IN THE ESTATE OF CARROL (DECEASED), CARROL *v.* THOMAS and NICOL

SUPREME COURT (During, Ag.J.): April 10th, 1970
(Civil Case No. 437/68)

[1] **Land Law—fee simple—determinable interest—devise to named person until marriage does not create fee simple when devisee dies unmarried:** A devise of property for the use and benefit of a named person until marriage with a gift over in the event of marriage does not create either a life interest or a fee simple if the beneficiary remains unmarried until her death and the gift over will fail; if there is no provision in the will for the residue of the estate, the property must pass as on an intestacy (page 45, lines 20–22; page 45, lines 33–35; page 46, lines 26–33).

[2] **Land Law—life interest—determinable interest—devise to named person until marriage does not create life interest when devisee dies unmarried:** See [1] above.

[3] **Succession—wills—conditional gifts—devise with gift over on marriage of devisee does not create fee simple or life interest when devisee dies unmarried—property passes as on intestacy if no residuary devise:** See [1] above.

The plaintiff sought a ruling as to the construction of a will and consequential orders and directions.

The testator devised certain property to his daughter until her marriage, when the property was to be divided between the daughter and her heirs forever, and three other named beneficiaries and their heirs. The daughter died unmarried and intestate and the plaintiff applied to the Supreme Court for a ruling as to whether the gift over could take effect without the condition of marriage being fulfilled, or whether the property passed as on intestacy. He maintained that the gift over failed because the will made no provision for the daughter dying unmarried, and the property therefore fell into the estate of the testator, and must pass as on intestacy.

The defendants, who were the deceased's executors, contended that the devise created a strict settlement in favour of the testator's daughter, giving her an equitable fee simple which devolved as an estate in fee simple on her death. A third claimant under the will argued that the daughter had a legal interest for life or until marriage, which became a fee simple under the terms of the will at her death.

Cases referred to:

(1) *In re Leach*, [1912] 2 Ch. 422; (1912), 106 L.T. 1003.

(2) *In re McGeorge, Ratcliff* v. *McGeorge*, [1963] Ch. 544; [1963] 1 All E.R. 519.

(3) *Pile* v. *Salter* (1832), 5 Sim. 411; 58 E.R. 391, considered.

(4) *Scarborough* v. *Scarborough* (1888), 58 L.T. 851.

(5) *Underhill* v. *Roden* (1876), 2 Ch.D. 494; 34 L.T. 227, applied.

Legislation construed:

Wills Act, 1837 (7 Will. IV & 1 Vict., c.26), s.28:

> "And be it further enacted, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

McCormack for the plaintiff;
Coker for the defendants;
Mackay for the claimant.

DURING, Ag.J.:

In this matter I have been called upon to give a true construction of a portion of the will of Daniel Carrol deceased, who was Master and Registrar of the Supreme Court of Sierra Leone and Acting Sheriff and Registrar General of the then Colony of Sierra Leone.

The portion to be construed reads:

"Until my daughter is married I Devise to her for her use and benefit the whole of my dwelling house and lot at the corner of Garrison and Little East Streets numbered Eight Hundred and Seventeen in the Register and plan aforesaid AND upon the marriage I Devise the fourth part of the said premises to her and her heirs forever and another fourth part to my son Daniel William and his heirs forever and another fourth part to all my grandchildren by Jane Marie aforesaid and their respective heirs as tenants in common forever and the remaining fourth part to Julia Bernice Lucy and Lilian Adeline my other grandchildren and their respective heirs as tenants in common forever."

I have also been asked to state whether on the death of the said Eliza Carrol, a spinster and intestate, there is any gift over or benefit to go to the other beneficiaries or persons named in the clause I have been called upon to construe, the said Eliza Carrol not having married

or fulfilled the condition of marriage and whether or not the property under the said devise now goes on an intestacy.

The paramount aim in construing a will is to find out the testator's intention, notwithstanding s.28 of the Wills Act, 1837.

