IN RE HAMILTON (DECEASED), LEWIS and ANOTHER *v.* DAVIES

SUPREME COURT (Beoku-Betts, J.): January 6th, 1950
(Civil Cause No. 88/49)

[1] **Family Law—property—married women's property—married woman cannot acquire property before 1933 independently of husband unless separate estate—recital in deed of conveyance describing property as separate raises rebuttable presumption in wife's favour:** Where a woman married before 1933 (when the Imperial Statutes (Law of Property) Adoption Ordinance (now *cap.* 108) came into force) has acquired property which is described in a recital of the deed of conveyance as having been bought by her out of money belonging to her for her sole and separate use, so as to make the property part of her separate estate, such a recital does not necessarily have that effect but merely raises a rebuttable presumption in her favour (page 5, lines 34–40).

[2] **Family Law—property—married women's property—married woman cannot acquire property before 1933 independently of husband unless separate estate—what constitutes separate estate:** A woman married before 1933 (when the Imperial Statutes (Law of Property) Adoption Ordinance (now *cap.* 108) came into force) cannot contract, or make any agreement for the sale or purchase of property, independently of her husband, and therefore cannot acquire property unless it is separate property within the meaning of the Married Women's Property Ordinance (*cap.* 124), other than its specific provisions, or in equity: and for property to be regarded as separate under the Ordinance, an intention to create a separate use or estate for the wife must emanate, not from her, but from the free and voluntary intention of the donor or testator, or, in equity, the property must be purchased by the wife out of her separate means; but where the husband and wife have agreed to live apart, property acquired by the wife during the separation by means of her private industry is regarded as her separate property to devise as she will (page 6, line 3—page 7, line 34).

[3] **Family Law—property—married women's property—property acquired before 1933 and disposed of by will after 1938—will need not be acknowledged before Supreme Court judge:** Where a married woman acquires real property during coverture, but before 1933 when the Imperial Statutes (Law of Property) Adoption Ordinance (now *cap.* 108) came into force, and disposes of it by will after 1938, such disposal is not affected by the provisions of that Ordinance, which has no retrospective effect, but does not require acknowledgement before a judge of the Supreme Court since that restriction was abolished by the Intestate Estates (Amendment) Ordinance 1938 (page 4, line 26—page 5, line 6).

[4] **Land Law—capacity to hold and transfer land—married women—married woman cannot acquire property before 1933 independently**

of husband unless separate estate—recital in deed of conveyance describing property as separate raises rebuttable presumption in wife's favour: See [1] above.

[5] **Land Law—capacity to hold and transfer land—married women—married woman cannot acquire property before 1933 independently of husband unless separate estate—what constitutes separate estate:** See [2] above.

[6] **Land Law—capacity to hold and transfer land—married women—property acquired before 1933 and disposed of by will after 1938—will need not be acknowledged before Supreme Court judge:** See [3] above.

[7] **Land Law—conveyancing—deeds—recitals—recital describing property as married woman's separate property raises rebuttable presumption in her favour:** See [1] above.

[8] **Succession—wills—restriction on freedom of testamentary disposition—acknowledgement before Supreme Court judge of married woman's will—no acknowledgement required if property acquired before 1933 but disposed of after 1938:** See [3] above.

[9] **Succession—wills—restriction on freedom of testamentary disposition—no restriction on married woman's separate property acquired before 1933—what constitutes separate estate:** See [2] above.

The plaintiffs sought probate of a will in solemn form; the defendant contested their claim.

The testatrix was married in 1908, but separated from her husband a year later and continued to live apart from him until her death in 1945. Prior to the coming into force of the Imperial Statutes (Law of Property) Adoption Ordinance (now *cap.* 108) in 1933, she acquired certain property which was described in a recital to the deed of conveyance as having been bought out of money belonging to her for her sole and separate use. After the Intestate Estates (Amendment) Ordinance (*cap.* 104) had abolished the restriction that married women's wills made during coverture could not be valid without being acknowledged before a Supreme Court judge, the testatrix made a will, without such acknowledgement, in which she disposed of the property. The plaintiffs sought probate of the will and the present defendant, who was administrator of the estate of her husband, now also deceased, disputed the claim when the original defendant died.

The Supreme Court considered whether the will, being that of a married woman during coverture, was validly executed, and whether a woman married prior to 1933 had power to dispose of her separate property by will.

Cases referred to:

(1) *Bankole Bright* v. *Bankole Bright*, Supreme Court, April 5th, 1937, unreported.

(2) *Beecher* v. *Major* (1865), 2 Drew & Sm. 431; 62 E.R. 684.

(3) *Bernard* v. *Minshull* (1859), John. 276; 70 E.R. 427.

