

Privy Council Appeal No. 82 of 1925.

Frederick Germano Martins - - - - - *Appellant*

v.

Emily Fowler - - - - - *Respondent*

FROM

THE SUPREME COURT OF NIGERIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 18TH JUNE, 1926.

Present at the Hearing :

VISCOUNT HALDANE.

LORD ATKINSON.

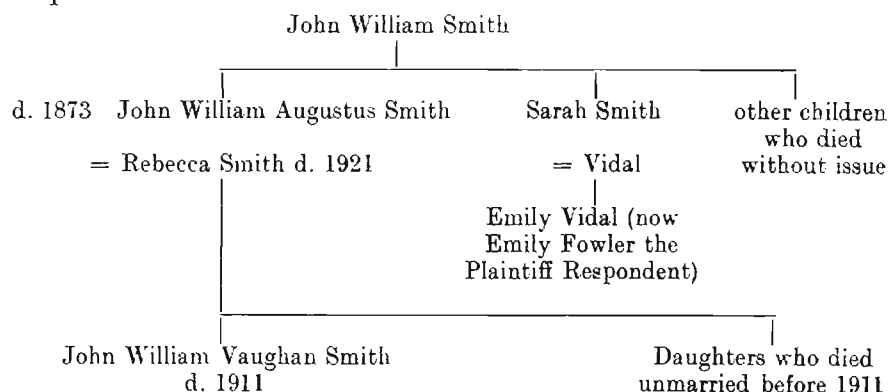
LORD DARLING.

[*Delivered by LORD DARLING.*]

This is an appeal from a judgment of the Supreme Court of Nigeria dated the 25th January, 1924, reversing the judgment of the Court below dated the 19th March, 1923. In the proceedings the present appellant was defendant and the present respondent was plaintiff.

The question for decision turns upon the construction of certain sections of the Marriage Ordinance 1884 (Cap. XCV of the Laws of Southern Nigeria).

The dispute between the parties is as to the true ownership of certain property known as "Smith's Compound" situate in Faji Market, Lagos, Nigeria. A family tree of the Smith family is here set out with a view to elucidating the facts and relationships hereinafter mentioned.



The property was originally purchased by John William Augustus Smith (hereinafter called Augustus Smith) at some time prior to his death in 1873. The exact date of purchase does not appear nor is it material to the present question. Augustus Smith died in 1873 intestate, leaving a widow Rebecca Smith and issue him surviving. At such time the law as to the devolution of real property in Lagos was similar to the law in force in England, and accordingly the property passed to his son John William Vaughan Smith. Vaughan Smith died in 1911 intestate and without issue. The other issue of Augustus Smith predeceased Vaughan Smith leaving no issue them surviving. Rebecca Smith died in the year 1921 having by her will devised the said property. The present appellant is the executor of the Will of Rebecca Smith. The present respondent, the plaintiff in the proceedings below, is the daughter of Sarah Smith the sister of Augustus Smith and is therefore a cousin of Vaughan Smith.

The respondent by her writ and statement of claim claimed possession of the said premises. The appellant by his defence in effect pleaded that he was in possession of the premises.

The substantial dispute between the appellant and the respondent is as to the devolution of the property upon the death of Vaughan Smith.

The appellant contended that the property devolved according to the rules as to devolution of personal estate and accordingly became vested in Rebecca Smith mother of Vaughan Smith.

The respondent contended that the property devolved according to the rules as to devolution of real property and accordingly vested in the respondent Emily Fowler, the cousin of Vaughan Smith.

The determination of this question depends upon the construction of Sections 38 and 39 of the Marriage Ordinance 1884.

