

**IN THE HONORABLE SUPREME COURT OF THE REPUBLIC OF LIBERIA,
SITTING IN ITS MARCH TERM, A.D. 2019**

BEFORE HIS HONOR: FRANCIS S. KORKPOR, SR.CHIEF JUSTICE
BEFORE HER HONOR: JAMESETTA H. WOLOKOLIE.....ASSOCIATE JUSTICE
BEFORE HER HONOR: SIE-A-NYENE G. YUOH.....ASSOCIATE JUSTICE
BEFORE HIS HONOR: JOSEPH N. NAGBE..... ASSOCIATE JUSTICE

Theophilus Addo Mills, Jr. et al., Co-Administrators of the)	
Intestate Estate of Theophilus Addo Mills, Sr., of the City)	
Of Monrovia, Republic of Liberia APPELLANTS)	
)	
Versus	)	ACTION:
	)	<u>APPEAL</u>
His Honor J. Vinton Holder, Judge, Monthly & Probate)	
Court for Montserrado County, Republic of Liberia and)	
Deborah T. Mills, Co-Administratrix of the Intestate)	
Estate of Theophilus Addo Mills, Sr. of the City of)	
Monrovia, Republic of Liberia APPELLEES)	
)	
<u>GROWING OUT OF THE CASE:</u>)	
)	
Theophilus Addo Mills, Jr. et al., Co-Administrators of the)	
Intestate Estate of Theophilus Addo Mills, Sr., of the City)	
Of Monrovia, Republic of Liberia MOVANTS)	
)	
Versus	)	MOTION FOR
	)	RELIEF FROM
Deborah T. Mills, Co-Administratrix of the Intestate	)	<u>JUDGMENT</u>
Estate of Theophilus Addo Mills, Sr. of the City of)	
Monrovia, Republic of Liberia RESPONDENT)	
)	
<u>GROWING OUT OF THE CASE:</u>)	
)	
Deborah T. Mills, Co-Administratrix of the Intestate)	
Estate of Theophilus Addo Mills, Sr. of the City of)	
Monrovia, Republic of Liberia INFORMANT)	
)	
Versus	)	BILL OF
	)	<u>INFORMATION</u>
Theophilus Addo Mills, Jr. et al., Co-Administrators of the)	
Intestate Estate of Theophilus Addo Mills, Sr., of the City)	
Of Monrovia, Republic of Liberia REPONDENTS)	
)	
<u>GROWING OUT OF THE CASE:</u>)	
)	
Deborah T. Mills, Co-Administratrix of the Intestate)	
Estate of Theophilus Addo Mills, Sr. of the City of)	
Monrovia, Republic of Liberia PETITIONER)	
)	
Versus	)	PETITION FOR
	)	EXEMPTION &
Theophilus Addo Mills, Jr. et al., Co-Administrators of the	)	EXCLUSION OF

Intestate Estate of Theophilus Addo Mills, Sr., of the City) REAL PROPERTY
Of Monrovia, Republic of Liberia RECONDENTS) FROM INVENTORY

Heard: April 15, 2019

Decided: August 5, 2019

MADAM JUSTICE YUOH DELIVERED THE OPINION OF THE COURT

Mr. Theophilus Addo Mills, Jr. and other co-administrators, of the intestate estate of their father, Theophilus Addo Mills, Sr., the appellants herein, have appealed from a judgment by the Monthly and Probate Court, granting unto the widow of their late father, the appellee herein, a relief from a judgment of said court.

The facts as revealed by the certified records show that following the death of Theophilus Addo Mills, Sr., his widow, Deborah T. Mills and other heirs applied for and were jointly granted letters of administration on February 8, 1984 by the Monthly and Probate Court, Montserrado County, under the gavel of Judge Luvenia Ash-Thompson. In compliance with the requisite provisions of the Decedents Estates Law, (Decedents Estates Law, chapter 111, section 111.3 (2), in the month of March of the same year, 1984, the administrators and administratrix filed an inventory of the estate consisting of both the personal and real properties of the decedent.