(4) *Duncan* v. *Cashin* (1875), L.R. 10 C.P. 554; 32 L.T. 497.

(5) *Dye* v. *Dye* (1884), 13 Q.B.D. 147; 51 L.T. 145.

(6) *Gore* v. *Knight* (1705), 2 Vern. 535; 23 E.R. 946.

(7) *Haddon* v. *Fladgate* (1858), 1 Sw. & Tr. 48; 164 E.R. 623, followed.

Legislation construed:

Intestate Estates Ordinance (Laws of Sierra Leone, 1925, *cap.* 104), s.50:

> "It shall be lawful for any married woman seized in her own right of land, or any estate or interest in land, to devise, bequeath or dispose of the same by will as effectually as if she were a *femme sole*. Provided that such will shall be acknowledged by her in the same manner as any instrument of conveyance by her *inter vivos* would by any law now in force or hereafter to be in force require to be acknowledged . . . ."

Married Women's Property Ordinance (Laws of Sierra Leone, 1925, *cap.* 124), s.2:

The relevant terms of this section are set out at page 6, lines 24–30.

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

> "So much of English Law as specially restricts the acquisition, holding or disposition of real or personal property by a married woman as such . . . shall have no force or effect in the colony."

Cole for the plaintiffs;
Margai for the defendant.

BEOKU-BETTS, J.:

In this action the plaintiffs seek to prove the will of the deceased Sybil Julia Hamilton in solemn form. The original defendant, James Gill, died after the action was instituted, and on November 11th, 1949 the present defendant, Frank Sydney Davies, was substituted as defendant, he being the administrator *de bonis non* of the estate of Samuel Thomas Hamilton, the late husband of Sybil Julia Hamilton, and the personal representative of James Gill.

As regards the facts, Sybil Julia Hamilton and Samuel Thomas

Hamilton were married on April 26th, 1908. Their married life was very short, for they separated and lived apart from 1909 up to the death of Sybil Julia Hamilton in 1945. Sybil Julia Hamilton predeceased the husband Samuel Thomas Hamilton. The plaintiffs claim to have probate of the will of Sybil Julia Hamilton dated November 17th, 1944 granted to them.

The defence is: (a) that Sybil Hamilton made no will and died intestate, and, if she did, it was made during coverture and was never acknowledged before a judge of the Supreme Court; (b) that the will was not duly executed according to the provisions of s.9 of the Wills Act, 1837.

In the substance of the case the defendant maintains that the alleged testatrix, being a married woman who made a will during coverture disposing of her legal estate in realty, should have had the same acknowledged before a judge of the Supreme Court, and that what purports to be the signature of the testatrix was neither so made nor acknowledged by her, and she is wrongly described in the will.

I propose to consider the second defence first, namely, that the will was not in compliance with the Wills Act. Having considered the evidence, I have come to the conclusion on the facts that the will produced was the document executed by the deceased, Sybil Julia Hamilton, as her last will and testament, that it was signed by her in the presence of witnesses, and that it was in compliance with the relevant provisions of the Wills Act, 1837.

The other defence is that the will disposed of real property obtained by a married woman during coverture and should have been acknowledged before a judge of the Supreme Court. On the face of the will there was no acknowledgement before a judge, and the admission on the notice to admit is that there was no such acknowledgement. Until the Intestate Estates (Amendment) Ordinance, 1938 was passed, no will by a married woman was valid unless acknowledged before a judge of the Supreme Court. The Intestate Estates Ordinance (*cap.* 104), s.50 empowered a married woman to make a will provided the will was acknowledged before a judge of the Supreme Court. When s.7 of the 1938 Ordinance repealed s.50 of the Intestate Estates Ordinance, married women married before the coming into force of the Imperial Statutes (Law of Property) Adoption Ordinance (now *cap.* 108) in 1933 were placed in the same position as regards the making of a will as they were by common law and under the Married Women's Property Ordinance

(*cap.* 124), for the Imperial Statutes (Law of Property) Adoption Ordinance (*cap.* 108) has been held not to be retrospective and leaves unaffected the rights of parties to property acquired before the Ordinance came into force in 1933 (*Bankole Bright* v. *Bankole Bright* (1) and other cases).

