaintiff. The defendant alleges that Elba got the conveyance of the property by certain representations made by Elba to the defendant. Exhibits C and D are the relevant documents. They were both made on the same day, May 10th, 1932. Exhibit D is a conveyance of the property from Thomas Hamilton Elba and Maria Jane Elba his wife, the defendant, on one part to one Claude Emile Wright. The property was alleged to be conveyed for the sum of £350. Exhibit C is a conveyance of the same property from Claude Emile Wright to Thomas Hamilton Elba. The consideration is the same—the amount of £350. 20 25 30 35

The defendant states that this was a convenient arrangement between husband and wife on the suggestion of the husband for the property to be protected in case of death of either party. The husband Elba admitted that no money passed between them when the deeds were made, and that the £350, or any money alleged to have been the consideration for the alleged sale of the property, 40

was not in fact paid. If this were a question between the husband and wife, I would have no hesitation in finding that the husband gave no consideration for the conveyance. This, however, would not decide the issue as the plaintiff is a third party and had nothing to do with the agreement between the husband and wife and he gave consideration on purchase of property. What I am concerned about is the legal position on the defence of possession by the defendant, and the plea of long possession for over 12 years and reliance on the Statute of Limitations. The defendant in possession is allowed to plead generally that he is in possession of the property and can thereby rely on the Statute of Limitations. As I have stated before, when that plea is made, the plaintiff must establish facts to show that the defendant cannot rely on such possession. The plaintiff, in his reply, alleged facts to show that he could not be affected by the possession of the defendant. It will be necessary therefore to examine the evidence in support of this plea of long possession, and then also to consider the allegations of the plaintiff in the reply. This will incidentally bring up the question of statutory possession as between husband and wife.

The first witness I propose to consider is the defendant, the first defence witness. She said she was married in 1921 to Elba and that before she was married she had been collecting the rents of the property in dispute. She said she rented a portion of the house to a Mr. E.B. Williams and remained in the other portion. She said her husband never gave her any allowance at any time. She said her husband never collected any rent of the property and that she had never given any account for the rents. In cross-examination, she said Mr. E.B. Williams paid his rent of £2 a month direct to her. She said she received the letter from the husband to apply to the bank for an allowance, but she never applied to the bank for an allowance or for any money, and so received none. This letter is Exhibit E and was written on December 12th, 1949. The defendant said that after Mr. Williams left the house she got another tenant.

In answer to me, the defendant said she was married in 1921 and left Sierra Leone with her husband the same year. She returned in 1925 and went to reside in the house in question. She apparently left Freetown after 1925, for she further said: "I have not been out of Freetown from 1936." She said that her husband lived with her in 1936 but left the house in 1937, and that she has been in the house from 1937 to the present. At this stage, at the request of

the parties and with their consent, Mr. E.B. Williams was called as a witness. He stated that he rented the premises at No. 5 Bent Street from 1943 to 1946 and that the arrangement was made with the defendant. He said he paid the rent in the first instance to the defendant but receipts were given by her husband. His evidence on this could not help us much for he said that he was away most of the time and payment was made by his wife, who, unfortunately, was not called. He however said that he and a Mr. S.C. Benjamin went to arrange about the house and the defendant fixed the rent. In answer to Mr. Margai, the plaintiff's counsel, the witness said he did not know if part of the rent was paid to the bank. He stated he received Exhibit F dated December 14th, 1946, but added he was away from Freetown when the letter was received. He said Elba signed receipts and he could not say whether the wife acted for him. In answer to me, the witness said that he rented the first floor of the house, that the defendant was living in the attic, and that at that time the husband was not living in the house. He said he paid the rent to the defendant, but did not know how Elba came to give receipts. He stated that Elba did not live in the house at any time while he was there.