However, the Court is troubled regarding certain acts by both the present parties, that is, the appellee, the appellants and their lawyers, which initiated a rift between the parties, and continued unabated to the present appeal. This rift was so pronounced, that at the instance of the appellee/widow it brought the interference into a matter that was *sub judicie* by a high ranking member of the erstwhile Interim National Assembly, (the Legislature) and the attention of the then Chief Justice, His Honor, Emmanuel N. Gbalazeh, both of sainted memory. The Court is further taken aback, by the fact that the parties were then represented by two of its astute legal practitioners, Counsellors Toye C. Bernard and Joseph Findley, both also of sainted memory, who seemed oblivious to and complacent with the escalation of the problem or just chose to ignore same. In fact, Counsellor Findley is on record requesting the trial judge's permission to remove the appellee/widow from the premises upon which was situated, the dwelling house where the appellee and her husband resided up to the time of his demise. Due to the impact of this request by Counsellor Findley on the rift which subsequently ensued between the administrators, and still remains to date, we quote the request letter as follows:

JF-38/24/1/'85

January 24, 1985

Her Honour Luvenia V. Ash-Thompson
Probate Judge, Mont. Co.
Monthly & Probate Court
Temple of Justice
Monrovia, LIBERIA

May It Please Your Honour:

Re: Interstate Estate of the late
Theophilus A. Mills of the

City of Monrovia

The Administrators of the subject Intestate Estate have found someone interested in leasing Lot. No. N/N part of the property of said estate and respectfully request authorization from Your Honour for that purpose.

There is, however, an apparent problem and that is the Widow Mrs. Deborah Mills is occupying a chalet at the back of the building under construction and the Administrators intent to have her removed to another place provided by them. We therefore respectfully request Your Honour on behalf of the Administrators to also approve this and appraise and notify the widow of this fact.

Respectfully submitted,
Theophilus A. Mills, Jr., et al
ADMINISTRATORS
By & thru their Counsel:
FINDLEY & ASSOCIATES

Joseph Findley
COUNSELLOR-AT-LAW

We note as per the contents of the above letter, that same was without the consent of the appellee/widow and there is nothing in the records to establish that the opposing counsel for the appellee/widow, was ever notified or served a copy of said letter to enable said counsel file formal returns or that a hearing was had thereon. What is seen is a handwritten notation dated January 28, 1985, made on the said letter by Judge Ash-Thompson, approving Counsellor Findley's request with the proviso that "the administrators must provide a suitable place for the widow to be relocated, subject to the court's satisfaction. The property must be leased to complete the renovation in order to yield more revenue and income for the benefit of the estate." A thorough review of the records and the arguments before this Court by the counsels representing the parties logically lead us to conclude that this communication and the response thereto by Judge Ash-Thompson was the crux of the rift which remains to date, in that the appellee/widow is out of the premises and the appellants have full control of same. Nowhere in the records do we see any evidence that the appellee/widow was placed in what the trial judge at the time termed as a "suitable place," or the reason for the judge alluding to the "complete renovation to yield more revenue and income for the benefit of the estate, or that said renovation included the dwelling house. There remain so many unanswered questions. What is undisputed is the fact that the appellee/widow is homeless. The appellants counsel's response to the reason for the widow being homeless as placed on the minutes of this Court is that the appellee/widow only has to "cooperate" with the other administrators. What this means is anyone guess.

Two months after Counsellor Findley's letter, the records show that the appellee/widow by a petition dated March 11, 1985, requested the probate court for the exemption of a certain parcel of land from the intestate estate on the basis that same is jointly owned by she and the decedent and by virtue of the principle of survivorship, said land become hers upon the death of her husband. We quote below, the appellee's petition, to wit:

“...AND NOW COMES Deborah Mills Petitioner, and respectfully petitions this Honourable Court to exempt and exclude the property sold by Abraham Kargar Morris to Theophilus A. Mills and Deborah Mills from being part of the Inventory of the Intestate Estate of the late Theophilus A. Mills, Sr. for the following reasons, to wit:

1. Because the said property was sold to Theophilus A. Mills and Deborah Mills by Abraham Kargar Morris in 1981, and therefore they owned said property as joint tenants. Consequently, upon the death of Co-Tenant Theophilus A. Mills, Deborah T. Mills becomes owner of the property under the principle of survivorship. A copy of the deed of conveyance from Abraham Kargar Morris to Theophilus A. Mills and Deborah T. Mills is hereto attached and marked Exhibit “A” to form a part of this Petition.
2. That subsequent to the purchase of the said property, Theophilus A. Mills and Deborah T. Mills became officially joined in Holy Matrimony on September 24, 1982, and lived together as such until the death of Theophilus A. Mills, as can be seen from a copy of the Marriage Certificate hereto attached and marked Exhibit “B” to form a part of this Petition.