In the pleadings the only defence raised is that as the will was not acknowledged it was not valid. As no acknowledgement is required by law that defence may be said to have failed. But it seems to me that I should consider what is the position of married women before 1933, and whether after the repeal of s.50 of the Intestate Estates Ordinance (*cap.* 104) they could make a will disposing of their property. In fact, both counsel argued this question at length and were agreed from their submissions that the question should be considered. The solicitor for the plaintiff, in answer to the notice to admit, stated that the will was not acknowledged by the testatrix in the presence of a Supreme Court judge, and that the alleged will was made during coverture, but that the property disposed of was the separate property of the testatrix. The law as regards married women's dispositions by will is the same as it was in England in 1882, that is, before the Married Women's Property Act, 1882 came into force. It is that a married woman could not dispose of her freehold estates by will, unless the property was her separate estate. The Statute of Wills, 1542 provided that any wills of lands made by a married woman should be void. The Wills Act, 1837 did not alter the law in this regard (see Lush, *Law of Husband & Wife*, 3rd ed., at 44 (1910), and in the cases of *Bernard* v. *Minshull* (3) and *Dye* v. *Dye* (5)). In Sierra Leone the law as regards women married before 1933 and owning real property is that they can only dispose by will of property which is their separate property under either the Married Women's Property Ordinance (*cap.* 124) or in equity. The Married Women's Property Ordinance (*cap.* 124) is based on the English Act of 1870. Learned counsel for the plaintiff submitted that the property is conveyed to the deceased as her separate estate by the deed, which recites that it is her separate property. In my opinion, the mere recital in a deed that property is bought by a married woman out of monies belonging to her for her sole and separate use would not necessarily make the monies her separate property, nor would a conveyance to her separate use of property which she herself bought make the property *ipso facto* her separate property. It raises a rebuttable presumption. If this were allowed a wife could always defeat the claims of the husband by using money

which does not, by law, form part of her separate estate and having it recited as her separate estate and getting a purchase deed made to her separate use. A married woman as the law then stood, and as it affects this case, could not contract independently of her husband or make any agreement for sale or purchase of property without her husband. She could not agree to have property conveyed to her as her separate estate. The property which could be limited to become her separate property must be such as is given to her. The intention to create a separate use for the wife must not have emanated from the wife (see 16 *Halsbury's Laws of England,* 1st ed., at 341). It must be the free and voluntary intention of the donor or testator as the case may be. In *Eversley on Domestic Relations,* 4th ed., at 329–330 (1926), the manner in which a separate estate in equity can be created is summarised, namely, by gift *inter vivos,* or by legacy of a stranger, or by gift from the husband, or by ante-nuptial agreement. It can be created by post-nuptial agreement only if the husband agrees that the properties of the wife shall continue to belong to her. Therefore the mere conveyance on a purchase by a wife and limitation to her separate use would not make the property her separate estate.

But there are certain circumstances which have to be considered in this case. By s.2 of the Married Women's Property Ordinance (*cap.* 124), a married woman has as her separate property:

> "The wages and earnings . . . acquired or gained by her after the passing of this Ordinance in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband . . . and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband . . . ."

I have to ask whether there is any evidence that the married woman in this case earned any money under any of the above categories. There is no direct evidence on this. But the deed recites that the money was money belonging to her for her sole and separate use. That recital as I have said before does not make the monies her separate monies, but the circumstances of the case have to be considered.

The decisions under the English Act of 1870 on which our Ordinance of 1875 (*cap.* 124) was modelled show that property purchased or acquired by a wife out of her separate means becomes her separate property: see Lush, *op. cit.,* at 136 and *Duncan* v.

Cashin (4). That was the law even before the Act of 1875 was passed and is based on equity, as the decisions in *Gore* v. *Knight* (6) and *Beecher* v. *Major* (2) show.

In this case before me, the parties were married in 1908 and separated in 1909. In 1929 the married woman bought a property and stated it was out of her separate money. Where husband and wife agreed to live apart, separate property acquired by the wife during the separation by means of her own industry is her separate property.

In *Haddon* v. *Fladgate* (7), A and B were married in 1811 and verbally agreed to separate in 1817. The wife supported herself by her own industry and acquired property, which she disposed of by will in 1856. Probate of her will was opposed by the husband who asserted his marital rights to the wife's property. It was held that under the circumstances the property had been acquired by the wife to her sole and separate use.

The case seems to be on all fours with the present case. The husband and wife in this case were separated in 1909. The wife purchased property in 1929 and stated in the deed, duly registered, that she bought the property out of her separate property. In such circumstances there is bound to arise a presumption that the wife acquired the money as her separate property as there is no evidence the husband supported her during the 10 years of their separation. In addition to this, the wife enjoyed the property from 1929 to 1945 when she died, and the husband did nothing, so far as is established, during her lifetime to repudiate her claim to enjoy the property as her separate property. The amount for which the property was bought was £350, a comparatively large amount. The wife could only have got such an amount either as a gift from someone or from her own exertions. As no effort has been made to rebut the presumption raised by the recital and in the circumstances of the case, I am satisfied the property was bought out of the separate property of the wife and I order that probate of the will be granted to the plaintiffs. Costs of both parties will be met out of the estate.

Order accordingly.