The other witness on this point was Thomas Hamilton Elba, the second witness for the plaintiff and the husband of the defendant. So far as is relevant, he said he sold the property to the plaintiff. He also said the property was his. He said he had a tenant, E.B. Williams, up to 1947. He said the tenant paid the rent to the defendant and to the bank to his account. He said when he fell ill in 1945 he gave certain instructions in writing. In cross-examination, Elba stated that the property originally belonged to his wife, that she got the property from her former husband, and that he (Elba) lived in the house with the defendant when they were married. He then referred to the execution of the deeds, Exhibits C and D, and said that no money passed when they were made, although he said he expended about £700 in repairs to the house. He said, when he and the defendant went to Louanda in 1932, one Woode, now dead, collected the rents; but he cannot say whether Woode accounted to the wife for the rents collected. He said he left the house in 1946 and left the wife in the house. He said he signed the receipts in favour of Williams. He further said it is not true he made the receipts in favour of his wife. In re-examination, the witness said that he gave his wife an allowance of £3 a month while she was living in the house; that his wife lived in

a portion of the house while Williams lived in the other portion; that his wife lived in the top floor of the house; and that he spent about £700 to renovate the house. In answer to me, the witness stated that the wife was owner of the house when they were married in 1921 and is still in possession of it. Unfortunately, the receipts given by the witness to Williams were not produced. No evidence was produced to dispute the evidence of the wife that she had been in possession of the premises since 1921, and Elba admits that he lived with the defendant in the house when they were married.

The conclusions which I have come to, on the facts, are that the property was the property of the defendant before she and her husband were married in 1921, and that she continued to exercise all rights as owner from 1921 to the present time. I believe the husband and wife did make Exhibits C and D for the purpose of their convenience. If she had not continued in possession of the house, but had allowed the husband to do so, then his possession might have been sufficient to confer title on the plaintiff. But in this case, I am satisfied that, although the deeds were executed in 1932, the defendant remained in possession and the husband lived in the house of the defendant as her husband, and not, as is suggested by the plaintiff, that the defendant lived in the house of her husband. I am satisfied and find on the evidence that Elba left the house of the defendant in 1937, and that the defendant continued in possession. I believe her evidence that she got the husband to sign receipts in favour of Williams. I have no doubt that Williams regarded the defendant as the owner of the house and dealt with her as such. Elba, in 1949, tried to show he had exercised possession over the premises and for that purpose Exhibits E and F were written, but there was no evidence to show that the defendant was ever a party to those documents. They must have been made for purposes which are not difficult to discern. They do not support the allegations of the plaintiff in proof of the title of Elba. I am satisfied that the defendant has been in undisturbed possession of the premises from 1921 and continued so even after the deed of 1932 was made. I do not accept as proved the allegation in paragraph 3 of the reply that the defendant lived in the house with the permission, approval or consent of her husband, or that she lived in the house as the wife of Elba, or that Elba was supporting her. I am satisfied that, for all the relevant period, in fact from and before 1921, the defendant lived in the house as owner thereof and that Elba did not at any time occupy any portion, but for a short period,

and then only as husband of the defendant. It is of importance to bear in mind that, when the plaintiff bought the property, the defendant was in possession of the premises and he would be affected by the possession of the defendant. There is no evidence that he made any effort to find out why the defendant was in possession and the person from whom he bought was not in possession.

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I have to consider whether, as between husband and wife, possession of land would give title by long possession. I have not decided this case on the question of the ownership of property on the documents for, although I am satisfied that the husband did not give any consideration for the alleged sale of the property mentioned in Exhibits C and D, yet the plaintiff would still have had the right to the property if the wife had allowed the husband to remain in possession for over 12 years. Before 1934, the legal estate in the property of the wife vested in the husband, but since that date, by the Imperial Statutes (Law of Property) Adoption Ordinance (*cap.* 108), the title would be vested in either if either allowed the other to be in possession for over 12 years. In other words statutory title ran in favour of either by s.4 of the Ordinance, which provides as follows:

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“So much of English Law as specially restricts the acquisition holding or disposition of real or personal property by a married woman as such . . . or limits her capacity to sue or be sued in her own name, shall have no force or effect in the Colony.”

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The effect of this provision is that, as from January 1st, 1934, the Statute of Limitations runs in favour of a married woman. A married woman in possession of property for over 12 years acquires a statutory title to the land even against her husband, provided they were not living in the same property or there are no facts to prevent the limitation period from running: see *Bankole Bright v. U.A.C. Ltd.* (2); 20 *Halsbury's Laws of England*, 2nd ed., at 233; *Lowe v. Fox* (4); *In re Hastings, Hallett v. Hastings* (3); *Lush, Law of Husband and Wife*, 3rd ed., at 361 (1910); and *Bankole Bright v. Bankole Bright* (1).