WHEREFORE, and in view of the foregoing, Petitioner respectfully prays this Honourable Court not to include the property upon which Theophilus A. Mills and Deborah T. Mills constructed a dwelling house in the Inventory of the late Theophilus A. Mills. Your humble Petitioner further prays that Your Honour will grant unto her such further relief which in Your Honour’s judgment would be deemed legal and equitable.

Respectfully submitted:
Deborah T. Mills,
PETITIONER;
by and thru her Counsel:
TOYE C. BARNARD LAW
OFFICE

Toye C. Barnard
COUNSELLOR-AT-LAW

The appellants filed their returns to the above petition which we also quote as follows:

“...Your Co-Administrators Theophilus A. Mills, Jr. and Richard E. Mills hereby acknowledge service on them through their Counsel on the 17th instant in Open Court copy of Petitioner’s Petition filed on the 11th of March, A.D. 1985 praying Your Honour not “to include the property which Theophilus A. Mills, Sr. and Deborah Mills constructed a swelling house in (sic) the Inventory of Theophilus A.

Mills, Sr. and reason why the petition should not be granted respectfully showeth unto Your Honour the following:

1. The Deed Exhibit "A" to the petition is a legal nullity; in that though the Deed is said to have been executed in 1981 it does not carry any specific date of execution, i.e. date and month.
2. The Deed is furthermore legally defective and bad for the fact that it was offered for Probate before the Monthly & Probate Court of Careysburg notwithstanding the fact that it is calling for land situated in the Settlement of Gardnersville, Montserrado County which is not a political sub-division or township within the territory of the District of Careysburg to warrant the Deed being offered and admitted into Probate for Registration in the Monthly & Probate Court of the District of Careysburg aforesaid. The Deed should offer into Probate before this Honourable Court; it is therefore irregularly and illegally admitted into Probate and therefore a legal nullity.
3. The Deed is further legally wanting and patently pregnant with fraud from its face. It was issued in 1981 and the Certificate of Marriage which qualifies the Petitioner as Deborah Mills (nee Tiasor) shows that she was married to Mr. Mills on the 24th September, 1982. It is clear that this Deed was not issued in the name of Mr. Theophilus A. Mills and Deborah Mills as his wife at a time when she had not been joined in Holy Wedlock with the Intestate. The fraud as well as deception is clear that Petitioner connived with her Grantors to steatiticy and fraudulently procure this Deed for selfish ends. Continuing with the fraud the Deed shows that though it was acquired in 1981, it was not offered for Probate until May 1984 after the death of Petitioner's alleged Co-Grantee, Theophilus A. Mills, Sr. aforesaid.
4. And also because considering the fraudulent acts set out in count 3 hereinabove, Co-Administrators Theophilus A. Mills, Jr. and Richard E. Mills deny count 1 of the petition that their late father Theophilus A. Mills, Sr. and Petitioner ever purchased the property subject of Exhibit "A" to the petition and they deny also that one Abraham Kargar Morris ever sold this property to the Grantees as the Deed indicates. Your Co-Administrators submit that the Deed.

Your Co-Administrators, Theophilus A. Mills, Jr. and Richard E. Mills submit that even if the property subject of the Deed filed with the petition were the same as that to which the late Theophilus A. Mills, Sr., had title before his death, Petitioner's Deed could not stand because Abraham Kargar Morris is a witness to the transfer of said title to the late Theophilus A Mills, Sr. and having stood by and permitted said title to pass by therefore could not convey it to any other person hence the conveyance is illegal, and should not be upheld by this Honourable Court.