The testator did not in his said will, made on November 19th, 1908 make provision as to who should take the residue of his estate both real and personal and counsel appearing in this matter agreed that there is no such provision, so that if the gift over fails then the devise should go on an intestacy of Daniel Carrol (deceased).

Learned counsel for the defendants, Mr. U. W. Coker argued that at the time of her death the late Eliza Carrol had a fee simple interest and that a strict settlement was created vesting property equitably on her until marriage. He referred to *Cheshire's Modern Real Property*, 7th ed., at 305 (1954) and the case of *In re Leach* (1), the judgment of Joyce, J., and also referred to s.28 of the Wills Act in support of his proposition. Learned counsel postulated that what the late Eliza Carrol had at the time of her death was an equitable fee simple which automatically became a fee simple estate which should devolve to those who should take under her estate.

I have read the will and I hold the view that the testator did not devise an estate in fee simple or equitable fee simple to Eliza Carrol, deceased. The case of *In re Leach* cited by counsel may or may not be good law but I am of the opinion that it is not of much or any assistance in so far as the construction of the devise I am called upon to construe is concerned.

Learned counsel for the interested party, Mrs. Doreen Williams argued that Eliza Carrol, deceased, had a legal interest for life or until she married and that at her death she had a quarter interest which she would have had on marriage. He referred to the case of *Underhill* v. *Roden* (5) and also referred to *Theobald on Wills*, 12th ed., at 485 (1963). As I had stated *supra* the intention of the testator is paramount and in construing the clause I am not supposed to bring in or create legal and/or equitable interests not provided for in the will. I hold the view that Eliza Carrol deceased did not at the time of her death hold a legal life interest in the said property and in fact Jessel, M.R. in *Underhill* v. *Roden* stated there were strong reasons in that case which led him to give the decision he gave.

Learned counsel for the plaintiff, Mr. E. J. McCormack, argued that Eliza Carrol, deceased, not having fulfilled the condition precedent, namely her marriage, and there being no provision in the will for her dying unmarried, the gift over fails and that, there being no

residuary clause in respect of realty, the gift of the corpus lapsed on a resulting trust to the estate of the testator and should therefore go on as an intestacy. In support of his proposition he cited *Pile* v. *Salter* (3) and *In re McGeorge* (2), the judgment of Cross, J. He also referred to *Cheshire's Modern Real Property,* 6th ed., at 754 (1949)—"Destination of lapsed property."

The case of *Pile* v. *Salter* (3) is not on all fours with the matter before me but I am of the opinion that it is of very great assistance to me in construing the portion or clause I have been called upon to construe. *Pile* v. *Salter* was not followed in the case of *Underhill* v. *Roden* (5) and also the case of *Scarborough* v. *Scarborough* (4). The case has however not been overruled.

In the case of *Underhill v. Roden,* Jessel, M.R. in his judgment stated (2 Ch.D. at 498; 34 L.T. at 228):

> "If a case exactly similar to *Pile* v. *Salter* had come before me, I should have considered that it was not in accordance with the general rule, and should therefore have declined to follow it. But in this case there are strong reasons for holding that the gifts over on the wife's second marriage take effect on her death, independently of the general rule; for though the House of Lords has decided that we cannot in the slightest degree impugn any well-established rules of construction, yet it has also decided that every case must be decided on its own words where not covered by authority."

Having read the will as a whole and the portion or clause of which I have been called upon to give a true construction and in the light of what I have said before, I am of the opinion that on the death of Eliza Carrol, a spinster and intestate, there is no gift over or benefit to go to the other beneficiaries or persons named under the said portion or clause, the said Eliza Carrol not having married or fulfilled the condition of marriage, and that the property under the said devise now goes on an intestacy of Daniel Carrol (deceased).

I have also been asked to state how the costs of this application are to be borne. Having regard to the nature of the matter and the industry of counsel who appeared in this matter I order that costs as between solicitor and client be paid to each solicitor out of the estate of the said Daniel Carrol, deceased, such costs to be taxed.

Order accordingly.