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The title which the wife obtained runs against the husband and the law is not now complicated by questions of adverse title. In all cases of possession where any person has been in undisturbed possession for over 12 years, statutory title exists without proving adverse possession: see 2 *Halsbury's Laws of England*, 2nd ed., at 682, para. 889; *N'Jie v. Hall* (7); and *Nepean v. Doe d. Knight* (6).

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In the case of *Pratt v. Noah* (8), I reviewed the law as to long possession and the question of adverse title, and the quotations (3 S.L. Law Rec. at 62-63) from *Lynes v. Snaith* (4) may be regarded as guiding authority on the matter. Learned counsel for the plaintiff stated that adverse possession cannot exist between husband and wife living together. This is correct to the extent that while the spouses were living together neither can claim possession of the property of the other on the ground of long possession. That is the ordinary law as regards any party. No person can claim long possession against an owner of property if he and the owner live together. But, if the owner leaves the house and some other person continues in possession, statutory title can run as against the owner, and adverse possession, in the sense that the term was used before 1874, is not necessary to be proved.

In this case, the wife was the owner of the property and has always lived in the house. When Exhibits C and D were made, the wife purported to convey the legal estate to the husband. This was in 1932. But the wife still continued to exercise the rights of owner of the property and, in 1937, the husband who had been living with the wife left the house and she, the wife, continued in possession of the property. Even if Exhibits C and D interrupted the possession of the wife, when the husband left the house in 1937 and the wife continued in possession, her possessory title continued or recommenced in 1937. This action was not instituted until April 4th, 1950, and a period of over 12 years must have run, whatever time one counts from 1937. The husband left the defendant in possession of the house for over 12 years and attempted, by what I must call an ineffective means, to try to interrupt the period of limitation running in favour of the wife. I am satisfied that, although Exhibits C and D were made, the husband never at any time exercised any physical control over the property and his act in leaving the wife in possession of the house for several years is strong evidence that he knew the property was his wife's and abandoned, if ever he exercised any, which I do not find was ever the case, any right of possession or ownership of the same. In all the circumstances, I must find that the property was and is that of the defendant, that the defence of statutory title is established, and that the plaintiff fails in this action. I have every sympathy for the plaintiff who has spent such large sums of money on the property, but he has himself to blame in spending such money in buying a property without making sure that the vendor had the right to sell. I do

hope however he will be able to recover the purchase price from Elba who has impressed me as thoroughly dishonest. There will be judgment for the defendant with costs.

Suit dismissed.

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JABER v. RADAR

SUPREME COURT (Beoku-Betts, J.): March 2nd, 1951
(Civil Case No. 75/50)

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- [1] Civil Procedure—pleading—matters which must be specifically pleaded—condition precedent—due performance presumed if non-performance not pleaded: Where one of the parties to an action intends to contest the performance of a condition precedent, he must, under O.XVI, r.10 of the Supreme Court Rules, 1947, state specifically what that condition is and plead its non-performance; otherwise its due performance will be presumed (page 104, lines 16–20). 15
- [2] Civil Procedure—pleading—defence—want of notice—defence must be specifically pleaded: Questions of notice or time are matters which are conditions precedent to a right of action and therefore must be pleaded specifically under O.XVI, r.10 of the Supreme Court Rules, 1947 (page 104, lines 3–13). 20
- [3] Civil Procedure—pleading—matters which must be specifically pleaded—defence of want of notice: See [2] above.
- [4] Equity—relief against forfeiture—court has discretion to grant relief—conduct of tenant to be considered—relief not granted where landlord's title impugned or tenant continues breach of covenant: The court has a discretion in deciding whether relief against forfeiture should be granted in a particular case, and in doing so must consider the conduct of the tenant: relief will be refused if he impugned the landlord's title in a way which amounts to a disclaimer or renunciation of the relationship between them, or if he continues in breach of covenant (page 104, lines 30–33; page 106, lines 7–27). 25
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- [5] Evidence—presumptions—presumption of law—omnia praesumuntur rite esse acta—condition precedent—due performance presumed if non-performance not pleaded: See [1] above. 35
- [6] Land Law—fee simple—incidents—estate confers all rights of ownership and transfer subject to existing interests or tenancies not inconsistent with freehold: A fee simple estate, being the most extensive in quantum and the most absolute in respect to the rights it confers of all estates known to the law, confers the lawful right to exercise over, upon and in respect of the land every act of ownership imaginable, including the right to commit unlimited waste and the 40