WHEREFORE and in view of the foregoing Your Administrators Theophilus A. Mills, Jr. and Richard E. Mills respectively pray that the petition be denied, Petitioner be removed as Co-Administratrix for her fraudulent acts set out herein and Your Honour proceed with the administration of the Estate by Your Co-Administrators.

Respectfully submitted,
Theophilus A. Mills, Jr.
Richard A. Mills, CO-ADMINISTRATOR
By & thru their Counsel:
FINDLEY & ASSOCIATES
P.O.Box 1744, MOROVIA

What subsequently ensued in the trial court are numerous petitions and counter-petitions, returns and notices of assignments etc.

However, two years later, on June 10, 1987, the late Judge Harper S. Bailey, then presiding over the Monthly and Probate Court for Montserrado County, heard and ruled denying the petition for exemption filed by the appellee/widow, solely on the basis that the deed for the property sought to be excluded by the appellee having been probated in Careysburg, outside of what he referred to as the jurisdiction of Gardnersville where the property is situated, rendered same void and therefore non-existent. To this ruling, the appellee excepted, but did not pursue any further steps for an appellate review of Judge Bailey's ruling.

We quote Judge Bailey's ruling, as follows, to wit:

"...When this case was called for hearing the Petitioner was represented by the Toye C. Bernard Office in person of Attorney Sylvester S. Kpaka and the Respondents were represented by Counsellor Joseph Findley. The Clerk of Court was ordered to read the Petitioner's Petition; Respondents' Returns and Petitioner's Reply. Same was read accordingly. Both Parties Counsels were given 30 minutes each to argue their case. That from the argument had pro et con, and the legal authorities cited and relied upon by each Party's Counsel, the Court attention was focus on the law points raised by the Respondents' Counsel as to the illegal probate and registration of the Warranty Deed from Abraham Karnga to Theophilus A. Mills and Deborah C. Mills, located and situated at Paynesville within the City of Monrovia which was probated and registered on the 18th of May, A.D. 1984, in the City of Careysburg in the Provisional and Monthly Court thereof outside the city of Monrovia, when in fact and indeed the land for which the deed was obtained is situated at Gardnersville within the environment of the City of Monrovia on the North; while Careysburg Provisional and Monthly Court is located in the Eastern part of Montserrado County apart from the City of Monrovia. The law on real property found in 3LCLR, 1956, page 1013, section 2 and also the New Judicial Law chapter 5, page 20, section 5.2, paragraph L thereof which read thus. From these two legal authorities the court wonder whether Gardnersville area is within the territory jurisdiction of the City of Monrovia under the Territory Jurisdiction of this Monthly and Probate Court or the Gardnersville area is within the Careysburg District to have fall within the territory jurisdiction of the Monthly and Probate Court of Careysburg District? The answer is positively "NO". That from the perusal

of the Inventory filed in this Court and signed by Theophilus Mills, Jr., Richard E. Mills and Deborah H. Washington who are Petitioner in this particular case, during Monthly and Probate Court, March Term, A.D. 1984, there is no mention and made about the very Warranty Deed which is now the born of contention. There is a legal Maxim which says: "Anything that is not legally done is at done at all". That perusing Petitioner's Petition further, we discovered that Petitioner had requested this Court to exempt and exclude the Property now in question on grounds of survival ship. Can there be any granting of exemption of a Real Property which does not legally and equitably in existence?

WHEREFORE AND IN VIEW OF THE FOREGOING, from the arguments had before us coupled with the legal authorities cited by each Party's Counsel and the law citation spread out by this Court as per record we failed to see why Petitioner's Petition should be granted for the fact that the question of taken the Warranty Deed that was for the property sold to the Petitioner and her late husband by Mr. Karnga to have same surreptitiously taken to the Provisional Monthly and Probate Court of Careysburg and had same illegally and probated and registered is in contradiction of the laws governing the Probation and Registration of all or any instruments as to that matter affecting real property, hence the legal probation and registration of the said instrument in the Provisional and Monthly Court in the District of Careysburg constitute the said instrument non and avoid ab-inito and therefore this Court denied having same exempted when it is not legally in existence and it is the DECREED OF THIS COURT THAT THE SAID PETITION TO BE AND THE SAME IS HEREBY DENIED AND THE RETURNS OF THE RESPONDENTS IS HEREBY UPHELD. The cost in these proceedings ruled against the Petitioner. AND IT IS HEREBY SO DECREED..."