The sections are, so far as material, as follows :—

“ 38. Every marriage celebrated in the Colony before the commencement of this Ordinance by any Minister of any religious denomination or body, according to the rites in use by such religious denomination or body shall be, and shall be deemed to have been from the time of the celebration thereof a legal and valid marriage ; ”

“ 39. Where any person who is subject to Native Law or custom contracts a marriage in accordance with the provisions of this or any other Ordinance relating to marriage, or has contracted a marriage prior to the passing of this Ordinance, which marriage is validated hereby and such person dies intestate, subsequently to the commencement of this Ordinance, leaving a widow or husband or any issue of such marriage, and also where any person who is issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this Ordinance, the personal property of such intestate and also any real property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of the Law of England relating to the distribution of the personal estates of intestates, any Native Law or custom to the contrary notwithstanding ”

Augustus Smith had been married before the commencement of such Ordinance and Vaughan Smith was issue of such marriage. It was admitted that such marriage was a valid marriage apart from the provisions of the said Ordinance.

The action came on for hearing on the 5th and 13th March, 1923, before His Honour Arthur Reginald Pennington and on the 19th March the learned Judge gave a considered judgment, in which he found in favour of the defendant. In effect the learned Judge held that the marriage of Augustus Smith was a marriage which had been validated by the Ordinance, and that consequently the property must devolve as personal property in accordance with the provisions of the Ordinance.

Against this decision the plaintiff appealed. The appeal came on for hearing on the 15th January, 1924, before Chief Justice Sir Ralph Molyneux Combe, and Judges Sir Frederick Alan Van der Meulen, and Mervyn Lawrence Tew. The Court reserved judgment.

On the 25th January, 1924, the Chief Justice delivered judgment, in which the rest of the Court concurred, allowing the appeal of the plaintiff and directing that judgment be entered for the plaintiff for possession of the premises, with costs.

Shortly stated the opinion of the Court was that although sec. 38 of the Ordinance applied to all marriages before the commencement of the Ordinance, whether otherwise valid or not, sec. 39 did not include marriages which were valid before the commencement of the Ordinance, on the ground that the words in sec. 38 "marriages declared to be valid by the Ordinance" were wider than the words in sec. 39 "marriages validated by the Ordinance."

From this decision the present appeal is brought. Final leave to appeal was granted on the 2nd May, 1924.

In giving the judgment from which this appeal is brought the learned Chief Justice thus expressed his decision upon the point in issue:—

"Section 38 applied to both the valid and invalid marriages and declared that all were valid, but in fact only those which were invalid were validated by the Ordinance. Section 39 applies only to marriages under the Ordinance and marriages 'validated' by the Ordinance.

There is in my opinion a distinction between the term 'marriages validated by the Ordinance' and 'marriages declared to be valid by the Ordinance.' The latter is the wider term and includes all marriages falling within Section 38, both those which were invalid before the Ordinance and those which were valid before the Ordinance.

The former term does not include the marriages which were valid before the Ordinance. If it had been the intention of the legislature to bring within Section 39 all marriages within Section 38 the term 'declared to be valid' and not the term 'validated' would have been used in Section 39."