GIVEN UNDER MY HAND AND SEAL OF COURT,
THIS 10TH day of June, A.D. 1987

Harper S. Bailey
JUDGE, MONTHLY AND PROBATE COURT

There was an impasse due to the onset of the Liberian civil crisis. Thereafter, on December 12, 2014, the appellee herein filed a bill of information before the Probate Court presided over by Judge J. Vinton Holder raising the issue as regards the return to her of the premises she had occupied before the civil crisis, same being the dwelling house the appellants sought to have her ousted and relocated, but that they refused to deliver same to her. The appellee also alleged that her petition for exemption and exclusion of real property from the inventory of the estate was pending undetermined before the Probate Court. The appellants filed returns contending that the issue of exemption was passed upon by Judge Bailey in 1987 and therefore Judge Holder could not pass upon same which is tantamount to reviewing the ruling of one's colleague of concurrent jurisdiction.

On March 18, 2015, Judge Holder ruled on the bill of information and the resistance thereto based on two issues, *viz*, "whether or not the creation of a tenancy by the entirety between a husband and a wife with right of survivorship devolved upon the wife as survivor to take the entire property as result of the death of the husband...? And whether or not the legality of the respondent's title deed

can be challenged in the Monthly and Probate Court?” Judge Holder answered the first issue in the affirmative and as to the second issue, held that the challenge to the deed was within the purview of the Sixth Judicial Circuit Court and not the Monthly and Probate Court. He therefore granted the bill of information stating that the property in question cannot legally be part and parcel of the intestate estate. The below is how Judge Holder framed his ruling on said issue:

“...On March 11, 1985, Co-Administratrix/Petitioner Deborah T. Mills, widow of the late Theophilus Addo-Mills filed a petition in the people’s Monthly and Probate Court for Montserrado County, sitting in its March Term, A.D. 1985, presided over by Her Honour Luvenia V. Ash-Thompson to exempt and exclude the property sold by Abraham Karngar Morris to Theophilus Addo-Mills and Deborah T. Mills, Sr. from being a part of the inventory of the Intestate Estate of the late Theophilus Addo-Mills, for reasons that both Theophilus Addo-Mills and Deborah T. Mills owned said property as joint tenants and that upon the death of co-tenant, Theophilus A. Mills, Deborah T. Mills became owner of the property under the principle of survivorship. Hence, Petitioner/Co-Administratrix, Deborah T. Mills, widow of the late Theophilus Addo-Mills annexed to her petition a copy of the deed of conveyance from Abraham Karnga Morris to Theophilus A. Mills and Deborah T. Mills as well as her marriage certificate in substantiation of her petition. During the pendency of the aforesaid petition, petitioner and her mother resided on the subject premises until the 1990 Liberian crisis when petitioner left her mother thereon and fled to the Republic of Sierra Leone and that upon her arrival in Monrovia, World War II broke out and again, petitioner (Deborah T. Mills) left mother in the premises and went into exile. Upon Deborah T. Mills’ return, Theophilus Addo-Mills, Jr. et al drove Deborah T. Mills’ mother from the premises; she exerted all efforts to return to the premises but same prove futile and premises; she exerted all efforts to return to the premises but same proved futile and presently she and her mother are sleeping on the street....

In the mind of this Honourable Court, a deed which bears the names of the husband and wife makes the subject property a tenancy by the entirety as such the principle of survivorship prevails. This court opines that Theophilus Addo-Mills having predeceased his wife, Deborah T. Mills, the subject property no longer becomes part and parcel of the late Theophilus Addo-Mills estate and by parity of the law controlling in such cases, the widow (Deborah T. Mills) takes all.

Further to issue No. 2, the legality of a title’s deed as in this instant case, can be challenged in the Sixth Judicial Circuit, Civil Law Court, Montserrado County, Liberia by petition for cancellation of a title deed upon fraud, misrepresentation and misinformation and not the Monthly and Probate Court. The deed bearing the names of Theophilus Addo-Mills and Deborah T. Mills can be challenged in the Civil Law Court, thus the parties are at liberty to channel this source, if need be, to either validate or invalidate the subject deed. Accordingly, the subject property cannot legally become part and parcel of the intestate Estate of the late Theophilus Addo-Mills.

WHEREFORE AND IN VIEW OF THE FOREGOING, Movants' motion for relief from judgment is hereby denied and Respondent's resistance is hereby sustained. And that this court maintains its previous ruling dated January 29, 2015. And is hereby so ordered..."

The appellants filed a motion for relief from the above quoted ruling, raising the same argument contained in their returns to the bill of information, but on January 29, 2015, Judge Holder confirmed his March 18, 2015 ruling. In his ruling on the appellants' motion for relief from judgment, Judge Holder held that the issue passed upon by Judge Bailey was distinct from the one before him, but proceeded to state in the said ruling that by Judge Bailey declaring the deed proffered by the appellee null and void did not make same part and parcel of the intestate estate, for as he put it: "... **how can a deed that is declared illegal be included in the inventory of a deceased person...**" This was in effect addressing the argument by the appellants that the property described in the appellee's deed was already included in the inventory. Judge Holder also held that as regards the legality or illegality of the challenged deed, either party had the right to proceed to the appropriate forum for a determination. On the issue of the return of the contested premises, Judge Holder ruled that the widow "be allowed to take possession of the property until otherwise determined in a (court of) competent jurisdiction..." meaning the determination as to the genuineness of the appellee's deed as against the appellants' deed.

The appellants excepted to this ruling and thereafter on January 27, 2015, filed a repetitious eleven (11) count bill of exceptions, basically assigning as errors the self-same two (2) issues raised in their returns to the appellee's bill of information wherein they asserted that the deed relied upon by the appellee is fraudulent and that Judge Holder erred when he passed upon an issue already decided by his predecessor judge of concurrent jurisdiction.

This Court has determined that there is only one (1) issue dispositive of the appeal, which is:

1. Whether or not the trial court properly passed on the issue of the rights of a widow as regards property of her late husband?

Before delving into this issue, we first take a cursory review of a collateral issue regarding the Judge Bailey's ruling on the appellee's request for the exemption of certain property from the inventory of the intestate estate of her late husband and the subsequent ruling by Judge Holder on the same petition. This Court reiterates its decision entrenched in numerous opinions, that, "no trial judge has the power to review, modify, rescind, and/or reverse the acts or any decision by a colleague of concurrent jurisdiction on any point already passed upon by him, however erroneous the said act of his colleague may be; said authority lies only with this Supreme Court; the Supreme Court has the authority to render whatever judgment the lower court should have rendered..." *The United Methodist Church and Consolidated African Trading Corporation v. Cooper et al*, 40 LLR 449, 459 (2001); *Emirates Trading Agency Company v. Global Import and Export Company*, 42 LLR 204, 212-213 (2004); *IN RE Judicial Inquiry against Judge Emery S. Paye*, Supreme Court Opinion, October Term, 2012.

Although Judge Holder intimated that the issue raised in the appellee's bill of information was distinct from that already passed upon by his predecessor, Judge

Bailey, we differ with him. The records clearly show that Judge Bailey did indeed pass on the issue of the request for exemption by the appellee, whether rightly or wrongly and that Judge Holder was without authority to pass upon the same issue. Moreover, the granting of the bill of information by Judge Holder further buttresses the fact of a review of his predecessor's ruling.

Albeit, this Court, authorized to review, modify, rescind or reverse a lower court's ruling, hold that the reason advanced by Judge Bailey for the denial of the appellee's request to exempt property mentioned in the deed relied upon, was erroneous. The fact that a deed for a parcel of land is probated and registered in another jurisdiction, other than that in which the said property is situated does not *ipso factor* render said deed illegal or null and void as Judge Bailey reasoned. But more importantly, the issue before him which he failed to address was that of a deed for property allegedly conveyed to the appellee/widow and her husband, and upon which a dwelling house was built and occupied by the appellee and her husband up to the time of his demise. The appellants do not deny this fact, but by the letter of Counsellor Findley, they wanted the appellee re-located in order to lease out the said premises.