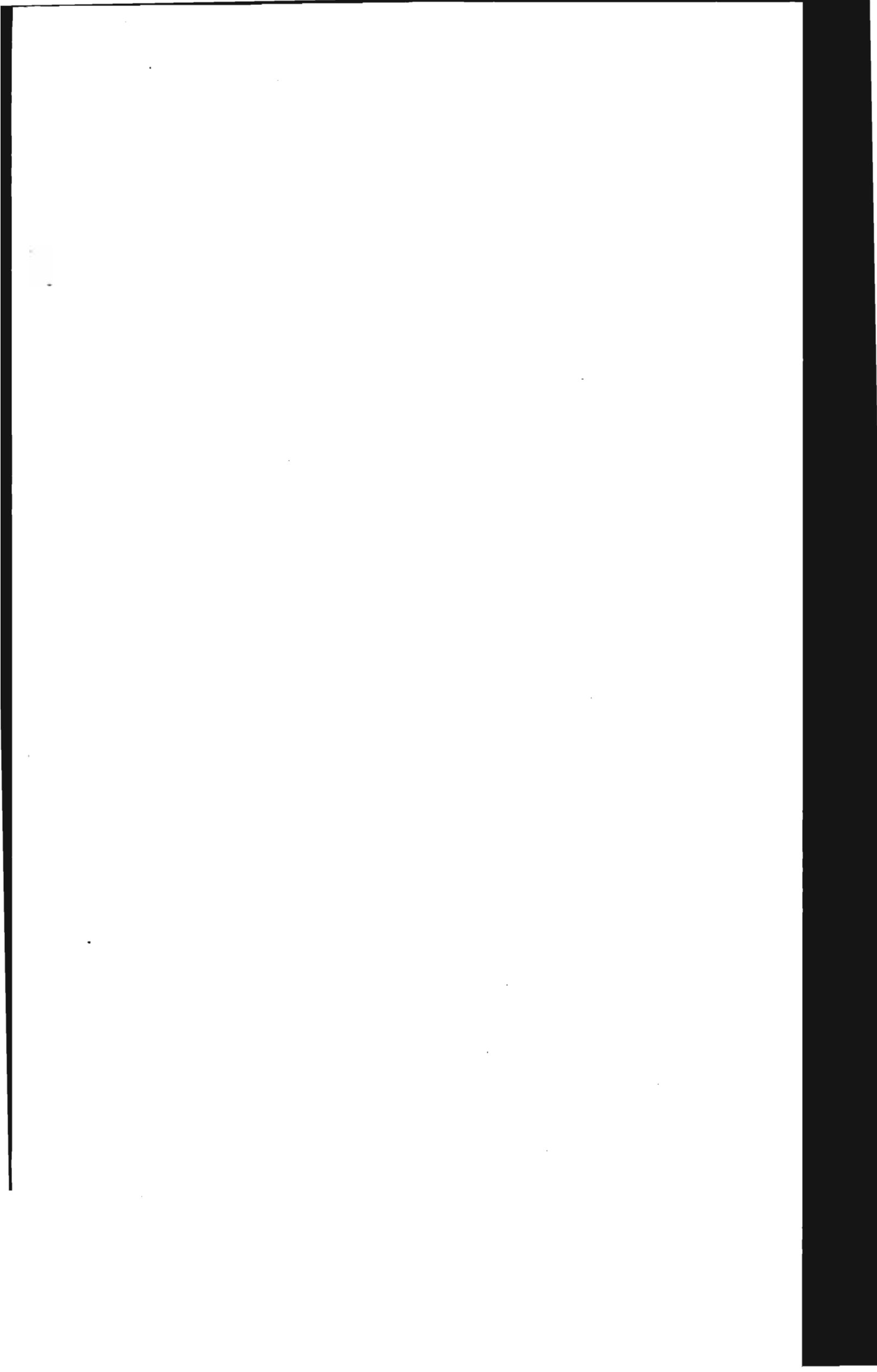
Since the marriage of John William Smith was—as is admitted—a valid marriage from the moment it was made, there never was any reason why it should be "validated." One does not

need to gild refined gold, nor to attempt to perfect a status which is perfect already. Their Lordships are of opinion that the judgment of the Supreme Court of Nigeria is correct for the reasons expressed by that Court.

Moreover, it is to be observed that Section 38 of the Marriage Ordinance is headed "Marriages already celebrated." It deals with marriages described as "valid," and contains no reference whatever to the descent or distribution of property. Now, Section 39 which contains the provision by which certain marriages are "validated"—is headed "Succession to Intestates' Property," and it proceeds to alter the law in regard to succession to the property left by persons whose marriages have been "validated"; making no mention of those whose marriages were already valid, as was always the marriage of John William Smith with Rebecca Smith.

It is clear that such headings as those referred to may be regarded as preambles to the provisions following them. This is so stated in Maxwell on The Interpretation of Statutes, 6th Edition, p. 92—and has received judicial authority from Farwell L.J. in *Fletcher v. Birkenhead Corporation*, L.R. [1907] 1 K.B. at p. 218, and also from the Privy Council in *Union Steamship Company of New Zealand, Ltd., or Melbourne Harbour Trust Commissioners*, L.R. 9 A.C. 365—to mention no others.

In the opinion of their Lordships the decision of the Supreme Court of Nigeria was right, and they will humbly advise His Majesty that this appeal should be dismissed with costs.



In the Privy Council.

FREDERICK GERMANO MARTINS

2.

EMILY FOWLER.

DELIVERED BY LORD DARLING.

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