When the appellants raised the issue of said deed being probated in Careysburg and not Montserrado County, and that the same property sought to be exempted was wholly for and in the sole name of the decedent, thus properly placed in the inventory, and squarely raising the issue of fraud, Judge Baily had the legal course of action available to him, to wit: 1) he should have transferred that particular issue to the Sixth Judicial Circuit Court, Montserrado County for adjudication to determine fraud or the authenticity, or the rightful ownership to the subject property, and by which also, an investigative survey could have been ordered to determine whether or not the properties were distinct or the same. Only upon the receipt of a judgment from the Sixth Judicial Circuit Court, could Judge Bailey have properly ruled as to whether or not to exempt or include the property as part of the decedent's estate, and we so hold. Even further, it is the law that the failure to probate and register any instrument relating to real property within four (4) months after its execution, is void only as to any other person subsequently holding similar instrument relating to the same property which is duly probated and registered. The present appellants making claim to the property described in the appellee's deed to be part of the intestate estate, raised the issue of title, which again the probate is not authorized to entertained, but to transfer to the Sixth Judicial Circuit Court for determination. And we so hold. But this Court hastens to emphatically state here, that with or without proof of her entitlement to the property for which the appellee sought to have exempted from the inventory of the intestate estate of her late husband, by the dictates of the law, she is entitled to one third of both the personal and real property of her deceased husband during her natural life.

This brings us to the main issue of whether or not the trial court properly adjudicated the issue of the rights of the appellee as regards properties of her late husband. This Court observed from the appellee's petition for exemption, a formal notice and request to her fellow administrators to remain on the property and in the dwelling house constructed thereon in which she lived with her husband up to his demise. This is a right of any surviving spouse under the laws extant. We quote below, relevant provisions of these laws, to wit:

“...Succession to property, real and personal, or intestacy. The property of decedent and not disposed of by will or otherwise, after payment of administration and funeral expenses, debts and taxes, shall descend and be distributed in the following manner:

- a) If the decedent leaves surviving a spouse and one or more lineal descendants, property to the value of \$5,000.00 to the spouse outright and one-half the residue to the spouse for life with the remainder thereof to the children ad to the issue of any deceased child in accordance with the provisions of section 3.4, and the remaining one half of the residue outright to the said children and to the issue of any deceased child in accordance with the provision of section 3.4; Decedents Estates Law, Revised Code II:3.2(a).

Also:

“Rights of Surviving Spouse. *Constitutional right of election by widows.* The constitutional right of a widow to one-third of her deceased husband’s real estate during her natural life and to hold one-third of his personal estate in her own right subject to alienation by her, by devise or otherwise, is hereby preserved. A widow has the personal right to elect to take such share in lieu of any testamentary disposition or distribution on intestacy provided for her.

1. *Statutory right of election by widowers.* A widower shall be entitled to one-third of his deceased wife’s real estate during his natural life and to one-third of her personal estate, which he shall hold in his own right subject to alienation by him by devise or otherwise. He has the personal right to elect to take such share in lieu of any testamentary disposition or distribution on intestacy provided for by him.

Rights of surviving spouse to purchase matrimonial home

1. *Written notice within six months after letters required; no sale permitted during such period without surviving spouse consent.* If the estate of a decedent comprises an interest in fee simple in a dwelling house in which the surviving spouse was resident at the time of the decedent’s death and which is not subject to an existing homestead exemption as provided in the Civil Procedure Law, the surviving spouse may, by notice in writing, require the personal representative to appropriate the said interest in the dwelling house toward the satisfaction of the share of any surviving husband or wife in the estate of the decedent under the will or under the provisions of section 3.2, including an election under section 4.1. Such notice shall be ineffective unless served within six months from the issuance of letter to the personal representative. **During such period of six months, the personal representative shall not, without the consent of the surviving spouse, sell or otherwise dispose of the said interest in the dwelling house.** (emphasis added).

2. *Devise of such dwelling ineffective if spouse exercise right.* A devise of such a dwelling house to a person other than the surviving spouse shall pro tanto, be ineffective and invalid if the spouse exercises the right conferred under this section.
3. *Dwelling house defined.* A “dwelling house” within the meaning of this section includes
 - (a) any part of a building which was at the date of the death of the decedent occupied as a separate dwelling by the surviving spouse; and:
 - (b) any garden or portion of ground attached to and usually occupied with such dwelling house or otherwise required for the amenity or convenience of such dwelling house...” Decedents Estates Law, Revised Code II: 4.1(2)(3); 4.2(1)(2)(4)(5).

The above provisions of the law clearly prioritize the rights of a surviving spouse to property of a decedent spouse and the right of preference to purchase the matrimonial/dwelling house in which the surviving spouse was resident at the time of the decedent’s death, or to elect same in lieu of any other devise. The trial judge was therefore duty bound to apply these laws at the time that the appellee made the request for her matrimonial home. However, we again hasten to note that the records reveal that the matrimonial home requested by the appellee, always formed a part of a building that was under construction and which building is completed and being rented by the estate. The provisions of our laws relating to matrimonial homes that form part of a building of a decedent’s estate, state the following:

“...Court application required when dwelling combined with other uses. Where:

- a) such dwelling house forms part of a building and an interest in the whole of the buildings is included in the estate, or
- b) such dwelling house is held with agricultural land and an interest in the agricultural land is included in the estate, or
- c) the whole or part of such dwelling house was at the time of the decedent’s death used as a hotel or lodging house or apartment house, or
- d) a part of such dwelling house was at the time of the decedent’s death used for purposes other than domestic purposes, the right conferred on the surviving spouse by this section shall not be exercisable unless the court, on being satisfied that the exercise of that right is not likely to diminish the value of assets in the residuary estate or make them more difficult to dispose of, so orders...”

Both the appellants and the appellee, have not denied the fact that the dwelling house or matrimonial home of the appellee forms part of a building on a property of the estate, which the appellants have developed and leased, and that proceeds

therefrom go to the estate, thus bringing the matrimonial or dwelling home being requested by the appellee within the exceptions of the law quoted above. In fact, this Court takes note that as far back as 1985, the letter of the late Counsellor Findley to the probate court mentions that the administrators had found someone interested in leasing the building.... But that the widow (the present appellee) was occupying a chalet at the back of the building that was then under construction.

Notwithstanding, this Court finds it disturbing that the appellee is not only out of said home, but is homeless; that she has not been accorded her right to share in or benefit from any of the proceeds collected as rent from the lease of the subject premises or any other leased premises by the estate; neither have the appellants placed any such proceeds in an escrow account for her benefit; the appellants have not refuted or denied these allegations proffered by the appellee.

However, were we to hold that the appellee be placed in possession of her matrimonial home which forms part of the estate would work detriment to the estate, especially so when proceeds generated therefrom are used for the benefit of the beneficiaries of the estate, which should include the appellee's one third interest in the real estate for her natural life, and one third interest of the personal estate in her own right, subject to alienation by her, by devise or otherwise.

We therefore hold that although the appellee is entitled to her matrimonial home as per her request contained in her petition filed in 1985, but by the provisions of the law stated herein, she cannot exercise said right to the matrimonial home as same is in a building which forms part of the estate.

We also hold, that the appellants should forthwith retroactively remit to the appellee proceeds representing her one third interest in the estate for the last five years and henceforth remit regularly, her one third of any and all proceeds received from the estate, and to immediately place the appellee in an appropriate home within the estate;

The Clerk of this Court is hereby ordered to send a Mandate to the court below to resume jurisdiction over this case and give effect to this Opinion. Costs are ruled against the appellants. IT IS HEREBY SO ORDERED.

When this case was called for hearing, Counsellor Dalama J. Solunteh of J. C. and Associates Law Chambers appeared for the appellant. Counsellor Ambrose Taplah of Kemp & Associates Legal & Consultancy Chambers, Inc. appeared for the appellee.